

GREY ZONES IN INTERNATIONAL ECONOMIC LAW AND GLOBAL GOVERNANCE

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Introduction

Grey Zones of International Economic Law and Global Governance

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New Institutions of Global Governance

Until the election of Donald Trump as president of the United States and the Brexit vote in the United Kingdom to leave the European Union in 2016, there was little to indicate that there are limits to the ever-expanding circle of global governance, characterized by the establishment of new international institutions and new international law instruments designed to identify points of consensus on global public goods as well as organizations that implement and promote these institutions. These developments in global governance have occurred over the past twenty-five years in tandem with developments in information technologies and communications that have facilitated greater global movements of people, ideas, and capital. They reflect, however, new values and institutions not yet well understood and invite careful critical scrutiny.

Of singular importance in this expansion of global governance is international economic law, which has transformed the global political economy with endless new bilateral and multilateral trade and investment agreements. The founding of the World Trade Organization (WTO) in 1995, in particular, was a watershed for these agreements. However, regional organizations such as the European Union (EU) and international agreements such as the *North American Free Trade Agreement (NAFTA)* also accented the significance of multilateral trade and investment agreements. These

agreements are designed, in large part, to facilitate trade liberalization and support greater economic competition.

International economic law is a complex body of law that sets out the legal rights and obligations of non-state actors – individuals, multinational firms, international organizations – and state actors – governments, state agencies, and so on – in the context of the global economy.¹ Trade and investment agreements are the most familiar legal instruments, the public face of what we describe in more depth below as the project of international economic law. New sets of rules for the global economy have been adopted at the same time that new international organizations have emerged. Both the Trump presidency and Brexit represent a backlash against the reach of international economic law and the limitations on its hegemony.

This book offers multiple perspectives on the elusive quest for improved global governance through the vehicle of international economic law and the institutions established in the period immediately following the Second World War. It suggests that, despite all of the efforts to expand endlessly the circle of global governance, far less has been achieved in terms of advancing global public goods by international trade than is typically acknowledged. In particular, the theme that runs through this book is that, despite the expansion of international economic institutions and organizations over the past twenty-five years, there are perennial grey zones in international economic law characterized by rule bending, flexibility, and innovation when problems and disputes arise and that little regarding these problems and disputes is black and white. These grey zones explain both the current legitimization crises that international economic law institutions and organizations face and the resilience of international economic law in the toolkit of global governance.

Grey zones are policy spaces that allow states to be either evasive or creative in response to new opportunities and challenges in the global economy. Our argument here is that, in many of these spaces, the appearance of global governance through international economic law providing uniformity and consistency is an illusion. Instead, these global economic spaces constitute grey zones in which there is an immense amount of flexibility, non-conformity, and diversity, much of it shaped by the dynamic between the countries involved in the issue, dispute, or negotiation. Rather than seeing global governance as providing black-and-white parameters in these spaces or zones, it is much more accurate to view them as grey zones in which little is initially settled and even less can be taken for granted. These

grey zones reflect the importance of having exceptions to rules or creating opportunities for exceptions. The existing rules in these zones can be suspended or ignored in order to respond to issues or crises. State action in grey zones is characterized by exceptions and opportunities to manoeuvre around rules, not by rule compliance or performance. Grey zones are spaces, in other words, in which countries adapt incrementally to structural changes and new circumstances.

It is through these grey zones that countries maximize their manoeuvrability in the global economy. The five issues in international economic law that we single out in this book to illustrate the concept of grey zones of international economic law are anti-dumping and subsidies, foreign investment protection and investor-state dispute settlement, labour rights, food security, and green industrial development. These issues are refracted in global economic spaces in which the foreign policies or external affairs of different countries intersect. The rule of law – international economic law – is typically portrayed as subjecting these spaces to uniform regulations and practices and enhancing the role of market mechanisms in public policy and pursuit of the public interest.

