Book Review

A BOOK REVIEW OF "INTERNATIONAL ECONOMIC LAW AND GOVERNANCE: ESSAYS IN HONOUR OF MITSUO MATSUSHITA" – EDITED BY JULIEN CHAISSE AND TSAI-YU LIN

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ABSTRACT

A group of leading scholars who are all friends and students of Professor Mitsuo Matsushita, one of the founding members of World Trade Organization (hereinafter "WTO") Appellate Body, just launched a new book on international economic law and governance. The contributors review the questions and concerns that were initially raised by Matsushita, and try to propose some novel insights from a contemporary perspective. The book is one of the "must-read" collections for those who are interested in contemplating the future of global economic system with a complete and profound understanding of the past and present problems regarding international rules making and dispute settlement proceedings.

KEYWORDS: *Mitsuo Matsushita, WTO, Appellate Body, international economic laws, global economic governance*

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The Festschrift dedicated to Mitsuo Matsushita, one of the founding members of the Appellate Body of World Trade Organization in 1995, is a "must read" volume on international economic laws for both scholars and policy makers working on WTO and RTA related matters. Leading experts who are all his friends have written more than thirty essays on international economic law and governance that give readers fresh insight into the future of international economic governance.

The edited volume starts with the Forward by Chang-fa Lo, Justice of the Constitutional Court of Republic of China (Taiwan), who now leads the Asia WTO Research Network after a decade of leadership by Professor Matsushita. He thoroughly explains why the contributors decided to include a unique subtitle "Essays in Honour of Mitsuo Matsushita". In Introduction, the editors of the volume, Julien Chaisse and Tsai-yu Lin argue that nation states no longer hold monopolistic power on their international economic policies, and the nature of the international economic governance has been significantly transformed due to the legalization of international economic relations. They set the overarching research agenda of the book, arguing that the question of appropriate means and institutions for the regulation and governance of international economic relations arises, especially after the establishment of WTO and the rise of Free Trade Agreements (hereinafter "FTAs").

Part I that includes ten essays in addition to Introduction, starts with two excellent essays on the challenges of the WTO dispute settlement system. Chapter 2 by William J. Davey shows that the record of WTO dispute settlement is positive. However, because of the success, WTO Members bring more cases to WTO dispute settlement, which would result in the delay in the dispute settlement process. He argues that the time taken by cases from the establishment of panel to adoption of Appellate Body report can be reduced by five months if proper reform is conducted. In Chapter 3, Claus-Dieter Ehlermann argues that the competition with Regional Trade Agreements (hereinafter "RTAs") and their dispute settlement is not a threat for the WTO, but the increased workload is the risk. However, there is no magic tool to solve the workload problem for the Appellate Body and some remedies would ruin the quality of Appellate Body reports.

The next four chapters discuss the role of dispute settlement in striking a delicate balance between competing norms. Chapter 4 by Frieder Roessler revisits one of the primary concerns of Professor Matsushita, namely, the relationship between international trade laws and domestic regulations. Based on the reviews of recent cases, he discusses what the Appellate Body will do if the conflict between the two occurs again in the future. Chapter 5 by Ernst-Ulrich Petersmann discusses how to reconcile health and economic laws with human rights. He argues that even though

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human rights are nowhere mentioned in WTO law, the legitimacy of multilateral trade governance largely depends on democratic and judicial protection of equal rights among citizens. China imposed restrictions on the export of rare earths in 2010, which attracted much attention from policy makers in the Asia Pacific region. Joel P. Trachtman examined whether the Chinese measures qualify for an exception under General Agreement on Tariffs and Trade (hereinafter "GATT") Article XX(g) on conservation of exhaustible natural resources in Chapter 6. In Chapter 7, Yasuhei Taniguchi and Tomoko Ishikawa tackle an important issue, the balance between investment protection and other public policy goals. They suggest that investment arbitration tribunals should depart from the strict application of the necessity test and refer to the Appellate Body's deferential approach as the initial guidance in the assessment of the necessity test.

