

Hungarian Academy of Sciences

University of Szeged

Federal Markets “Momentum” Research Group



Free trade, public interest and reality: new generation free trade agreements and national regulatory sovereignty

May 4, 2017

Venue: Aula Magna (Díszterem), Academic Committee of Szeged of the Hungarian Academy of Sciences (MTA SZAB Székház)
6720 Szeged, Somogyi u. 7.

Convener:

Prof. Csongor István Nagy, professor of law and head of the HAS-Szeged Federal Markets “Momentum” Research Group



Background and relevance

International free trade has become one of the central global issues of the 21st century both in terms of fierce political debates and economic significance.

New generation free trade agreements are opening a new age in international economic relations and necessitate the re-thinking of our fundamental notions on global governance, state sovereignty and regulatory autonomy. The share of free trade in the global economy is becoming paramount and the emerging new-generation free trade agreements not merely abolish tariffs and quotas (as old-fashioned agreements did) but effectively open up national regulatory sovereignty to international governance, re-shaping regulatory autonomy, internationalizing national competences and raising serious questions of democratic legitimacy. New-generation free trade agreements cover the whole spectrum of items (goods, services, technology, capital etc.), ambitiously, address not only traditional barriers to trade (such as tariffs and quantitative restrictions), but also, in a comprehensive manner, all trade restrictions and state acts (e.g. regulatory disparities, public procurement, certain fundamental rights issues).

Unfortunately, the scholarship has failed to keep abreast with these revolutionary developments and has addressed the foregoing subject only sporadically, delivering territorially ragged results. This is a major shortcoming, given the subject's utmost economic, political and social relevance.

Subject of inquiry: the new age of regulatory sovereignty and international governance in world trade

Political and social context

The recent period of world trade created a very special political and social environment for the free trade boom experienced nowadays.

First, the failure of the last round of WTO negotiations suggests that, in global trade, multilateralism reached its limits and pushed pro-free-trade states towards bilateralism (or restricted multilateralism). Furthermore, while some states reverted to protectionism, others grasped free trade as a way-out from the current economic crises.



Second, it appears that the global system fulfilled its mission by minimizing traditional trade restrictions and the focus of world trade shifted from traditional trade restraints to regulatory restraints (facially evenhanded regulatory hindrances, such as standards) and was extended to other subjects of trade, such as services, technology and capital. It has to be taken into account that in the last period the social role of regulation strengthened extraordinarily and, today, its significance in the market is incomparably higher than it was at the age when the principles of the law of economic relations were worked out.

New age of free trade law

The blend of these political and social factors resulted in a new age of free trade law, which intrudes considerably into national regulatory sovereignty and fundamentally re-shapes the basic notions of economic relations, sovereignty and democratic process.

First, new-generation free trade agreements address regulatory restraints that are socially rooted and closely intertwined with national regulatory autonomy, thus, entailing a major shift of sovereign regulatory powers onto international governance.

Second, while the excessive promotion of free trade may suppress local legitimate regulatory policy considerations and may display free trade as ‘unregulated trade’ in the eyes of the local electorate, impairing the legitimacy of the notion of free trade, facially non-discriminatory regulation is frequently used by local interest groups to cut out foreign trade.

Sub-topics and specific objectives

Free trade, national interests and international governance

All free trade systems, same as WTO law, allow states to restrict trade if justified by a local legitimate end. States may introduce standards, shape taxation, impose public service duties on enterprises or maintain monopolies in a way that restricts trade and free competition. Since the regulatory frameworks contain vague and fluid concepts and notions, states are normally afforded a wide margin of appreciation and the application of the law becomes a social and mental process, blending economic, societal and legal considerations and aspects.



Value standards

While fundamental rights do not appear to be of trade-relevance (and there is no global endeavor to create a global regime for these universal values), states have realized that compliance with fundamental rights requirements has economic effects because it has cost implications, and domestic producers are put at a competitive disadvantage, if they have to comply with higher standards. It is not a surprise that, for instance, labor and environmental standards have become one of the major issues of world trade. Furthermore, rule of law, transparency, due process (fair trial) became hot issues mainly for similar reasons: international (inter-state) dispute settlement can mainly address national rules and visible government actions, the net of free-trade law can scarcely catch under-the-radar violations (such as hidden discrimination and undue influence on judicial proceedings).

Investment protection: substantive standards and procedural mechanisms

The first investment protection treaty (Germany-Pakistan treaty of 1959) was meant to convert certain constitutional requirements (e.g., expropriation, protection of legitimate expectations) into international obligations so as to ‘guarantee’ them. Although, interestingly, investment protection, at least as far as substantive standards are concerned, has always remained bilateral, without a realistic chance to a multilateral system, during this half-century, this pattern brought about a labyrinthine network of bilateral arrangements, and investment protection took a life of its own, and instead of a duplicate it became an independent parallel system. Furthermore, investor-state arbitration subjected genuine public-law disputes to an arbitral procedural pattern designed for purely commercial disputes, which is devoid of democratic legitimacy due to its secrecy, intransparency and ad-hoc nature. This process was topped by new-generation free trade agreements, which are blamed for introducing these loose standards and the attached dispute settlement mechanisms lacking democratic legitimacy into relations between developed democracies.