These grey zones often map onto what we call below the gaps and silences in the project of international economic law, spaces in which there is no consensus or orthodoxy. The persistent use of state subsidies by all governments is a clear example of this correspondence. Few non-specialists realize how many of these gaps and silences exist in international economic law, and this is surprising given the influence of international economic law as a tool of global governance and the fact that it is regarded by many governments as setting the gold standard for international regulation. Indeed, in our view, some of these gaps and silences are expanding, not shrinking, as is the case with anti-dumping. As perhaps the Brexit vote in the United Kingdom and the election of Trump as the forty-fifth president of the United States make visible, even the linear trajectory of expanding trade liberalization might have been an illusion. On some issues in international law more broadly, such as the obligations of governments to accept refugees, there no longer appears to be any common ground, as the divergent responses to the Syrian refugee crisis demonstrate.

From our perspective, however, less consensus in global governance, which grey zones make visible, is, ironically, both dangerous and good: dangerous because it contributes to global instability and allows for decisions that can worsen already dire situations, good because it enables innovation

and experimentation that can advance public goods and social justice internationally. The point that international economic law enables innovation and experimentation has been underappreciated to date because all too often it has been viewed as rigid and insensitive to concerns that are not narrowly trade oriented.

Moreover, these grey zones enable countries to experiment with new modes of domestic governance in their own domestic policy spaces.² Significantly, countries operating in these grey zones turn to their own national institutions or regional ones for innovative solutions to disputes rather than the established institutions of global governance such as the WTO dispute resolution mechanism. In the past, grey zones often led to beggar-your-neighbour protectionism in times of economic crisis. Government responses in the 1930s during the Great Depression are the textbook case.³ During the Great Recession of 2008–09, in contrast, grey zones in international economic law and global governance were seen by most states as a green light for stimulus spending and job creation in domestic policy space.⁴ Not surprisingly, those who advocate a return to austerity target not just stimulus spending but also the lack of discipline that grey zones enable.⁵

In this book, our focus shifts from domestic policy space to the realms of global governance that govern relations and disputes between countries. The landscape of our discussion is shaped by growing public concerns around the world about trade and investment organizations such as the World Trade Organization and agreements such as the *Comprehensive Economic and Trade Agreement (CETA)* between Canada and the European Union, the failed *Trans-Pacific Partnership (TPP)* among the United States and eleven other countries on the Asia-Pacific Rim, and the proposed *Transatlantic Trade and Investment Partnership (TTIP)* between the United States and the European Union, all seen as global threats to job security and national standards in public health and environmental protection. Ironically, the perennial existence of grey zones in international economic law means that, however much harmonization and uniformity are being created in the global economy through template trade and investment agreements such as those above, the institutions and organizations of international economic law are facilitating diversity and, in effect, varieties of capitalism in market societies at more local levels of governance. We offer in this book a bold new way to capture and make sense of the public's concerns about international trade and investment agreements by bringing to the forefront this fundamental, albeit neglected, aspect of international economic law instruments.

The Constitutive Core of International Economic Law

This book is focused on what we call the project of international economic law.⁶ The constitutive core of international economic law emerged in the second half of the twentieth century and has changed slowly – too slowly for many. Although the body of international economic law is highly technical and specialized, and thus difficult to summarize quickly, the constitutive core of the international economic law project can be described in relatively accessible terms as comprised of an integrated set of the basic initiatives of the multilateral trade system, the legal building blocks of such a system, fundamental principles of non-discrimination, and key institutional arrangements such as market societies to enable it to serve as a vehicle for global governance.

Basic Initiatives

Three basic initiatives can be identified with the project of international economic law over the past century. The first initiative is the increase of trade legalism – the idea that international trade issues should be resolved through applications of the rule of law, binding and universal rules – rather than international diplomacy and power politics.⁷ In a sense, the catalyst of international economic law is the belief that the traditional way of approaching disputes between countries – through diplomacy and war – can be replaced in the case of trade through a legal system that anticipates the sorts of issues that will arise and addresses them with a set of rules and corresponding institutions that are procedurally fair for all parties. As Richard Shell perceptively notes, “global economic integration appears to generate a need for dispute resolution and governance systems. Moreover, these systems have a tendency over time to gain a kind of technical autonomy, operating more or less independently of the governments that established them.”⁸ International economic law aspires to meet this need for fair and independent dispute resolution.

The second initiative is greater trade liberalization – the idea that trade between nations should be unhindered by artificial barriers established by individual nation-states.⁹ The classic barriers are tariffs and subsidies that favour vendors based in that nation. Traditional trade agreements, in effect, are pacts between nations to reduce or remove tariffs and subsidies, especially on manufactured and agricultural goods. More recent trade pacts are typically characterized by a much more expansive understanding of what artificial barriers to trade between nations are, such as financial services,

procurements, labour standards, environmental protection measures, and intellectual property regimes.

