Part II Section IV

Transparency and Good Governance

B. Good Governance

II.24 Democracy and Minority Rights

As J Rawls remarked in *Political Liberalism*,[8] our modern democratic societies are 'characterized not simply by a pluralism of comprehensive religious, philosophical and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines.' This observation is even more accurate today than when Rawls wrote it, due to the rise of mass migrations, which are mostly the result of deep inequalities in the (re)distribution of growth and wealth between rich and poor countries.

Cultural pluralism, trade, and the conception of social justice

The idea of pluralism is not new – for more than 6000 years trade has been fostering pluralist societies. International trade has been and is a decisive factor of cultural exchanges. By trading goods, we do not only exchange objects, we also say, show or reveal something from our own community, about our moral conceptions of justice and fairness, about our rules of promise and contract, about our language and our diet, in brief about our culture as a whole. Thus, trade is always an exchange of artefacts embodying social norms (such as labor, tax and environmental law) and, more broadly, conceptions of social justice.

The conflicting legal orders which inevitably emerge from the act of trading are one of the main sources of the World Trade Organization's (WTO's) current difficulties with multilateralism. International trade has thus grown along communication routes for thousands of years and trade has always been the major route of intercultural communication.

Majoritarianism vs. minority rights

Conflicting claims about democracy, culture and values divide into roughly two traditions of thought. Each tradition designs different democratic institutions and distribution of rights within Nation states depending on the conception of equality that the state decides to promote in the public sphere.

One side privileges majority rule and the norms which express the majoritarian culture. According to this formal conception (meaning) of equality, a state violating some minority rights could justify its behavior by pointing out that its duty is to protect one national identity epitomized by the majoritarian rule.[9]

Thus, everyone enjoys the same fundamental rights, but these rights are undifferentiated. For example, students may have free access to education, but the state does not recognize that some people would like to benefit from a class or their entire education in their own regional language, perhaps Breton, Gaelic, Alsatian, or Corsican.

The other tradition recognizes minority rights for some groups of people. This more real, differentiated conception of equality can be found in Aristotle's *Nichomacean Ethics*, V, 6: 'If, then, the unjust is unequal, just is equal, as all men suppose it to be, even apart from argument'; and he follows by adding: if the people 'are not equal, they will not have what is equal, but this is the origin of quarrels and complaints – when either equals have and are rewarded unequal shares, or unequals equal shares'.[10]

Of course, Aristotle did not share our political *Weltanschauung*. But the idea according to which the concept of justice must be defined in terms in proportional equality has been decisive in contemporary legal thought.

As a matter of fact, if we replace the Aristotelian term of 'share' with the term 'right', we find quite directly the basis of a milestone decision of the European Court of Human Rights in the matter of minority rights. The Court has indeed considered that 'the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.[11] Four years later, the Court reminds

[8] John Rawls, *Political Liberalism* (Columbia University Press 1993) xvi.

[9] One model of majoritarian rule is given by the traditional French Republicanism which identifies 'equal citizenship with the notion of a common public culture and with the regulation of particular cultural and religious identities to the private sphere'. Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton University Press 2014) 3.

[10] Aristotle, *Ethica Nicomachea*, trans WD Ross, Book V, 3, 1131 a (Clarendon Press 1925).

[11] *Thlimmenos v Greece* ECHR 2000-IV, para 44.

us that it has attached 'particular importance to pluralism, tolerance and broadmindedness' and that 'democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.[12] As part of this balance, democracy requires that states establish the conditions under which minorities can 'express, preserve and develop' their own identities.[13]

There are accordingly two conditions for the legitimacy of political decisions in respect to minorities. The first is the logical priority of questions of procedural justice (in the sense of proportional equality) over one or other substantial conception of the good life in a pluralistic democracy. The second is that such a democracy must create the constitutional framework in which everyone has the ability to meaningfully contribute to its construction.

The relevance to international economic law

Now, what is the relevance of all this for an international economic system which is obviously highly pluralistic? In the limitations of this study, I can only indicate two ways we could look at this subject. It is well known that modern international economic law has its origin in some commonly held economic views of the Allied Powers after World War II. They did not agree on all economic matters, but belonged roughly to the same culture. They agreed to open the frontiers to facilitate international trade and investment and to put two key levers at the center of the institutional frameworks: providing fora for negotiations between countries for increased international exchange and a principle of non-discrimination – the most favored nation treatment and the national treatment obligations found in nearly all trade and investment agreements. After the colonies (of the allied countries) gained their independence, after considerable enlargement of the members of the WTO, and after capital flows began to move South-to-North and South-to-South as well as North-to-South, the international economic field changed dramatically. The system as a whole became pluralistic, the geo-strategic global framework became more complex and the principle of multilateralism is more and more difficult to enforce. Hence, the current situation seems to be a good occasion to think about a better redistribution of real equality (instead of formal equality).