Standards and regulatory coordination

Nowadays, the most important hurdles to trade are not traditional trade restrictions but disparities between national technical, sanitary, phytosanitary, consumer, environment etc. standards. While there is a general understanding that discriminatory measures should be prohibited, the status of non-discriminatory measures is dubious. The more tolerant approach opens the way to veiled protectionism, while the more interventionist approach goes



hand in hand with the risk of subordinating local regulatory values to free trade. New-generation free trade agreements champion regulatory coordination, which, however, raises sensitive issues of democratic legitimacy.

Regulatory sovereignty and protectionism

The purpose of the states' margin of appreciation is to preserve regulatory autonomy and the free trade systems' legitimacy, since the excessive promotion of free trade may suppress local legitimate regulatory policy considerations. Although states are granted a certain give to enforce local values, this also implies the risk of disguised protectionism, since regulatory decision-making is frequently impregnated by nationalistic and protectionist trade interests.



Conference program

9:00-9:30 *Registration*

9:30-9:50 *Keynote speech*

Prof. János Martonyi, former minister of foreign affairs of Hungary & professor emeritus, University of Szeged

SESSION 1

WTO and New Generation Free Trade Agreements (FTAs)

Chair: Prof. Csongor István Nagy, professor of law, University of Szeged

9:50-10:10 Prof. Frank Emmert, professor of law, Indiana University
World Trade, National Interests and International Governance

10:10-10:30 Dr. Marija Bartl, assistant professor of law, University of Amsterdam
International Economic Order after Trump

10:30-10:50 Dr. Jessica Lawrence, assistant professor, Central European University
Normative Power Europe? Non-Trade Values and Market Rationality in the EU's New Generation Trade and Investment Agreements

10:50-11:00 Q&A

COFFEE BREAK

SESSION 2

Regional Economic Integrations: FTAs and customs unions

Chair: Prof. János Martonyi, former minister of foreign affairs of Hungary & professor emeritus, University of Szeged

11:20-11:40 Prof. David Gantz, professor of law, University of Arizona
Renegotiating NAFTA: Risks and Rewards of Reopening the North American Trade Relationship



11:40-12:00 Prof. Valentina Delich, director of the Program on Rights and Public Goods and Academic Director of the Master's Degree in Intellectual Property at FLACSO-Argentina
Latin American trade policies reconsidered: the “convergence while diversity” mantra

12:00-12:20 Dr. Yao-Ming Hsu, associate professor, National Cheng-Chi University, Taipei
East-Asian Perspectives of Regional Economic Integrations: RECP and TPP

12:20-12:30 Q&A

LUNCH

SESSION 3

Regional Economic Integrations: Federal Markets

Chair: Dr. Zoltán Víg, associate professor, University of Szeged

14:00-14:20 Prof. Csongor István Nagy, professor of law, University of Szeged
Transsystemic Perspectives of Regional Economic Integrations

14:20-14:40 Dr. Márton Varjú, research chair, Hungarian Academy of Sciences
How Member State Interests Are Allowed to Shape the EU Single Market?

14:40-15:00 Prof. Lee Strang, professor of law, University of Toledo
The Supreme Court's Changing Efforts Via Its Dormant Commerce Clause Jurisprudence to Navigate State Police Power and National Free Trade

15:00-15:20 Prof. Gonzalo Villalta Puig, Head of the School of Law and Politics and Chair in the Law of Economic Integration, The University of Hull
The Construction of a Federal Market for Australia

15:20-15:30 Q&A

COFFEE BREAK



SESSION 4

International investment protection

Chair: Dr. Mátyás Császár, associate professor, University of Szeged

15:50-16:10 Dr. Pál Sonnevend, associate professor, ELTE Law School, Budapest

Constitutional standards of developed democracies and the requirements embedded into the jurisprudence of the European Court of Human Rights: do foreign investors need special protection

16:30-16:50 Rebecca Khan, research fellow, HAS-Szeged Federal Market Research Group & doctoral student, Central European University

Third Party Participation by Non-Government Organizations in International Investment Arbitration: Transparency as a Tool for Protecting Marginalized Interests

16:50-17:10 Prof. Hannah Buxbaum, professor of law, Indiana University Bloomington

Investor-state arbitration between developed democracies: a NAFTA perspective

17:10-17:30 Dr. Zoltán Víg, associate professor & Gábor Hajdu, research assistant, University of Szeged

Investment protection under the CETA: pouring old wine into new bottles?

17:30-17:40 Q&A

Closing remarks