The third initiative is the elimination, within the global economy, of preferential treatment for capital investment based upon its country of origin.¹⁰ The thinking here is that not only trade but also capital should flow between nations unhindered. The targets of this initiative are the restrictions placed by nation-states on the flow of capital, both inward and outward. Classic examples of these restrictions include acquisition approval processes for foreign capital established by the state, prohibitions against foreign ownership of certain sectors of the economy, and extensive state regulation of the banking sector.

Not surprisingly, these last two basic initiatives of the international economic law project have led many to equate it with neo-liberalism in the sense that the logical consequence of the successful realization of these two initiatives is the retreat of the state from involvement in the domestic economy. Underlying these two initiatives appears to be a belief that the involvement of the state in the domestic economy – be it in terms of regulation, investment, or ownership – is a fetter on economic growth and prosperity. And this belief is at root the essence of neo-liberalism.¹¹ Certainly, many advocates of neo-liberalism are also proponents of international economic law. However, our point in this book is that international economic law is far too flexible and pragmatic to be equated with an overly simplistic view of how governments should use or not use domestic policy space to achieve greater growth, prosperity, or equality in their economies.

Legal Building Blocks

The legal building blocks of international economic law are the basics of private law – contract, tort, intellectual property – and administrative law – fairness and equity in public decision making. Private law is widely recognized as fundamental to the operation of modern market economies organized around private property. This is the basic insight of the law and economics movement and now one widely shared by most other theories of law.¹²

The law of contracts, of course, is the jurisprudence centred on an agreement creating obligations enforceable by law. The basic elements of a contract are mutual assent, consideration, capacity, and legality. Enforceable contracts are as important in the global economy as they are in market societies. Torts constitute, in private law, a way of thinking about injury or harm and compensation for loss. A tort is an act or omission that gives rise

to injury or harm to another and amounts to a civil wrong for which a court or some similar adjudicative body imposes liability. An ongoing challenge for the project of international economic law is to establish or legitimate adjudicative bodies that can effectively impose liability when injury or harm occurs in the global economy. Intellectual property law deals with the rules for securing and enforcing legal rights to inventions, designs, and other intellectual products. Patent and copyright laws are the most familiar examples. Over the past twenty-five years, greater uniformity between states on patent and copyright has been a key objective of most international economic law instruments. Administrative law is the body of law that addresses the actions and operations of governments and their regulatory agencies. In essence, administrative law is based upon the accountability of democratic governments for their decisions, in which the measure of this accountability is some standard of procedural fairness in decision making. In international economic law, administrative law is evident especially in a commitment to the processes and decisions of international bodies that are procedurally fair. In effect, international economic law builds upon and reinforces private law and administrative law principles at the foundation of the rule of law in states with market economies. From this perspective, international economic law is the regulatory system of global governance necessary for the operation of an efficient and effective global market economy mirrored by a successful domestic market economy.¹³

International economic law is modelled in different ways on either public law or private law. When international economic law functions as an instrument for resolving disputes between private parties – to wit, multinational corporations – without regard for public interest or global public goods, it can be readily thought of as a form of private law with its corresponding institutions, such as binding arbitration. However, the more international economic law is understood to be a mirror of international human rights law, the more sense it makes to see it as public, where at least one party in the main issues and disputes is a government or some other public institution. Certainly, from our perspective, when the project of international economic law presents itself in its most ambitious light, it appears beyond question to be principally a form of public law.

Many of the contributions to this volume have been written from the perspective of socio-legal studies. This perspective does not treat law or legal institutions in isolation from broader societal contexts or issues. Nor does it focus on law in the “books.” Instead, thinking about the project of international economic law from a socio-legal perspective requires us to

look at how its legal building blocks operate in practice. Law in the real world and in everyday life is messy and rarely meets the standards set out in its idealized form. It therefore comes as no surprise that socio-legal research reveals grey zones in international economic law. Socio-legal approaches to international law have a great deal of currency in the areas of international human rights law,¹⁴ but they are still in their infancy as applied to international economic law.

