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INTRODUCTIONS

“INTERNATIONAL ECONOMIC LAW”:
IMPLICATIONS FOR SCHOLARSHIP

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“What’s in a name?” Does this Journal, or any scholarly endeavor, smell sweeter because it deals with “international economic law” instead of the more prosaic “international business law?” The question has significance beyond the walls of the University of Pennsylvania, for the term “international economic law” is coming into wider use. The American Society of International Law, for example, has an active Interest Group operating under that name,¹ distributes an on-line compilation of documents on the subject, and has itself considered publishing a journal of international economic law. The answer depends, of course, on the kinds of scholarship that “international economic law” is thought to embrace. This essay considers why the new locution is winning acceptance, and what its adoption implies for scholarship, generally and in this Journal.

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¹ The authors of several of these essays have been actively involved in this group.

To begin with, a new appellation is not needed because of any fundamental transformation in the law itself. To be sure, the rules and institutions that affect international economic activity have undergone significant changes in recent years. GATT has become the WTO; NAFTA, APEC and an alphabet soup of regional organizations have become significant actors; and the EC has metamorphosed into the EU. But these are largely cases of institutional evolution; even regionalism has strong antecedents. The Uruguay Round has produced a number of new agreements, but even the most innovative — TRIPS and GATS — rest solidly on traditional foundations. Numerous countries, especially in the developing world, have adopted new liberal policies on trade, foreign investment, intellectual property protection and technology transfer, but these too generally follow existing models.

The rise of “international economic law” is, I think, less a result of external changes in rules and institutions than of internal changes in perception, especially about scholarship. The definition and boundaries of scholarly disciplines like international economic law, international business law, or international law as a whole are not material facts, out in the world to be discovered. Disciplines are constructed in the minds of those who work within them, and they change as mental boundaries are redrawn. The growing use of “international economic law” reflects a new set of intellectual boundaries among interested scholars, all of which are implicated in this Journal’s change of name.

One of these boundary shifts is a new line of demarcation, setting off international economic law from the larger discipline of international law. This is not an act of secession, but an effort to gain intellectual legitimacy. It reflects, first, the sheer importance of the subject: in the external world, economic law is perhaps the largest and most successful component of international law. It also reflects a perception that the scholarly discipline of international law has regarded research on international economic relations as a poor stepchild, in spite of its generally high quality.

The other boundary changes, however, are acts of integration, eliminating barriers between areas of scholarship previously considered separate. The most significant change involves vertical integration: international economic law brings together the kinds of rules and institutions (predominantly national, or even private) that directly affect international business transactions with those (predominantly international or transnational) that shape the

economic relationships among nations and other public actors. One can also discern elements of horizontal integration, although these are less apparent. “Economic” is a much broader term than “business,” for example, encompassing subjects — such as international monetary affairs and foreign assistance — that are only incidentally matters of “business law.” Integration of both types can be seen in Andreas Lowenfeld’s innovative series of teaching materials, entitled “International Economic Law.”

As a believer in intellectual integration, I applaud these moves to a broader perspective. Their actual significance, of course, can only be determined in practice: if the enlarged territory of “international economic law” is not fully occupied, their promise will go unfulfilled. At the same time, however, another word of caution is also in order: the boundaries of “international economic law” can become constraining, rather than liberating, unless care is taken to interpret them broadly. To see why this is so, consider the three elements of the phrase.

International. This term may pose the weakest constraint, since scholars today are used to using the word “international” in a broad sense, not limited to matters affecting relations among states. Yet the point remains important: because international economic law is at least partly defined by reference to international law, there may be considerable temptation to focus unduly on the prominent interstate arrangements we hear so much about. In fact, the study of international economic relations involves at least five “levels” of law.

- At the highest level is “supranational” law. To date, the only real example (some observers dispute even this) is the law of the EU.
- Next is traditional “international” law, including treaties and other agreements among states, activities of international organizations like the WTO, IMF and OECD, and decisions of international courts, arbitrators and other third-party dispute resolution institutions, such as the Appellate Body and panels of the WTO.
- Cooperation among national government agencies at the substate level has led to the rapid growth of “transnational” law and institutions, exemplified by the extensive arrangements for information-sharing and cooperation on enforcement among national antitrust regulators and the highly technical fora for policy coordination created by securities and banking

regulators.

- A broad range of national law — encompassing everything from the constitutional law of international agreements through the bases of personal jurisdiction to the details of antidumping regulation and foreign tax credits — is of crucial importance to international economic activity.
- Finally, in international economic transactions among firms and other private actors, the legal “front lines” are privately generated rules, contractual forms and transactional patterns. Private institutions are also relevant, most notably those providing arbitration and other ADR services. The law-like quality of this private activity is greatest in the field of arbitration and in international commercial transactions, where trade association contracts and rules and codifications of practice like Incoterms and the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce order economic behavior worldwide.

“International” economic law thus draws on a remarkably rich array of legal material, as rich as any field of legal scholarship.

Economic. I have already sketched some implications of a move from “business” law to “economic” law: the latter term is broader and more integrative in both the vertical and the horizontal dimensions. Here I want to make a related point: the definition of “economic” policy and law itself is expanding. The boundaries between policies, regimes and rules considered to be “economic” and those considered part of other intellectual categories are shifting and becoming more porous. This development has important implications for international governance.² It also affects the ambit of scholarship on international economic law.

