

EconoFact Chats: Challenges to the International Trading System

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Michael Klein:

I'm Michael Klein, executive editor of Econofact, a non-partisan, web-based publication of The Fletcher School at Tufts University. At Econofact, we bring key facts and incisive analysis to the national debate on economic and social policies publishing work from leading economists across the country. You can learn more about us and see our work at www.econofact.org.

Michael Klein:

There has been a great deal of debate about international trade over the past few years. The former administration saw trade as a zero sum game, with countries having a trade surplus as winners, and countries having a trade deficit as losers. There is also a denigration of trade deals. One of the first acts of the Trump administration was withdrawing from the Trans-Pacific Partnership, a trade deal among 12 Pacific rim countries. And NAFTA was replaced with the US-Mexico-Canada Agreement.

Michael Klein:

There was also an ongoing concern that the decisions of the World Trade Organization, the WTO, were routinely biased against the United States. Economists are generally in favor of free trade while also recognizing that trade creates winners and losers. But economic experts are not the only ones who focus on trade issues. International trade law is an important and intellectually vibrant field that offers important insights. And one of the foremost experts in this field is Professor Joel Trachtman, my guest today on Econofact Chats. Joel is my colleague at The Fletcher School at Tufts University. Joel, it's a pleasure to welcome you to this podcast.

Joel Trachtman:

Thank you, Michael. Nice to be here.

Michael Klein:

Joel, many of our listeners will have some familiarity with trade policies like tariffs and quotas, but they'll likely have less knowledge of how trade law affects commerce between nations. What are some of the key ways in which national laws affect trade?

Joel Trachtman:

National laws relate to both tariffs and quotas. Tariffs are restricted under World Trade Organization law, quotas are generally prohibited. But lots of ordinary regulation, services regulation, or goods product standards can have restrictive effects. And when the European Union started its single market initiative in the late 1980s, when we've looked at the Trans-Pacific Partnership or the Transatlantic Trade and Investment Partnership, analysts have identified lots of barriers with great values that could be eliminated. And the idea here is that national regulatory differences might cause reduction of trade and therefore reduction of welfare.

Michael Klein:

So sometimes these laws are called prudential laws, things to help make the country safer. And who's to say whether a law is truly prudential or instead is protectionist?

Joel Trachtman:

It's a great question. It's very difficult to specify a particular rule as to whether something is prudential or protectionist. Sometimes measures that states enact have dual purposes. A purpose, for example, of European Union restrictions on hormone fed beef was to protect health but also to protect beef farmers in the European Union from competition from Canada or the United States. In the WTO legal system, we speak about discrimination against imported products and we try to identify that. But defining discrimination is actually rather difficult. And we have to look at the reason for the regulatory difference. Whether it seems to be a sincere reason and whether the adverse trade effects, whether the barriers to trade that come from it, seem to be disproportionate to the legitimate regulatory goal.

Michael Klein:

Joel, you mentioned the WTO. Can you describe a little bit what it is and how it operates?

Joel Trachtman:

Sure. The WTO was formed by a treaty on the first day of 1995. It's the successor organization to the General Agreement on Tariffs and Trade, GATT, which was formed in 1947 and was tremendously successful at reducing tariffs among wealthy countries. So the WTO is an international organization formed by an international treaty. It only makes new rules by revising its treaties and no state is bound to any treaty that it has not signed. So every time we try to make new rules, we have to induce every state that is a member of the WTO, there are 164 members, to agree to that.

Joel Trachtman:

Then there is some authority to make decisions inside the WTO, but that's done by consensus, meaning that if any state objects that decision does not get made. And so it's important to say that the WTO is what we call a member organization, where nothing happens without the specific consent of the members except in connection with dispute settlement, where panels and the appellate body, when it was functioning, were able to make decisions without the specific consent of the states. But those were decisions interpreting the law that the states had agreed to.

Michael Klein:

The Trump administration imposed tariffs on China and also tariffs on imports of steel and aluminum from many countries. The Biden administration has not reversed these restrictive trade measures and they continue to be in effect. Do these trade actions comply with U.S. domestic law and also with WTO law?

Joel Trachtman:

It's interesting, under the United States constitution the president has no inherent authority over tariffs, but he has delegated authority under specific statutes. And those statutes provide for conditions upon which the president may impose additional tariffs. And the question of whether those conditions are met is largely unreviewable. It's seen as within the president's discretion to determine whether those facts are met. So it's hard to say whether it's legal or not under United States law, because no court is likely to decide that question. In terms of WTO law, it's clear that those tariffs on most products from China, large, additional tariffs on most products from China, and the additional tariffs on steel and aluminum that were imposed on the basis of a national security pretext are illegal. And if the dispute settlement function of the WTO were permitted to operate, I believe it would find that those measures are illegal under WTO law.