Fundamental Principles

International economic law rests, as Michael Trebilcock, Robert Howse, and Antonia Eliason pointed out in 1995, on the view that “the evolution and maintenance of an open, liberal trading order is to the mutual benefit of states.”¹⁵ There are two closely related fundamental principles that guide this sort of open, liberal trading order. The first, the “most favoured nation” principle, is the norm that countries should not discriminate against a trading partner with respect to imports, exports, services, investments, and other related regulations. The broad point is that, when governments impose barriers such as tariffs on certain goods or services entering their countries, these barriers function to discriminate against trading partners, and this form of discrimination is beneficial to neither country. The complementary principle of “national treatment” holds that, even within a domestic economy, goods and services originating from trading partners should not be discriminated against, for example by subsidizing the production of domestic goods or giving preferential treatment to domestic vendors in public procurement processes. This sort of discrimination, as with tariffs, is again beneficial to neither state. International economic law also relies on some broader general principles of the rule of law, such as transparency and procedural fairness, many of which are reflected in its embrace of administrative law.¹⁶

Institutional Arrangements

The institutional arrangements key to institutional economic law are three-fold. The first institutional arrangement is the primacy given to market societies. In such societies, the development of modern states occurred in tandem with the development of modern market economies.¹⁷ The state and market function in market societies in a complementary fashion. The state has certain spheres in which it can operate through law and regulations and others in which it has no role. The economy in such a society is a configuration of the overlap of these different spheres.

The second institutional arrangement is centred on the existence of clear sets of rules to regulate global trade and investment. These rules – characteristically found in treaties and agreements between states – are often thought to reflect a type of constitutionalism, in effect a rule-of-law scheme for global governance, one that is both complementary and parallel to the existence of constitutions for the regulation of domestic political systems.¹⁸ This form of legal pluralism is clearly the institutional arrangement that corresponds to the basic initiative of trade legalism.

The third institutional arrangement is the existence of international court-like bodies for dispute settlement in trade and investment law. The point is that, if there is to be an extension of legalism into the global economy, then it requires institutions – dispute resolution bodies, international courts, tribunals, arbitration panels – guided by law, not diplomacy, in the settlement of disputes. As well, there has been a dramatic increase in the number of international courts responsible for interpreting and enforcing this law – providing the kind of dispute settlement that global economic integration needs and trade legalism envisions. The emergence of the World Trade Organization with its dispute settlement mechanism in 1995 exemplifies this institutional arrangement.¹⁹ Permanent international courts have rapidly increased in number and activity over the past three decades, issuing 37,000 binding rulings, 91 percent of them since 1990.²⁰

The Ascent of Economic Law

Why have grey zones in international economic law been overlooked? The answer lies in the ascent of international economic law as a mode of global governance, one that sees it as providing an inflexible form of the rule of law. Two important moments can be readily identified in the ascent of international economic law over the past 100 years. The first moment began with the *Bretton Woods Agreement* in 1944, which established the landmark system for monetary and exchange rate management. In effect, the *Bretton Woods* system provided the framework for trade and commercial relations among the major Western economies – United States, Canada, Western Europe, Japan, and Australia – following the Second World War. The principal institutional achievements of that moment were the World Bank, the International Monetary Fund (IMF), and the *General Agreement on Tariffs and Trade*, which came into effect in 1948. The *Bretton Woods* system made concrete the aspirations of international economic law as a mode of global governance. The second moment came forty years later with the emergence of the so-called Washington Consensus, a prevalent set of beliefs and

corresponding institutions about the policy essentials for economic growth in the global economy. As the name suggests, it reflects a point in history when the United States filled – without contest – the role of the only super-power both in military and in economic terms. This second moment provides the context for the discussion of international economic law in this volume.

John Williamson, who coined the term “Washington Consensus” in 1989, identifies its ten policy reforms.²¹ They are (1) promoting greater fiscal responsibility for governments, including the prospect of austerity; (2) shifting public expenditures to pro-growth priorities; (3) liberalizing interest rates; (4) floating currency exchange rates; (5) undertaking tax cuts and reforms; (6) advancing trade liberalization; (7) liberalizing capital investment; (8) privatizing government services and assets; (9) imposing deregulation; and (10) better securing private property rights. Many of these policies are closely identified with neo-liberalism. Although not all of these policy reforms are integral to international economic law, many dovetail well with the basic initiatives of this project. In practice, the instruments of international economic law – especially trade and investment treaties – emerged as powerful vehicles for implementing the policy reforms of the Washington Consensus, reflected in the unprecedented increase in international trade and investment agreements over the past twenty-five years.