The final four chapters in Part I handle issues related to possible fragmentation of dispute settlement mechanisms. Chapter 8 by Chin-leng Lim is on the relationship between WTO and RTAs. He argues that the time has come to devote as much attention to the interpretative issue which RTAs raise as we have previously devoted to the design and architectural aspects of the RTA problems. He believes that panels and the Appellate Body have a duty, instead of discretion, to apply the rule of treaty interpretation. In Chapter 9, Meredith Kolsky Lewis insists that the Appellate Body has erred too far in favor of appeasing the majority at the expense of a faithful Vienna Convention on the Law of Treaties (VCLT) analysis of what the agreements do and do not permit. She asserts that the United States is likely to insist on more clarity and less interpretive leeway in all future trade remedy-related negotiations within WTO. In Chapter 10, Jaemin Lee finds that the fragmented nature of investment arbitration awards provides less-than-optimal clarity in terms of guidance for the governments. He foresees that Joint Committees established by Bilateral Investment Treaties (hereinafter "BITs") and RTA investment chapters will take up the role of making interpretative decisions regarding key terms in BIT and RTAs so that the concerns of the host state governments could be alleviated. Soon after its unsuccessful challenge to the jurisdiction of ICSID arbitral tribunal (*Planet Mining v Indonesia*), Indonesia announced in 2014 that it would review its all BITs. Chapter 11 by Luke Nottage points out that international investment dispute resolution is getting more politicized, less legalistic, because some developing countries are increasingly concerned about the investor-state arbitration system.

PART II has nine chapters that discuss the relationship between WTO law and other areas of international law. The first four chapters tackle this important issue with an emphasis on the evolution of legal norms and regimes. Chapter 12 by Jan Wouters and Ines Willemyns examines the interplay between the G20 and WTO. In their view, there is currently only a

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limited amount of interplay, but the complementary potential could be better implemented if there is a breakthrough in the Doha Development Agenda (DDA) negotiations. Chapter 13 by Rolf H. Weber takes up Professor Matsushita's early thoughts on "competition laws and policy in the context of WTO system". After careful examination, he finds that what Matsushita argued twenty years ago is still valid and suggests that WTO should convene an expert group tackling the issues related to the development of a more convergent competition law framework. Chapter 14 by Frederick M. Abbott asks an important question regarding competition laws: Is the conclusion of multilateral agreement on competition feasible and desirable? After careful examination, the Chapter concludes that there is hardly any advantage to emerging economies from trading away their flexibility to enforce competition law because competition law is an important tool for industrial policies and should be tailored to the circumstances of each country. In Chapter 15, Julien Chaisse examines international economic laws that may regulate State-Controlled Entities (hereinafter "SCEs") and Sovereign Wealth Funds. He argues that the current patchwork of international rules addressing SCEs operations is mainly made of competition, trade and investment law and policy and each are formulated by distinctive instruments that would bring a considerable risk of incoherence for SCEs' operations.

The second half of Part II includes papers that discuss economic integration, environment, health and Technical Barriers to Trade (hereinafter "TBT"). The relationship between WTO laws and other public international organizations such as World Health Organization and RTAs, is examined by Chapter 16 by Chien-huei Wu. The author is of the view that built-in institutional linkages between WTO and other international organizations, established by way of incorporation and explicit reference, are necessary for the coordination and coherence between WTO and the others. The central question of Chapter 17 by Thomas J. Schoenbaum is to what extent the norms and criteria adopted in other international environmental regimes concerning natural resources may be adopted by WTO dispute settlement. The chapter argues that, despite Matsushita's early effort to integrate WTO laws and multilateral environmental agreements, WTO dispute resolution bodies have, on the whole, been too reticent in citing norms contained in multilateral environmental agreements. Taking investment as an example, Chapter 18 by Tsai-yu Lin shows that neither the WTO nor RTAs/BITs address the issue of mutual overlap. The chapter suggests that the WTO should play a more active role in assisting investment arbitral in applying or interpreting WTO agreements, rather than having interpretations of WTO agreements scattered and incorporated into various agreements outside the WTO. In Chapter 19, Won-mog Choi finds that recent TBT cases bring unusual

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rulings by Appellate Body that makes a significant departure from the past interpretation of non-discrimination principle. He argues that the future implications of this new approach are limitless and concludes the chapter with the remark: "once the tribunal has crossed the Rubicon, it should conquer Rome as quickly as possible and declare new governing rules." Chapter 20 by Shin-yi Peng first introduces the increasing tension between privacy and regional economic integration such as Transatlantic Trade and Investment Partnership (hereinafter "TTIP"), Trans-Pacific Partnership (hereinafter "TPP") and Trade in Services Agreement (TiSA). The Chapter considers whether regionalism is trading away privacy for trade integration, by classifying the Asia-Pacific Economic Cooperation (APEC) model and the European Union (EU) model to the privacy problems.