Michael Klein:

So you're mentioning here that the WTO law would probably find that illegal. And I mentioned in the introduction that some people view the WTO's decisions as routinely biased against the interests of the United States. Does the data bear out this view?

Joel Trachtman:

No, it doesn't. First of all, in WTO litigation the complainant most often wins. So when the United States is a complainant, like other states it usually wins. When it's a respondent, like other states it usually loses. And there's just no evidence of bias. The United States record is similar to that of other major states. And it should be pointed out that this system was first of all created by the United States after the Second World War. It was an idea that was developed by the United States with the United Kingdom. The United States was the prime mover of the WTO. The United States asked for this binding dispute settlement. And so it's hard to say that there's any bias in this system against the United States.

Michael Klein:

Before Joel, you said that countries were bound to WTO decisions. But our former colleague, Alfred Rubin, who is a very distinguished scholar of international law, began his course on international law by saying there is no such thing as international law. So what I took that to mean is that, international laws unlike national laws have no teeth. There's no strong, consistent enforcement mechanism. How would you respond to Al's point, especially when it comes to trade law?

Joel Trachtman:

Well, I think Al was trying to provoke his students. And I think Al realized as we do that international trade law, like other international law, like other law, has a certain behavioral effects. And those behavioral effects may vary with the type of law, the type of enforcement mechanism. What the WTO does have is mandatory dispute settlement. That system is broken right now because the appellate body is inoperative because the United States is not agreeing by consensus to appoint new appellate body members.

Joel Trachtman:

But before that came about, this was a system where we had binding dispute settlement, we had binding authorized retaliation, and we had a multilateral system that seemed to cause behavioral effects. And it also seemed to be important to states to negotiate the rules and to enforce the rules. And so we can ask if those rules didn't have behavioral effects, why were states so attentive to them? So I think it's fair to say that this is binding law like other laws. The fact that it's occasionally violated with some consequences or perhaps sometimes even without some consequences doesn't mean that it isn't law.

Michael Klein:

So the behavioral effects, it's a little bit like, if I know the speed limit is 55, I'm not going to drive faster than, well, 65, but it has affected my behavior because just the presence of that law means I'm not going to drive 80 or 85.

Joel Trachtman:

Exactly, right. And the fact that murders are occasionally committed doesn't mean that the law against murder is not law. It has a behavioral effect.

Michael Klein:

Well, hopefully Joel, my speeding is not analogous to somebody murdering somebody else, but I'll leave that to the lawyers. So to the extent that international law is binding, there is a concern that it reduces national sovereignty. And this has certainly been one of the complaints about the WTO. Are you concerned about the erosion of national sovereignty through efforts to promote greater global trade integration?

Joel Trachtman:

First of all, the existing rules are not very intrusive. The existing rules for most types of cases simply say that states are not permitted to discriminate against imported products when they regulate. And this is enforced with a fair amount of deference to the prerogatives of states. And so I don't think in the area of what we called prudential regulation, that there is a significant restriction on the right to regulate. It may be that as we proceed further and try to reduce barriers to trade, we would see more harmonization of rules and more recognition of other states rules. And these will entail some reduction in national regulatory prerogatives. But that will be bargained and it will be engaged in on the basis of reciprocity where states decide that it is to their benefits to accept those restrictions. Remember, the WTO isn't a them, it's an us. It's the states themselves deciding, and no state is bound unless it agrees to be bound in this reciprocal way.

Michael Klein:

I guess you could make an analogous argument that we're all bound by rules and regulations but that is what allows society to exist. Because even if I wanted to speed, I wanted to go 95, I realize that that's something that's unsafe and I'm glad I'm not in some ways. But I'm especially glad that other people aren't either. So we all agree to be bound in some ways so things work out better overall.

Joel Trachtman:

That's exactly right. And it's the extension of that principle in domestic law that we accept restraints on our autonomy for our own good and the good of others in our society, to this international realm. And it seems to make sense if we consider trade, but also if we consider global warming or cybersecurity or pandemics, all sorts of problems require states to agree on how to address them.

Michael Klein:

What about if we consider labor workers rights. For example, suppose in a country that there's very high unemployment and they would see something like a greater power for unionization as overall detrimental, but other countries would demand that there are labor rights. And an extreme example of this I guess is child labor. So, how does the decision about whether or not to impose labor rules from one country onto another fit into this idea of global trade harmonization?