Consider three developments at the boundaries of the field. The first is the escalating demand for harmonization of national regulatory programs in pursuit of a “level playing field” for trade and investment.³ Some of the policies forced onto the international economic agenda in this way would be considered “economic” under any definition: competition law is a prime example. Others may be economic in nature, but traditionally have been

² See Kenneth W. Abbott, *The Evolving Boundaries of the Regime of International Federalism*, CARDOZO L. REV. (forthcoming 1996).

³ See FAIR TRADE AND HARMONIZATION (Jagdish Bhagwati & Robert Hudec eds., 1996).

dealt with in separate intellectual compartments, quite distinct from commercial and financial issues. Worker rights and labor standards, for example, were first addressed as part of a commercial treaty in the labor agreement signed along with NAFTA. Still other policies involved in the current debate have not been thought of as "economic" at all. Examples include environmental protection, also the subject of a NAFTA side agreement, and some forms of political corruption, on which the US is seeking new rules at the OECD and the WTO.

A second, related occurrence is the rise of the concept of sustainable development. Like the level playing field debate, sustainable development links environmental and economic concerns, but it does so in a very different way. The core of the concept is the idea that economic growth and environmental protection are neither discrete nor inherently contradictory goals. Instead, they are structurally interrelated, and even may be mutually supportive. Thus, one cannot reasonably make environmental policy without analyzing the effects, positive and negative, of economic activity, the feasibility of economic approaches to regulation, and the implications of the policy for economic development; the converse is true for economic policy. On a more specific level, advocates of sustainable development are particularly concerned with economic inequality, within and among nations; the massive income differentials observed today are thought to hinder both environmental protection and economic growth. The concept of sustainable development is central to the documents adopted at the 1992 UN Conference on the Environment and Development, and is incorporated in a surprising number of "economic" instruments, including the Bogor Declaration on the Asia-Pacific economic community, the Miami Declaration on the free trade area of the Americas, and the operating policies of the international development banks.

A third development, also related, is the linking of economic and social policy. This process already is far advanced in the EU, where the 1989 Social Charter and the Protocol on Social Policy to the 1992 Maastricht Treaty view social and economic issues as linked inherently and equally important. The US currently is supporting some form of "social clause" at the International Labor Organization, the OECD and even the WTO. In all these contexts, "social policy" is largely synonymous with worker rights and labor standards, but it also addresses the governmental "safety

net” and an expanded catalog of issues drawn from human rights as well as conventional labor law. The NAFTA labor side agreement, for example, addresses subjects like employment discrimination and equal pay for men and women along with traditional issues like the right to organize. “Social clause” advocates particularly emphasize the protection of vulnerable groups, notably women and children.

The latter concern was given sharp focus in the Beijing Declaration issued at the 1995 UN Conference on Women. This document argues that in many areas of national and international policy — including, prominently, economic policy — (a) the contributions of women in the “private sphere” are systematically discounted, and (b) the negative effects of particular policies on women, children and families are regularly ignored. The Declaration links “social development” with economic growth and environmental protection, and calls for improvements in the position of indigenous peoples and other marginalized groups along with that of women. These ideas clearly resonate with the concerns raised by grass-roots activist groups during the debate over NAFTA, and they appear in a number of high-level international instruments, including the Miami Declaration.

Many of the policies described here are hotly contested, and it is impossible to predict what lasting impact they may have. From the point of view of scholarship, however, the fact remains that many of the most interesting issues in international “economic” law today could as easily be described as issues of environmental law, human rights or feminism.

Law. The last element in the phrase “international economic law” may ironically be the greatest potential constraint on scholarship. I have already suggested that the purely legal material involved in international economic relations is extremely rich. Nonetheless, it would be unfortunate to limit the study of this complex and turbulent field to legal doctrines and procedures *per se*.

International economic “law” is particularly well-suited to interdisciplinary scholarship. A number of approaches have been shown to be productive. Economics is obviously relevant: international economics, of course, but also the kinds of micro-economics and institutional economics applied in other areas of law. Public choice theory, which began with studies of interna-

tional trade policy, still has much to contribute.⁴ Sociological studies of national and international legal and economic institutions provide new and fascinating insights.⁵ Scholars in cultural studies, anthropology, critical theory and post-modernism are deeply engaged in analyzing the role of economic relations and institutions in today's world.⁶ In my own work, I draw on political science theories of international relations. Even within the field of international relations, realist, institutionalist, liberal and constructivist theories offer a range of fruitful approaches. Management theory is another relevant discipline. Scholars of management analyze business strategy, finance, multinational management, international marketing and other subjects central to international economic relations, often using highly sophisticated techniques. To my knowledge, however, students of international economic law rarely explore this body of research.

It would be hard to think of a single phrase that adequately describes the extraordinarily rich field of inquiry outlined in this essay. "International economic law" is a perfectly satisfactory shorthand term. It should be clear, however, that by adopting that field as their own, the editors of this Journal have taken an ambitious step. From a scholarly point of view, the crucial thing now is to bear in mind, from issue to issue, just how ambitious it really is.

⁴ See, e.g., Symposium, *The Decline of the Nation State and Its Effect on Economic and Constitutional Law*, CARDOZO L. REV. (forthcoming 1996).

⁵ See, e.g., YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

⁶ See, e.g., proposal for New Approaches to International Law Conference, *International Law, Critique and Social Change*, (June 14-16, 1996, Madison, Wisc.) (copy on file with author).