The watershed in the ascendance of international economic law occurred with the transition from the *General Agreement on Tariffs and Trade* (GATT), first negotiated in 1948, to the WTO in 1995.²² The WTO embraced both trade legalism and trade liberalization while offering a new model of constitutionalism for the global economy. Significantly, it provided new binding dispute settlement mechanisms for member states. Although the WTO was initially negotiated with a small number of countries from the Global North, its membership has come to be dominated by states from the Global South. There are currently 159 member states of the WTO, and 24 other states are in the process of negotiating membership.

At the same time, major regional trade agreements have also had a transformative effect on the legal terrain of global governance. The reconfiguration and expansion of the European Union in the early 1990s profoundly changed the shape and direction of governance in Europe. There are currently 28 member states compared with the 6 states that founded the European Economic Community in 1956. (The United Kingdom is set to exit the European Union by March 2019.) The European Union not only embraced trade liberalization and the free movement of people and capital but also

introduced a single currency, the euro, adopted by 19 of its member states. *NAFTA*, a trade liberalization agreement among Canada, Mexico, and the United States, came into effect in 1994. It provided, for the first time, extensive opportunities for non-state legal actors to utilize dispute settlement mechanisms – binding ones for foreign direct investors, non-binding ones for environmental and labour disputes. The failed *Trans-Pacific Partnership* aspired to set a new standard for international economic law, described not as a trade agreement but as a platform for the governance of the global economy, with individual chapters that address everything from tariffs and foreign investment protection to labour standards and environmental projects. It is unsurprising that proponents of the *TPP* in Washington and elsewhere maintain that, even though it has collapsed, the individual chapters can be readily inserted into new trade agreements, including a renegotiated *NAFTA*.

Over the past ten years, there has also been a proliferation of bilateral trade agreements. As a number of chapters in this volume show, Chile and China, arguably, have been the leaders in the embrace of bilateral trade agreements. These two countries have created a metaphorical spaghetti bowl of international economic agreements. But countries such as Canada have also played an important role. For example, the *Comprehensive Economic and Trade Agreement* between Canada and the European Union, signed in October 2016, has arguably been the highest-profile bilateral agreement in many years. This is partly because *CETA* is often seen as a model for the negotiation of a proposed *Transatlantic Trade and Investment Partnership* between the United States and the European Union.

Investment treaties have likewise come to populate the international law terrain. Over the past three decades, more than 3,200 investment protection agreements have been signed, most of them involving developing countries making decisions under conditions of uncertainty and vulnerability.²³ Investment protection has emerged over the past decade as one of the most contentious aspects of the Washington Consensus and the uses of international economic law instruments. Much of international law has traditionally focused on state-state dispute resolution, the effectiveness of which remains an open, but widely studied, question. Investment protection agreements, however, typically provide for dispute resolution for firms that make foreign investments – non-state actors – that have complaints against governments. In effect, these investment protection agreements appear to advance the rights of multinational firms through international economic law to the detriment of the right of states to regulate.

The Current Conditions of Uncertainty and Change

At the beginning of the twenty-first century, it was plausible to suggest that, in tandem with the Washington Consensus, international economic law – principles and institutional settlements – enjoyed a level of hegemony that made it the driver of global governance. In 2000, the Washington Consensus appeared to be seamless, the WTO was effortlessly adding new member states (China joined in 2001), and the European Union was successfully integrating new member states in rapid succession.

