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The International Economic Law and its Revolution

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1. INTRODUCTION

When the world seems to have come to a consensus that business economic organization in the form of the market or the firm should be central to economic organization.

The central position of business should not be confused with an exclusive position, however. As economic organization includes more than business, this change in name really is a step toward a broader field rather than a step away from business. More importantly, it is a step toward a more nuanced perspective on international law and toward a more mature perspective on the role of business in domestic and international society. It is a step toward recognizing that there are markets beyond the private market for goods and services, and that these additional markets and accompanying institutions merit closer study. These other relevant markets include the market among governments for trade and regulatory concessions. Institutions beyond the firm and the state also merit closer study.

This Article with an examination of four associated fields of legal study: private international law, international business law, international economic law, and public international law. I make four related arguments. While none of these points is wholly novel, my goal is to show their common underpinnings and their interrelation as the foundation for a new, cosmopolitan perspective which may be used to understand and manage the international economic law revolution. These first four points are simply intended to establish the broad parameters of international economic law. After I have established these parameters, I turn to the question of the importance of international economic law, and of its relation to other areas of economic regulation. I then describe the role of international economic law as a central forum for mediating between national and international and public and private law.

The international economic law encompasses international business law, including relevant portions of the topic known as "private international law." Economics is a public policy science that, in its normative form, evaluates the design of institutions for the organization of economic activity. [3] The use of the term "economics" recognizes the contingency of business and recognizes that the inclusion of markets and firms is a question of institutional design rather than a fact of nature. We must decide continually, as a national or as an international society, where this design fulfills our needs better than others.

Second, partially as a corollary to the first point, I note the emptiness of the category "private international law." Private international law is not separate from public international law. As many realists and critical legal theorists long ago pointed out, "private law" is an oxymoron.Rather, the important underlying issue is that there are at least two kinds of persons subject to law: private persons and states. The two types of applicable law may be quite different.

The third point follows from the second. That is, the very term "international law" must be revisited and reevaluated, as the system of law that governs international relations has both states and individuals as its subjects and objects.[4] Increasingly, "international law" is taken to mean "transnational law," the term coined by Philip Jessup, the late judge of the International Court of Justice, to include in the scope of study private law and other municipal law that affects relations between different countries and their peoples.[5]

Fourth, I note that international economic law and public international law are not separate categories; rather, international economic law simply refers to a type of "public" international law that has economic goals.[6] In fact, economic integration is the leading motivation for new public international law today, and the most fertile source of new legislation and constitutionalization in international law. International economic law comprises a new or expanded set of legislative fields for international law to address. Indeed, international economic law is the leading engine for revising the domaine reserve of traditional public international law, the unquestioned margin of deference accorded the state. Perhaps most importantly, international economic law provides the functional basis for a new era of international institutionalization.[7]

In this regard, traditional public international law serves as the default constitutional structure on which we build through constitution-like treaties. International economic goals motivate positive legislation of constitutional and legislative rules.

I refer to the opening of this new era of international legislation and constitutionalization as the "international economic law revolution." This revolution allows us to see our world as a single system, both geographically and functionally.

This new era is revolutionary because it changes the underlying assumptions of international law regarding the domaine reserve; regarding the need for, possibilities for, and structure of international legislation; regarding the role of international adjudication; and regarding an international legal "constitution." It is revolutionary because it has revealed the contingency of our public international law institutions. The revolution in international law recognizes a greatly increased scope of possible institutions from which

to choose in organizing international society.

2. INTERNATIONAL BUSINESS LAW AND INTERNATIONAL ECONOMIC LAW

Economics is often associated with the allocation of social capital through markets. While economics usually is defined as the study of market-based activity, it increasingly has turned its attention and analytical techniques to spheres not typically considered to be markets, such as marriage, child-rearing, and crime.[8] As the domain of economics is expanded to encompass nonmarket forms of economic organization, such as the family, firm, or state as units of organization, economics emerges as a broad science of choice of organizational form, a leading example of which is the market itself. Perhaps business is the pragmatic implementation of this science of choice to exploit markets. Business includes sales, marketing, accounting and human relations, topics conventionally excluded from economics the perspective of economics is often that of the government, which is assumed to act as optimizer for the aggregate of society rather than for the individual or firm. Business analysis, on the other hand, often takes the perspective of the individual or firm.

