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International Economic Conflict and Resolution

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FOREWORD

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Conflict and their resolutions contribute to the development of the law. Organizations and systems are structured or restructured and policies are formulated in response to them. In the case of international economic law, conflict comes in a variety of forms and is resolved in a number of ways and in different forums.[1] The 2001 Conference of the International Eco-

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* Professor, South Texas College of Law; Chair of the International Economic Law Group of the American Society of International Law (2001-2003). Professor Taylor was also Chair of the 2001 International Economic Law Group Conference.

[1] For a thorough analysis of the various dispute settlement regimes in international trade and investment, *see* Andrea Kupfer Schneider, *Getting Along: the Evolution of Dispute Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697 (1999) (examining the Investor Arbitration, International Adjudication and Supranational Court regimes that have developed for trade organizations) [hereinafter Schneider]. In international economic law, the most frequently examined forms of dispute resolution involve arbitration. Notable in this respect are international commercial arbitration and trade and investment arbitration pursued by organizations and economic integration arrangements, such as the World Trade Organization ("WTO"), and the North American Free Trade Agreement ("NAFTA"). The dispute settlement system for the WTO is contained in its Dispute Settlement Understanding ("DSU"), Understanding on the Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational

nomic Law Group focused on the issue of conflict resolution.[2] The two plenary sessions of the conference were held at the Warwick Hotel in Houston. This symposium issue of the *Northwestern Journal of International Law and Business* contains three of the articles presented during those sessions of the conference. Other scholars who presented papers at the conference were Jeffery Atik, David Gantz, Helen Hartnell, John McGinnis, Mark Movsesian, Matthew Schaefer, Gregory Shaffer, M. Sornarajah, Spencer Weber Waller and Anthony Winer. Featured speakers were Robert Hudec, Paul Stephan and Joel Trachtman. The International Economic Law Group (IELG) of the American Society of International Law (ASIL) was designed to offer scholars a chance to closely examine and study international economic law.[3] This IELG conference aimed at studying how and why conflicts arise in international economic law as well as offering analyses and prescriptions of how they are and should be resolved.

I. CONFLICTS

One of the underlying ideas of the conference is that the nature of conflicts needs to be scrutinized by governments and scholars just as much as methods for resolving conflicts.[4] International economic law encompasses

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Trade Negotiations, Annex 2, app. 1, 33 I.L.M. 1244 [hereinafter "DSU"]. NAFTA actually has five different dispute settlement systems. *See generally* C. O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L LAW & BUS. 850, 854-59 (1997).

[2] The 2001 Conference of the International Economic Law Group (IELG) of the American Society of International Law was held from February 16 - 18, 2001 in Houston, Texas. The Opening Session of the conference, held at South Texas College of Law, focused on conflict resolution in international trade and investment in the WTO, NAFTA, the Free Trade of the Americas Agreement (FTAA), and other economic integration arrangements. The presentations made at the Opening Session are contained in a volume of the South Texas Law Review, 42 S. TEX. L. REV. 1187 (2002).

[3] The IELG is an interest group of ASIL. Since 1992 the IELG has devoted itself to studying international economic law and creating scholarly conferences to facilitate the development of the field. The first IELG Conference was devoted to teaching of International Economic Law. The second IELG Conference, *Interdisciplinary Approaches to International Economic Law*, was published in 10 AM. J. INT'L L. & POL'Y 595-887 (1995). The third conference, *Institutions for International Economic Integration*, was published in 17 NW. J. INT'L L. & BUS. 351-1056 (1997). The fourth conference, *Linkage as Phenomenon: An Interdisciplinary Approach*, was published in 19 U. PA. J. INT'L ECON. L. 209-708 (1998) and 19 U. PENN J. INT'L ECON. L. 709-768 (1988) (providing an addendum). The Fifth Conference, *Interfaces: From International Trade to International Economic Law*, was published in 15 AM. U. INT'L L. REV. 1231-1657 (2000). All of these conferences were held in Washington, D.C.