Today it is much harder simply to claim that there exists anything like the Washington Consensus in the global political economy. Indeed, as we have argued elsewhere, the 2008 global financial crisis illustrated both that, among countries in the Global North, the Washington Consensus was broken, and that there are more innovative possibilities for international economic law, including establishing better links to the advancement of social justice, equality, and human rights.²⁴ The wide embrace of massive economic stimulus around the world – from Washington to London to Berlin to Beijing – as the appropriate response to the 2008 global financial crisis reflected this shift in thinking about the roles of governments. Of course, in the Global North, there has been a revival of austerity in some countries, but there is no sense in which austerity rules, even in Washington, London, Paris, or Ottawa.²⁵

Indeed, since 2016, from Brexit to the Trump presidency, it is evident that many in the public are rejecting trade liberalization, the cornerstone of the Washington Consensus and a basic initiative of the international economic law project. These citizens – themselves members of the most economically dominant countries in the world – have lost confidence in the dominant self-image of the advanced Western countries of our age, an image of masters of the global trade economy. This rejection does not neatly track along ideological lines. Nor is there any new consensus emerging. However, it is clear that there is a logic of resistance to international economic law that dates from the Seattle protests at the G8 meeting in 1998 to the Occupy movement in 2008 to the global resistance to new regional trade agreements such as *CETA* and the *TTIP*. An important question for this book concerns the resilience of the project of international economic law as described above and whether it can adapt to and survive this crisis of public confidence.

Although the Washington Consensus is broken, international economic law still appears to be dominant as a mode of global governance on the world stage, except it is no longer necessarily embraced in the United States

or the United Kingdom but by leaders in the Global South. The project of international economic law has been embraced by these new state actors with policy priorities very different from those embedded in the Washington Consensus. Over the past fifteen years, the embrace of the framework of international economic law has shifted from being, in the 1990s, largely a concern of countries in the Global North to being the focus of numerous constructive initiatives by the largest economies of the Global South, in particular China and India. This tension is especially evident in the workings of the WTO, once a club run by a few nations but now a site where many nations compete for influence. In effect, the constituents of the international economic law project have broadened.

At the same time, countries in the Global South have become more confident about using the tools of international economic law because they understand how the rules work. Indeed, China and Chile have taken the initiative of leading negotiations for new trade and investment treaties. The many recently negotiated bilateral trade agreements also highlight how the WTO has been weakened. Instead of governing all trade across the globe, it is seriously limited in its scope. The WTO has been under pressure for two decades to accommodate public global goods such as public health, environmental sustainability, and food security. The failure of the Doha negotiations reflects both this agenda and the difficulties that the Global North and Global South have in agreeing on the way forward. For many advocates of trade liberalization, the decline of the WTO has revealed the importance of finding surrogates in the form of comprehensive bilateral and regional trade agreements. Both Canada and the United States, for example, have made the negotiation of trade agreements with the European Union and the Asia-Pacific countries a priority compared with investing more effort in the WTO.

The Washington Consensus at one time was reinforced through the exercise of economic power by the International Monetary Fund and the World Bank. Neither institution, however, has the authority or the legitimacy that it once did. China, for example, took the lead in 2014 in establishing the Asian Infrastructure Investment Bank, set to rival the influence of the World Bank in Asia. However, in practice, with the exception of China, the countries of the Global South have thus far obtained very few concessions from the Global North, and rogue nations such as Venezuela have been subject to endless investor dispute claims. Perhaps the new United Nations Sustainable Development Goals, agreed upon in 2015, will prove to be a watershed because they have been formulated expressly to address the shortcomings

of international economic law in terms of sustainable development in the Global South.

Significantly, the idea that the principal actors in international economic law should be states is being challenged. Investment dispute settlement has long recognized that foreign direct investors – multinational firms predominantly – should also have a place at the table. But few now question that non-governmental organizations and civil society social movements – human rights organizations, environmental groups, labour organizations, Indigenous peoples groups – should also have roles in the making of international economic law. These new actors have been very effective in painting much of international economic law as an instrument of neo-liberal politics and corporate power. These organizations and social movements are adding new items to the global governance agenda, in effect making visible gaps and shortfalls in the hegemony of international economic law. Ironically, it often appears that countries in the Global South, such as China and India, are struggling more to listen to the voices of these non-governmental actors than countries in Europe or North America.

The Washington Consensus also relied, in part, not just on framing the substantive agenda for global governance but also on the language in which these agenda items were discussed. These new actors from civil society often use language different from the language that has traditionally prevailed in elite discussions of international economic law. This new language is displacing earlier terms, especially in public discussions of trade liberalization. For example, as several contributions to this volume show, the language of food security has superseded, for the most part, the more orthodox framework of agricultural subsidies in media discussions of trade negotiations. Likewise, disputes over energy subsidies are being framed during WTO dispute settlements in environmental protection terms regarding global warming and climate change. Labour movements are likewise trying to shift the global conversation on labour issues from the traditional concerns about collective bargaining and the right to strike to questions about precarious work and discrimination in the workplace.