A related purported distinction between international business law and international economic law is the distinction between transactions and trade. Transactions, in this sense, are between private persons (or public persons treated more or less as private persons), while trade is a matter of public policy and mercantilism or protectionism. The distinction is one between levels of analysis. Analysis at the individual or firm level of economic organization is transactional, while analysis at the state or higher level is economic. They are made inseparable because of the interdependence between domestic law and international law. Thus, the business person may use international law as a basis to attack adverse domestic law. International law may or may not be directly applicable to require the no application of inconsistent domestic law. Even if it is not applicable by courts, it may form the basis for a favorable interpretation of domestic law, or for a political attack on an adverse domestic law.

Sales cannot be made without considering tariff and nontariff barriers to export transactions and their international legality. Foreign investment decisions cannot be made separately from issues of tariffs, antidumping duties, and rules of origin, and from issues of protection against mistreatment that may be possible, for example, under bilateral investment treaties. Of course, from a may make sense to separate the contract, commercial law, conflict of laws, and other private dispute resolution issues, which share some common themes, from trade law issues, which relate more to competition, especially competition among states, as opposed to private persons. From a practical and theoretical standpoint, however, it must be recognized that transactions and trade are inseparable.

Finally, the distinction between business and economics, between international business law and international economic law, may be viewed as a distinction between private and public.

3. THE FUNCTIONAL ALLURE OF INTERNATIONAL ECONOMIC LAW

International economic law is most visible in the GATT/WTO systems, although it is growing in other regional organizations and in multilateral or plurilateral organizations with sect oral responsibilities. The European Union's design and history have been marked by a functionalist approach. This functionalism asks: what do we need to do today, and It purports to eschew idealism - including one-worldism or world federalism rolls up its sleeves, and sets about pragmatic tasks to address concrete, mostly economic, needs.

This functionalism in the GATT/WTO system is aligned with the cosmopolitan perspective described by David Kennedy as exemplified by the work of John Jackson: pragmatic, modest and shy of its own idealism.[9]

6. MANAGING THE INTERNATIONAL ECONOMIC LAW REVOLUTION: ALLOCATIVE EFFICIENCY AND REDISTRIBUTIVE CONCERNS

"Economic" motivations - motivations to maximize the things we value - sometimes lead us to cooperate with each other. This cooperation often will take legal or institutional form. International economic law transcends international business law and serves as the focal point for the construction of the institutions which govern international society and international law in general. The international economic law revolution provides the basis for a new constitutional era in international law.[10]

The economic perspective is open to institutional competition through experimentation and survival of the most efficient. While a degree of institutional homogeneity, horizontal cooperation among institutions, may be justified in order to promote communications and understanding among institutions, such homogeneity must be weighed against the utility of diversity and competition.

Redistribution today can be effected on two bases, each fully consistent with locatives efficiency. First, it can be affected in the form of side payments to induce developing countries to accept a higher standard of regulation than they might otherwise accept. Greater opportunities for transactions due to greater scope of coverage, may allow poorer countries the opportunity to realize the value of their assets. For example, in the Uruguay Round of GATT, developing countries were able to exchange greater protection for intellectual property and greater access for Foreign Service providers for greater access for textiles, agricultural products, and tropical products. Free trade in public goods enhances values on both sides and results in more efficient outcomes. These outcomes include greater freedom of trade in goods and services. This, too, should operate to the benefit of people in developing countries, resulting in greater homogenization of incomes over time.

Second, redistribution through institutional politics, based on community, solidarity, or safe streets kinds of motivations can take place in international society, albeit to a lesser extent than in a domestic society.[11] Perhaps this is natural. All politics is relatively local, and solidarity and community do seem to dissipate over geographic or cultural space. Neighbors seem to help neighbors more than they help strangers, presumably for entirely rational reasons relating to expectations of reciprocation.