[4] The IELG chooses the papers presented at its conference from those submitted by scholars, lawyers and government officials in response to a Call for Papers. The Call for Papers for this conference on international economic conflict and resolution proposed a panel at the conference on "International Economic Conflicts." According to the Call that panel "would examine the nature of conflicts in any area of international economic law. One focus would be how conflicts arise between countries, between citizens and their governments, be-

many areas, including international trade law, international monetary law, the law of international commercial transactions, competition/antitrust law, intellectual property law, law and development among other fields.[5] Given this breadth, examining some recent conflicts provides invaluable insight into how the world works. International economic conflicts arise within a state, between nation states and within international organizations and economic integration arrangements.[6] The way conflicts arise and play out illuminates the needs of the marketplace and nations, and the functions of international organizations and arrangements.[7] Usually these needs are for the interpretation of existing rules and/or the creation of new rules or methods for resolving disputes. Studying conflicts allows citizens, corporations, governments, organizations and systems to determine whether the current laws, procedures and arrangements designed for facilitating the necessary contacts between all such groups are functioning properly or improperly. If most conflicts are channeled into some form of dispute resolution and are resolved, settled or managed out of existence to the satisfaction of the conflicting parties, then the current system functions properly.[8] If conflicts are not resolved in a timely or satisfactory way, spillover into other areas causing disruption and break down, or grow too costly, then the current system functions poorly.[9]

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tween countries and organizations, and within organizations. Another focus would be on current important and divisive conflicts in international economic law."

[5] According to Professor Jeffery Atik, the Chair of the 2000 Conference, international economic law encompasses not only international trade law but also monetary law, competition/antitrust law, intellectual property law and law and development as well as alternative perspectives and in disciplinary approaches to studying these areas. Jeffery Atik, *Uncorking International Trade, Filling the Cup of International Economic Law*, 15 AM. U. INT'L L. REV. 1231, 1232 (2002).

[6] The articles in this volume, for example, cover international commercial arbitration, arbitration in the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO).

[7] Sometimes new areas of commerce or new forms of property are created and yield a demand for a new dispute settlement system. For examples, see the articles in this volume by Michael Ryan and Ljiljana Biukovic.

[8] The WTO has a very active dispute resolution system. As of April 2002 it had accepted 248 disputes for review. The WTO Web site maintains a state-of-play overview of the WTO dispute settlement system that began in January 1995. *See* http://www.wto.org /english/tratop_e/dispu_e/dispu_e.htm. (Last visited May 9, 2002). Nevertheless, in the case of the WTO, approximately three-fifths of all cases submitted to the Dispute Settlement Body are settled prior to a ruling by an arbitral panel. *See* Marc L. Busch & Eric Reinhardt, *Essay: Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000).

[9] The best designed dispute settlement system may not be the most powerful but one which best achieves the objectives of the agreement which establishes it. Michael Reisman & Mark Weidman, *Contextual Imperatives of Dispute Resolution Mechanisms, Some Hypotheses and Their Applications in the Uruguay Round and NAFTA*, 29 no. 3 J. WORLD TRADE, (June 1995) at 5, 10. *See also* Schneider, *supra* note 1.

Studying conflicts, therefore, should lead to conclusions about how well the rule of law and existing dispute settlement mechanisms in international economic law resolve disputes. What is learned should then inform the various actors as they negotiate and write new rules and standards, to design new institutions or procedures, and reform and reformulate existing ones.[10]

The IELG Conference presentations in this volume add to what we know about the type and form of international economic conflicts. Each article focuses on one or more types of conflict within the system, organization or arrangement it examines—in the market and in international organizations. Each article analyzes the nature of the conflict (how and why it arises) and its consequences. These studies go on to illustrate how domestic forces, interest groups, and governments use the knowledge gained from conflicts to shape international law and organizations and how those organizations and their efforts in turn affect what goes on inside the nation state.