The Future of International Economic Law and Global Governance

This chapter has brought to the forefront the uncertainty and change challenging international economic law and global governance. The idea of grey zones in international economic law is an innovative heuristic device that allows us to explain the uncertainty and change – the weakening of the Washington Consensus – and to provide insights into what the future might

hold. Much of the dominant thinking about global governance has not recognized the importance of grey zones and therefore has offered impoverished predictions about the resilience and direction of global governance.

There are grey zones in international economic law, characterized by flexibility and murkiness, because in some instances they are necessary to advance important global public goods and to respond to crises. These grey zones provide opportunities for proximal development in the sense that they stretch the status quo but only within certain limitations. Not all international economic law is murky or fuzzy. In some instances, it is simple and straightforward in principle. Many aspects of the World Trade Organization's mandate and system of rules remain intact and are embraced by all of its 150-plus member states. This is the case when it comes to state nationalization of assets without compensation or the role of international arbitrators in conflict resolution between two private parties. However, despite agreement in principle, compliance with WTO and other trade rules is best understood as a type of interpretive mediation between local and international legal cultures as well as different areas of international law often in tension (especially trade and human rights law), meaning that state performance with regard to international economic law is always adapted locally and never uniform globally.²⁶ We envision grey zones giving individual states a wider ambit to innovate on the global stage for the sake of advancing public goods, albeit constrained by, for example, the WTO's legal culture and the limitations of proximal development.

Countries use a variety of strategies within these grey zones to adapt to technology-driven structural change in their own economies, to experiment with new policy instruments, to meet the demands of particular domestic special interest groups such as organized labour or farmers, and to advance certain public goods such as public health or food security. Many governments also face intense pressures from their citizens and social movements in civil society to avoid conforming too readily to models of international economic law that diminish the capacities of states to prioritize the public interest over that of foreign investors and multinational corporations. When old policy prescriptions and global rules cannot provide adequate answers to new conditions in the global economy, the first reflex of every government is to "muddle through." This response is not a weakness in global governance at a time of systemic challenges such as Brexit and the threats of the Trump presidency to trade multilateralism but one that often spurs innovative alternatives to failed past policies and effective solutions to emerging crises, without discarding what is valuable in past practices and policies.

Indeed, these challenges and threats have spurred Canadian governments to reflect and even lead measured defences of the existing institutions of international economic law.

The contributions to this volume utilize our idea of grey zones to offer insights into the theory and practice of international economic law. The first part of the book reframes three key features and issues – the dumping of manufactured goods, foreign investor protection, and state industrial subsidies – through the lens of grey zones in international economic law and global governance. The second part of the book focuses on the dynamic relationship between local adaptation and legal culture, on the one hand, and global and regional trade agreements, on the other, drawing out the flexibility and adaptability of international economic law that we have identified as central characteristics of grey zones. The chapters in the third part of the book illustrate how grey zones operate by focusing on two substantial areas – food security and labour standards – in which the benefits of trade are weighed against the concerns about socio-economic rights. The fourth part of the book has chapters that draw out the complex issue of green energy subsidies by delineating when and where there are grey zones in international economic law. In the conclusion, we review the insights of all four parts of the book to delineate three broad policy options regarding trade for the government of Canada.

NOTES

- 1 For a much more detailed description of the body of international economic law and its place in global governance and policy, see, for example, John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (New York: Cambridge University Press, 2006), and Michael Trebilcock, Robert Howse, and Antonia Eliason, *The Regulation of International Trade*, 4th ed. (London: Routledge, 2013). The website <http://www.worldtradelaw.org/> provides one of the many excellent monitors of these developments, especially its International Economic Law and Policy blog, hosted by Simon Lester with contributions by many of the leading experts in the field, available at <http://worldtradelaw.typepad.com/ielpblog>.
- 2 Elsewhere, we have argued that, though international trade and human rights law – a prevalent instrument of global governance – is often viewed as reducing domestic policy space, the actual dynamic between these international law instruments and policy space is much more complex. See Daniel Drache and Lesley A. Jacobs, *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times* (New York: Cambridge University Press, 2014). Rather than constraining policy choices, these instruments often create new opportunities for policy development, in effect enabling the use of policy space rather than reducing it. The point is that domestic

policy space represents a realm in market societies in which there is flexibility and opportunity for policy innovation and that the mechanisms and techniques of global governance facilitate this policy space.