7. SYNTHESIS: THE INTERNATIONAL ECONOMIC LAW REVOLUTION

This Article began by showing the difficulties with and limitations of the terms "private international law," "international business law," and "public international law." These difficulties and limitations are addressed by international economic law. International economic law is the universal solvent, piercing and transcending these traditional cat-

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egories, and also piercing and transcending some of the traditional constitutional underpinnings of the international system.

The international economic law revolution is most importantly a revolution in international law. It is a transformation of society that draws from and contributes to intensified relations among states, which in turn draws from and contributes to increasing possibilities for institutionalization of these relations. This process is driven by several facts. First, each state's domestic legal system and regulatory structure has an intended or unintended effect on each other state, either in terms of externalities or in terms of competition. Every field of business regulation is a trade issue, and trade is dependent on every other area of business regulation. This fact is analogous to the fact in domestic society that every field of business regulation affects the market and the market is dependent on every area of public policy. In domestic society, we have legislative, judicial, and executive institutions to make decisions regarding how much regulation we want, and how much market allocation we want. In international society, these institutions are in a formative stage. With the intensification of economic relations has come the recognition that these relations can be facilitated, or made more efficient, by increased regulatory transactions between states in the area of international trade law and business regulation. These regulatory transactions take the form of agreements regarding issues perceived as barriers to trade, including agreements regarding regulatory jurisdiction, agreements regarding standards for treatment of foreigners or their things, agreements for disciplining regulatory jurisdiction through rules of proportionality, and agreements regarding harmonization of law.

Thus, despite the potential benefits of institutionalization, we should not create international economic law and institutions simply for the sake of building arks. We should not cooperate for cooperation's sake. Rather, we should cooperate when cooperation helps us to get more of what is good.

CONCLUSION

Since 1980s, the rule making of international economic law has witnessed unprecedented achievements. In a short period over two decades, lawmaking has achieved significant progress or breakthrough at various levels including international trade, international finance and international investment. In fact, the recent development of international economic law has formed a preliminary global free market order system around the world. Certainly, in essence capital expansion and global inflation is endless forever, which requires free flow of productive elements and an integral and truly unified free market system, while the current lawmaking achievement can only meet such requirement initially. Therefore, the essence of market and capital expansion or inflation determines that they will not stop at the present achievement of lawmaking of international economic law but request it to move further in broadness and depth.

However, in the prosperous phenomenon of the recent lawmaking of international economic law, the crisis of legitimacy in itself must be paid significant attention to international community. For instance, the failure of the negotiation on Multilateral Agreement on Investment (MAI), the financial crisis of Southeast Asia with influences overall world, increasing poverty and the marginalization of numerous developing countries. The heating anti-globalization movement, which mainly occurs in developed countries that have taken initiatives to advocate the lawmaking of international economic liberalism and is sponsored by NGOs, has rendered people doubtful about the economic globalization motivated by market economy and the lawmaking of international economic law based on liberalism.

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Geoffrey Brennan & James M. Buchanan, The Reason of Rules: Constitutional Political Economy p.7 (1985). | Mark W. Janis, Individuals as Subjects of International Law, 17 Cornell Int'l L.J. 61 (1984). | Philip C. Jessup, Transnational Law pp1-2 (1956); | John H. Jackson, International Economic Law:p595(1995) | | . In fact, while it is not necessary to my argument, this argument may be extended to hold that economics also dominates politics: Politics is one category of institutional technique for social decision making, and economics includes both this category and, for example, the categories that we have come to speak of as the market and as the firm. The public choice technique of applying economic analysis to political issues is based on this proposition. For a discussion of the application of public choice theory to international economic law, see Paul B. Stephan III, Barbarians Inside the Gate: Public Choice Theory and International Economic Law, 10 Am. U. J. Int'l L. & Pol'y 745 (1995). | Gary Becker, The Economic Approach to Human Behavior p.53 (1976); | David Kennedy, The International Style in Postwar Law and Policy, p,10 1994 | Supra Note7,p.103 | Supra Note5,p.105 |