Joel Trachtman:

Indeed autonomy is on both sides of the equation. So when the United States entered into the United States-Mexico-Canada Agreement, the replacement for NAFTA, with Mexico, it looked at labor rights in Mexico and it said, Mexico should improve its permission for unionization and other labor rights. And here, part of the idea is that the United States is persuading Mexico in this transactional way to change its labor rights. But the United States has an eye on its own labor rights and wants to make sure that pressure from Mexican competition doesn't cause the United States to undermine its own labor rights. And again, this is a negotiation.

Joel Trachtman:

And this is a negotiation where parties decide whether it makes sense for them to compromise their autonomy as Mexico did in this case, or perhaps the United States accepts that it will be under some competitive pressure from Mexican goods, recognizing that those Mexican goods might be produced with fewer safeguards for workers. And the states have to decide whether the enhanced trade is worth it to them. And I think it's important for states to negotiate about environmental protection, about carbon reduction, about labor rights, and all of these issues as they enter into these agreements. And that's why these agreements will become more complex in the future.

Michael Klein:

So this is, again, a little bit like protectionist versus prudential, where it's actually prudential in terms of not just what's happening to workers in the United States, but people may make the argument there are concerns about workers in Mexico. But on the other hand, it might just be a protectionist thing to help U.S. labor against lower cost Mexican labor.

Joel Trachtman:

That's right. And sometimes as you're pointing out the protectionism is cloaked in prudential rationales. And so, one of the functions of negotiation, but also one of the functions of dispute settlement is to try to identify those pretextual prudential rationales and push them aside.

Michael Klein:

Even though as I mentioned, the Biden administration has not yet reversed many of the trade policies of the Trump administration, there's clearly the sense that there will be a shift towards greater engagement with other countries with this current administration. There are a lot of challenges in this area. Joel, what do you see as the biggest legal challenges in the future for the international trading system?

Joel Trachtman:

Well, there are lots of challenges. As we draw closer together, as we have more trade, and as we have more global concerns like global warming, like the ability to collect taxes, like privacy when we use all sorts of platforms like cyber security, it will be necessary to work on solutions to those issues. Collective solutions to those issues in order to preserve the ability to trade. So, for example, many products and many services include a digital component. And there are concerns about privacy and about cyber security connected with those digital components.

Joel Trachtman:

If we aren't able to solve those concerns through a system of checking or trust, we won't be able to have trade and the benefits of trade any longer. And similarly, with things like global warming, if we can't agree on how to reduce carbon, then different states will decide to impose taxes on imported goods, where they argue that the other state, the exporting state, hasn't priced carbon appropriately and we'll have a breakdown of trade. So I think these will be challenges to the trade system to in effect work with other areas of international cooperation, like taxation, environmental policies, cybersecurity policy, to integrate those bodies of rules.

Michael Klein:

Joel, one thing that we haven't talked about yet and seems to be quite a big challenge is the issue of intellectual property. What's your view of the protection of intellectual property, things like not only movies and books, but also, say, pharmaceuticals?

Joel Trachtman:

Yes. Well, intellectual property protection was nailed on to the trade law regime when the WTO was established in 1995. This is the so-called TRIPS Agreement, the Trade-Related Intellectual Property Rights Agreement. And many felt that that was something that was not well related to trade, should have been kept in a separate regime. It was brought into the trade regime because the United States insisted on that. And the United States insisted on that because the United States wanted to bring to bear the possibility for trade retaliation as a way of protecting United States based intellectual property rights.

Joel Trachtman:

So, no one can say what the efficient level of protection of these rights is, or whether it's welfare enhancing or welfare demeaning to have these rights at certain levels. But they are negotiated and this was a negotiation. But this is an area where some argue with I think more force, that the trade system is inappropriately reducing national autonomy. If we think about patents on COVID vaccines. We can say that's an area where perhaps states should have retained more autonomy to appropriate intellectual property. On the other hand, we could argue that it would be good if there were global protection in order to induce research into new vaccines.

Michael Klein:

Joel, I found out a long time ago from our conversations that an economist can learn a lot about real world aspects of international trade by talking to a trade law expert. I'm sure our listeners will have come to the same conclusion through our conversation today. So, thank you very much for joining me in this episode of Econofact Chats.

Joel Trachtman:

It's my pleasure. Thank you, Michael.

Michael Klein:

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