

INTERNATIONAL ECONOMIC LAW

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When asked what kind of law I teach, I usually reply “international economic law.” After the inevitable pause, I offer the necessary explanation: “I teach and write about the legal aspects of international trade, international business, international banking, and other subjects that involve economic relations between nations, as well as between private parties.” Another pause. “You know, NAFTA and stuff like that.”

As a relative newcomer to the international law lexicon, international economic law is still striving towards increased recognition and definition. Some scholars limit the definition of international economic law to encompass only economic relations between nations, a kind of public international law of economic relations.¹ Such a limitation, however, often proves too confining. How can one examine the rights of private parties in cross-border trade or investment if one ignores the influence of governmental and intergovernmental regulation? Conversely, can intergovernmental economic relations be effectively analyzed without resort to the effects on private transactions? It may be useful to limit one’s inquiry, on occasion, and to examine characteristics of *public* international economic law and *private* international economic law. In most international problems, however, both public and private aspects are inextricably mingled, and thorough analysis requires an examination of both. A broad definition of international economic law also fulfills the strong desire of international law professors, who like to define the field broadly in order to comment on a wide array of interrelated issues.

With this in mind, I offer my own definition of international economic law: International economic law comprises a broad collection of laws and customary practices that govern economic relations between actors in different nations. It includes the

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¹ PIETER VERLOREN VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* 9 (1981).

examination of both law and policy issues on multiple levels, including private law, local law, national law,² and international law.³

The decision to inaugurate the *University of Pennsylvania Journal of International Economic Law*, formerly the *University of Pennsylvania Journal of International Business Law*, is a welcome development for it is bound to help secure a more precise definition and understanding of this subject. By concentrating on the law and policy of international economic relations, public and private, and, in particular, by stressing the need for scholarly inquiry into issues of immense practical importance, the *Journal* can make a significant contribution to this important subfield of international law.

As the foregoing suggests, the change in name implies a considerable broadening of the *Journal's* perspective. International economic law extends far beyond the subject of international business to include legal aspects of every facet of international economic relations involving public and/or private actors in different states. For instance, the United States granted balance-of-payments support to Mexico in 1994, after the latest run on the peso, in the context of rules of international monetary law. The action profoundly affected individual businesses, but did not involve business per se. Development assistance from the multilateral development banks, international trade law and

² It is useful to distinguish between local law and national law. We are coming to realize that in a federal system, such as the United States, state and local governments may be at odds with the federal government that traditionally has determined all international economic law policies. For example, in the implementing legislation to both the NAFTA and the Uruguay Round Agreements of the General Agreement on Tariffs and Trade, the U.S. Trade Representative agreed to permit state governments to represent specific state interests in matters of international trade negotiation and dispute resolution. See North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3312b (1993); Uruguay Round Trade Agreements 19 U.S.C. § 3512b (1994).

³ One also might add "transnational law" to this list, although I am not a firm believer of the utility of the term. A friend of mine, a prestigious international lawyer, strongly believes that the term transnational law is preferable to the term international law in many economic subjects, for which there is little international law clearly established (i.e., treaty law or customary international law). The term transnational law, popularized in the 1960s by Columbia University Professor Wolfgang Friedmann, emphasizes rules that apply to cross-border transactions other than through a formal international law regime. See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 37 (1964).

policy, and many other subjects of government-to-government economic relations affect the lives of citizens throughout the world, but cannot be properly classified under the title of international business.

The *Journal's* decision adds to the recognition that this is an important subfield of international law.⁴ As a subfield, it shares generally many characteristics with international law. Much of international economic law is treaty-based, and therefore many of the basic rules of international economic law are grounded in the law of treaties. Despite the existence of a wide array of customary practices of public and private actors, there are few examples of customary international economic law of a positive nature.⁵

While a great deal of international economic law has been established by treaty,⁶ this is not to say that the rules are clearly delineated and rigorously enforced. International economic law suffers from the "soft law" syndrome that characterizes international law generally.⁷ In many instances, the rules themselves are vaguely worded to allow for flexibility.⁸ Even where the rules

⁴ The European-based *Revue Internationale de Droit Economique*, published in Belgium, was established in 1987. This publication is connected to the *Association Internationale de Droit Economique*.

⁵ There are few rules of customary international economic law that have been accepted by courts and commentators. Most of the customary rules that do exist are negative in nature; that is, they proscribe certain actions by nation states, rather than impose a positive duty. See generally Stephen Zamora, *Is There Customary International Economic Law?*, 32 GERMAN Y.B. INT'L L. 9 (1989).

⁶ The two-volume collection of BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW (Stephen Zamora & Ronald Brand eds., 1991), contains 60 international agreements dealing with international economic law, most of them treaties.

⁷ See Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443 (1983).

⁸ For an example of such vagueness, see Article IV of the Articles of Agreement of the International Monetary Fund, establishing the rules for maintenance (or non-maintenance) of exchange rates:

[E]xchange arrangements may include (i) the maintenance by a member of a value for its currency in terms of the special drawing right or another denominator, other than gold, selected by the member, or (ii) cooperative arrangements by which members maintain the value of their currencies in relation to the value of the currency or currencies of other members, or (iii) other exchange arrangements of a member's choice.

Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. IV, § 2, 60 Stat. 1401, 1404, 2 U.N.T.S. 39, 46, as amended by Second

are more precisely defined, the enforcement mechanisms offered by international economic organizations leave much to be desired. The Uruguay Round Agreements notwithstanding, the enforcement of international trade law by the GATT/WTO still has a hit-or-miss quality.

The continued refinement of international economic law, including the revamping of the Bretton Woods system, will be crucial to world economic development and to the maintenance of world peace for future generations. This refinement must take place in the face of the substantial challenges imposed by economic and political events. These challenges include:

- (1) The complications imposed by global markets, in which production of goods and services easily spans frontiers, while most economic regulation is of a national character and stops at the border. Part of this challenge is to harmonize national regulation, and part is to define which elements of regulation should take place in the international sphere.⁹
- (2) The tension between a liberal, open economic regime on a global scale, and the increasing tendency to form regional trading regimes, such as the European Union, the NAFTA, or the MERCOSUR. These regional regimes will continue to create conflict within the international economic system, since it is not always clear whether regional or global commitments should take precedence.
- (3) The continuing inability of international economic law to provide an effective mechanism for distributing economic growth and wealth to all countries in the world. Despite the successes of the Bretton Woods system, many countries currently are as mired in poverty as they were at the end of the Second World War.

Amendment of Articles of Agreement of the International Monetary Fund, as approved on Apr. 30, 1976, art. IV, § 2(b), 29 U.S.T. 2203, 2208-09.

⁹ This issue, sometimes referred to as the problem of subsidiarity, is discussed in Joel P. Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L.J. 459 (1992).

(4) Problems of overlapping jurisdiction between different international economic organizations. In addition to conflicts that may arise between regional trading blocs, one begins to see an increasing tension as international organizations increase their expertise and their jurisdictions.

Thus, the editors of the *University of Pennsylvania Journal of International Economic Law* have found fertile ground for academic inquiry. The *Journal* can add much to our understanding of how the international economic system functions in accordance with rules of law.