The articles by Michael Ryan and Ljiljana Biukovic examine new conflicts, those arising in cyberspace. Ryan demonstrates how the development of the Internet and its extension from the world of research into the commercial marketplace created another market, one for domain names.[11] Given the perceived value of these cyberspace addresses, conflicts quickly arose over ownership of this new form of property. The reality of these conflicts then led those participating in the development of the new industry (computer scientists, companies, and the U.S. government) to push for methods for resolving these disputes.[12] In her article, Biukovic illustrates how the commercial exploitation of cyberspace created disputes over not only electronic sales but virtually all other applications of the Internet.[13]

The article by Patrick Kelly examines conflicts arising within the World Trade Organization ("WTO"). Kelly's article focuses both on the content of WTO law and how the WTO dispute settlement system does and should operate. Kelly analyzes the WTO Dispute Settlement Understanding ("DSU"), GATT/WTO dispute settlement history, and recent WTO

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[10] One of the conclusions states have reached is that certain goals can be achieved by international cooperation. The activities that promote this cooperation are "negotiation, continuing interpretation, and enforcement of multilateral treaties under organizational auspices." José E. Alvarez, *The WTO As Linkage Machine*, 96 AM. J. INT'L L. 146, 146 (2002).

[11] Michael P. Ryan, *Knowledge, Legitimacy, Efficiency and the Institutionalization of Dispute Settlement Procedures at the World Trade Organization and the World Intellectual Property Organization* 22 NW. J. INT'L L. & BUS. 400, 418-424 (2002).

[12] *Id.* at 418-421.

[13] Ljiljana Biukovic, *International Commercial Arbitration in Cyberspace: Recent Developments*, 22 NW. J. INT'L L. & BUS. 319, 326-328.(2002)

cases and controversies in an effort to construct the proper model for the judicial authority of the WTO Appellate Body.[14]

II. RESOLUTIONS

Once international economic conflicts arise, great efforts are usually made to resolve them. Conflicts can be resolved by the negotiation of rules,[15] negotiated settlements or by the interpretive efforts of dispute settlement systems.[16] For the conflicts that develop out of commercial transactions, these systems are national courts and international commercial arbitration.[17] In the case of international economic conflicts arising within organizations or arrangements, there are courts,[18] dispute settlement systems based on arbitration models,[19] processes created by an organization's rules, and institutional structures aimed at resolving disputes through the ongoing negotiation of rules.

Those studying international dispute resolution usually concentrate on the design of the dispute settlement system, the procedural aspects of the system, the substantive results produced by the system,[20] and increasingly

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[14] J. Patrick Kelly, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 NW. J. INT'L L. & BUS. 359 (2002).

[15] The WTO has attempted to avoid some conflicts by negotiating agreements. *See* Debra P. Steger, *Afterword: The Trade and Conundrum—A Commentary*, 96 AM. J. INT'L L. 135, 143 (2002) [hereinafter Steger] (discussing the adoption of the Agreement on the Technical Barriers to trade (TBT Agreement) and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) to deal with the governments acting to increase non-tariff barriers to trade. This legislation by the states followed an earlier expansive GATT panel interpretation of GATT Art. III.)

[16] One of the recently acknowledged limitations of the WTO is that there is a "legislative" and "judicial" imbalance at the WTO. It is harder to legislate (to procure agreement on new rules, to amend existing rules or to issue interpretations) than it is to resolve cases in the dispute settlement system. Steger, *id.* at 154. Kelly also points out this imbalance. *See* Kelly, *supra* note 18, at 364.

[17] The articles in this volume study international commercial arbitration. *See* Biukovic, *supra* note 14, Ryan, *supra* note 12.