- 3 Ben S. Bernanke, *Essays on the Great Depression* (Princeton, NJ: Princeton University Press, 2004).
- 4 See Drache and Jacobs, *Linking Global Trade*.
- 5 Mark Blyth, *Austerity: The History of a Dangerous Idea* (New York: Oxford University Press, 2013).
- 6 By calling it a project, we are saying that there has been a shared endeavour pursued by a range of actors – states, international organizations, scholars, and others. It is important to distinguish, within this project, between the actual content of the body of international economic law – the ever-evolving jurisprudence of trade and investment law – and the constitutive core of international economic law. The content or body of international economic law, evolving rapidly as new trade and investment agreements are ratified and the jurisprudence expands, has its origins in the *General Agreement on Tariffs and Trade* (GATT) principles reached after the Second World War.
- 7 G. Richard Shell, “Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization,” *Duke Law Journal* 44, 5 (1995): 830–927.
- 8 *Ibid.*, 927.
- 9 Jackson, *Sovereignty, the WTO, and Changing Fundamentals*.
- 10 Krista Nadakukaren Schefer, *International Investment Law* (Cheltenham, UK: Edward Elgar Publishing, 2013).
- 11 David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).
- 12 Richard A. Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1983).
- 13 Andreas F. Lowenfeld, *International Economic Law*, 2nd ed. (Oxford: Oxford University Press, 2008).
- 14 Marie-Bénédicte Dembour and Tobias Kelly, *Paths to International Justice: Social and Legal Perspectives* (Cambridge, UK: Cambridge University Press, 2007).
- 15 Trebilcock, Howse, and Eliason, *Regulation of International Trade*, x.
- 16 *Ibid.*
- 17 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001).
- 18 Christian Joerges and Ernst-Ulrich Petersmann, eds., *Constitutionalism, Multilevel Trade Governance, and International Economic Law*, rev. ed. (Oxford: Hart, 2011).
- 19 Shell, “Trade Legalism and International Relations Theory.”
- 20 Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014).
- 21 John Williamson, *A Short History of the Washington Consensus* (Washington, DC: Institute for International Economics, 2004), <https://piie.com/publications/papers/williamson0904-2.pdf>.
- 22 Jackson, *Sovereignty, the WTO, and Changing Fundamentals*.

- 23 Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge, UK: Cambridge University Press, 2015).
- 24 Drache and Jacobs, *Linking Global Trade*.
- 25 Blyth, *Austerity*.
- 26 Pitman Potter, *Assessing Treaty Performance in China: Trade and Human Rights* (Vancouver: UBC Press, 2014), and Pitman Potter and Ljiljana Biukovic, *Globalization and Local Adaptation in International Trade Law* (Vancouver: UBC Press, 2012).

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Library and Archives Canada Cataloguing in Publication

Grey zones in international economic law and global governance /
edited by Daniel Drache and Lesley A. Jacobs.

(Asia Pacific legal culture and globalization)
Includes bibliographical references and index.
Issued in print and electronic formats.

ISBN 978-0-7748-3853-5 (hardcover). – ISBN 978-0-7748-3855-9 (PDF). –
ISBN 978-0-7748-3856-6 (EPUB). – ISBN 978-0-7748-3857-3 (Kindle)

1. International economic relations. 2. Foreign trade regulation. 3. Industrial relations. 4. Human rights. I. Drache, Daniel, editor II. Jacobs, Lesley A., editor III. Series: Asia Pacific legal culture and globalization (Series)

K3820.G74 2018

343.07

C2018-903303-7

C2018-903304-5

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

Set in Futura Condensed and Warnock by Artegraphica Design Co. Ltd.

Copy editor: Dallas Harrison

Proofreader: Caitlin Gordon-Walker

Indexer: Noeline Bridge

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpres.ca