Part III includes eleven chapters that deal with global and regional economic governance. The first four chapters tackle policy issues: WTO negotiations and mega-RTAs. Chapter 21 by Bernared M. Hoekman and Petros C. Mavroidis tackle a critical question of multilateral negotiations: why is concluding WTO negotiations so difficult? The problem associated with regulatory barriers, which is the central concerns of negotiations, can be addressed between homogenous players, but WTO membership does not satisfy such a condition. They argue that the WTO must move to WTO 2.0, where variable geometry will be a possibility and clubs of few like-minded members will be allowed to co-exist alongside the big WTO 1.0. Chapter 22 examines the prospects of TTIP between European Union and the United States. If concluded, it may have a significant effect on future WTO negotiations, because certain global issues, such as energy and climate change, may not be solved multilaterally but rather bilaterally. Junji Nakagawa points out in Chapter 23 that recent RTAs address non-tariff measures, which often take the form of domestic regulations. Mega-RTAs such as TPP and TTIP are the forefront of such a trend. The chapter carefully examines possibility and challenges of regulatory cooperation and regulatory coherence through mega-RTAs, drawing important policy suggestions regarding how to avoid negative outcomes of regulatory cooperation and regulatory coherence. Chapter 24 by R. V. Anuradha discusses the implications that the rise of plurilateralism on multilateral trade governance. The chapter suggests that countries that seek to remain outside the mega-agreements need to assess whether to take a more practical approach at the multilateral level and keep up the emphasis on a stronger WTO. She points out that plurilateral agreements do not address the issue of weak bargaining position of countries that initially remain outside the agreement.

In Chapter 25, Bryan Mercurio argues that the impact of TRIPS Agreement has been far less substantial than what proponents hoped for or critics feared. He is of the view that some significant achievements such as

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the Doha Declaration on TRIPS and Public Health (2001) and panel decision in *Canada-Pharmaceutical Patents* (2000) seems to suggest that TRIPS Agreement is not necessarily a threat to public health. Chapter 26 by Raj Bhala discusses controversy on intellectual property in the TPP negotiations, such as copyright enforcement and biologics data exclusivity. While the observation was made before the conclusion of TPP, the Chapter well documents the negotiation dynamics in the controversial area. In Chapter 27, Chios Carmody argues that WTO law can be understood as a law of interdependence. In his view, WTO system is a combination of contract and constitution, a "contractual constitution" with the emphasis being on the latter.

The second half of Part III includes papers that try to foresee the future landscape of economic governance and suggests necessary reforms on the governance system. In Chapter 28, Chang-fa Lo tackles a challenging question regarding the regional and global governance. He suggests widening the geographic coverage of RTAs by admitting non-parties is critical for regional governance. For global governance, he suggests allowing WTO dispute settlement to address preliminary issues arising from external norms so that some critical external human values can be integrated into the operation of the WTO. Chapter 29 by R. Rajesh Babu argues that it is nearly impossible to agree upon new rules through WTO multilateral negotiations, which tend to be too democratic. The reality is that judicial law-making takes place at the panel and Appellate Body, which are less democratic. Such a rule making undermines the consent-based decision-making process which is the cornerstone of the WTO. In Chapter 30, Dukgeun Ahn reviews the current situation of China, Japan and Korea in the WTO trade remedy system. While it remains to be seen how the three countries develop their trade remedy practices and institutions, he is of the view that the policies of Eastern Asia will become important factors for future development of the WTO trade remedy system. Chapter 31 by Yuka Fukunaga explores the usefulness of managerial approach in securing compliance with Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter "SPS Agreement") as an alternative to the panel and Appellate Body review. She argues that the *ad hoc* consultation under Article 12 of the SPS Agreement can effectively deal with SPS issues and be sensitive to the sovereign rights of members in adopting SPS measures.

In conclusion (Chapter 32), Julio A. Lacarte Muró shares his thoughts on WTO's next twenty years. His principal concern is RTAs. He argues that trade has moved for years in the direction of preferences and away from the most-favored nation clause and the process has now begun to speed up mega-RTAs. He also suggests that WTO should have an executive board with limited membership.

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After reading the huge edited volume, I discovered two things that are commonly proved by the contributors. First, it is clear that not only is Professor Matsushita's character truly loved by his friends, his works are also widely read and highly influential. I was surprised to find a majority of their arguments in each chapter are directly related to his early works, typically starting with a sentence that refers to Professor Matsushita's work or view on the issue. Second, Professor Matsushita's concern is not limited to legal issues. WTO's legal system exists not only for the sake of trade lawyers, but also for the balanced development of the world trade and economy. This is perhaps one of the reasons why his works are attractive to many scholars specializing in different areas. It is worth browsing this thick volume if you are eager to study a wide range of WTO related topics and look into the future of global economic governance.

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