The second problem indirectly associated with the question of minority rights is epistemological. It has always struck me that almost all legal scholars writing in international economic law take for granted the neoclassical paradigm in economics, as if they were simply satisfied with being pure instruments of the majoritarian economic thought. But this cannot be the case if justice is to prevail. Economics is a social science of promoting some values to the prejudice of others.

One need only mention the values hidden behind trickle-down theory to make this point. Yet, the legal scholars have to advance their own ethical agenda for one simple reason: the notion of efficiency in economics is based on a means-end relationship, but says nothing about the chosen ends. Thus, the legal scholars cannot abandon to the economists their specific culture, their democratic values and their principles of equity, while discussing the ends and the results of the international trade system.

PHILIPPE COPPENS

Selected References

Robert Howse, Michael Trebilcock and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013)
Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995)
Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton University Press 2014)
John Rawls, *Political Liberalism* (Columbia University Press 1993)
Amartya Sen, *The Idea of Justice* (Harvard University Press 2009)

II.25 Corruption

Corruption is generally defined as the abuse of power for a private benefit. Condemned throughout history and globally, corruption is nevertheless widespread and continuing both in the public sector and in private business relationships. This is problematic, because even though corruption at one time was considered to be a rational business response to overly rigid government regulation, the current consensus is that corruption is not only morally inexcusable, but economically harmful and damaging to a functioning democracy. The dialogue surrounding the legitimacy of a government is therefore tied to measures ensuring that corruption is kept to an absolute minimum: no government can be considered 'good' if it is plagued by corruption.

The relationship between corruption and international economic law (IEL) has received only limited attention thus far. That corruption plays a role in international economic relations, however, is indisputable. The following will first sketch out a typology of corruption before giving an overview of the ways in which corruption has been addressed in the trade and investment law fields.

1. Types of corruption

Returning to the definition of corruption as an abuse of power for personal gain, the first distinction to be made is between public and private corruption. When the abused power comes from holding a public office, the corruption is considered 'public' and when it does not, it is 'private'. Current international law has binding rules relating to public corruption. The United Nations Convention Against Corruption (UNCAC)[14] is the most comprehensive instrument, but regional anti-corruption treaties (the Inter-American Convention Against Corruption and the African Convention on Preventing and Combating Corruption) are further important elements of the international legal framework. Each of these instruments calls on state parties to take steps to prevent corruption and to adopt legislation criminalizing both the offering and accepting of bribery and embezzlement (the diversion of public funds) by public officials. The UNCAC goes further by suggesting that states also hold officials criminally liable for trading in influence, abuse of function, and illicit enrichment, as well as addressing corrupt behavior in the private sector. The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[15] demands that state parties make the offering of bribes to foreign public officials a crime – a so-called 'supply-side' approach to corruption reduction.

2. Corruption and trade

There are numerous entry points for corruption in the trade context, and these extend from the 'petty corruption' of the bribery of customs officials to secure a lower tariff bracket for a particular shipment to the paid-for influence used to ensure non-enforcement of domestic regulations to the 'grand corruption' of rigged procurement decisions and the 'political corruption' that can lead to the maintenance of protectionist trade policies in an entire industrial sector. Note that the trade 'problem' with corruption is necessarily limited to protection. Paying a lower tariff, for example, or getting a shipment in outside of a quota can be trade enhancing, as can political influence used to liberalize trade policies.

While each of these examples of corrupt behavior is also an example of poor governance and delegitimizes the trading system as one based on rules, most had not been addressed by trade agreements as 'corruption'. Rather, any attempts to minimize the opportunities for bribery or peddling in influence were indirectly referred to as 'transparency' measures. Making the procedural aspects of trade foreseeable and open was the remedy for the abuse of power until the mid-2000s.

Then, in 2012 the World Trade Organization (WTO) changed its approach in government procurement, the most visible example of corruption in the international trade setting. Hard to quantify, estimates of the financial losses suffered by the public due to corruption in government purchasing practices vary widely, but average at one-quarter of total government spending, and non-economic losses must be added to that for a complete accounting of the effects of bribery, theft, and waste on such projects. To reduce such losses, a subset of WTO Members revised the Agreement on Government Procurement to include spe-

[12] *Gorzelik and others v Poland* ECHR 2004-I, para 90.
[13] Id.

[14] United Nations Convention Against Corruption (adopted 9 December 2003, entered into force 14 December 2005) A/58/422 (UNCAC) (http://www.unhcr.org/refworld/docid/4374b9524.html accessed 17 May 2017).

[15] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference on 21 November 1997 (http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf accessed 17 May 2017).