[18] In the case of one economic integration arrangement, the European Community, the dispute resolution system is the European Court of Justice (ECJ). The ECJ has been widely recognized as a major force in creating the single market of the European Union. *See generally* Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991); Martin Shapiro, *The European Court of Justice, in* THE EVOLUTION OF EU LAW 321, 333-340 (Paul Craig & Gráinne De Búrca eds. 1999) [hereinafter EVOLUTION OF EU LAW]; Bruno DeWitte, *Direct Effect, Supremacy and the Nature of the Legal Order* in EVOLUTION OF EU LAW 177 (Paul Craig & Gráinne De Búrca eds., 1999).

[19] The most obvious examples are the GATT/WTO system, *see supra* note 1, and the various NAFTA systems. *Id.*

[20] There is a wide body of literature devoted to studying the design and operation of the WTO dispute settlement system. *See* Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999) (analyzing the new system and issues which should be examined and cataloguing much of the scholarship written on the procedure); *see generally* DISPUTE RESOLUTION IN THE WORLD

on whether parties to the system comply with its decisions.[21] All of these aspects of a dispute settlement system work together to produce results that disputants will either accept or reject. Successful dispute settlement systems are those that prove to be legitimate and effective. The two concepts are interrelated. Legitimacy comes from the institution and/or the process that created the dispute settlement system, from its procedures and from the results it produces.[22] Do the disputants recognize this system as the appropriate one for resolving their conflict? Do the disputants believe that the system operates fairly? If the answer to these questions is "yes," the disputants will submit themselves and their conflict to the dispute settlement system. The system will then play a role in resolving that conflict and will sometimes issue decisions. Do most disputants accept these decisions and follow them? If so, then the dispute settlement system is legitimate.

Effectiveness can be gauged by examining the substance of the decisions a system produces as well as the consequences of those decisions. Do the decisions fully answer the questions posed by the disputants? Do the decisions build the rule of law? Does the system have a mechanism for enforcing its decisions? Do the disputants follow the decisions and internalize the results? A system which commands a "yes" answer to all these questions is one which effectively resolves the dispute for the disputing parties and the organization or arrangement.

Each of the articles in this issue moves beyond studying and analyzing a particular conflict to addressing how it is or should be resolved. They analyze the strengths and weaknesses of new methods and forms of dispute resolution.[23] In addition, they analyze current forms of dispute resolution

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TRADE ORGANISATION (James Cameron & Karen Campbell eds., 1998); INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed., 1997).

[21] *See generally* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules — Toward a More Collective Approach*, 94 AM. J. INT'L L. 335 (2000); Carolyn B. Gleason & Pamela W. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709 (2000); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001). There has been a surge in recent scholarly literature about compliance with the international law in general. *See* Beth Simmons, *International Law and International Relations: Scholarship at the Intersection of Principles and Politics*, 95 AM. SOC'Y INT'L L. PROC. 271 (2001).

[22] *See* Roger B. Porter, *Efficiency, Equity and Legitimacy: The Global Trading System in the Twenty First Century, in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM 3, 11 (Roger B. Porter et al. eds., 2001) ("The modern age accords much attention not only to the substantive outcomes of policy but also to the process by which decisions are reached. Internationally, policymakers vigorously debate the procedures by which disputes should be settled and what institutional arrangements should govern global economic activity.")

[23] *See* Ryan, *supra* note 12; Biukovic, *supra* note 14.

for the purpose of using them as models for other systems[24] or for determining whether they operate effectively.[25]

The articles by Michael Ryan and Ljiljana Biukovic discuss new forms for resolving conflicts. Ryan's article focuses on the new dispute settlement procedure developed by the World Intellectual Property Organization (WIPO) to resolve domain name disputes.[26] In her article, Biukovic provides an overview of the on-line method for international commercial arbitration.[27] Both authors use another dispute settlement system as a model for comparison purposes and for determining whether these new systems will prove effective. Ryan views the WIPO system through the analytical model he has developed for studying the WTO dispute settlement system. Ryan's thesis is that successful dispute settlement systems, like the WTO, should demonstrate knowledge, legitimacy and efficiency.[28] He then studies the WIPO system using this perspective. Biukovic explicitly compares on-line with traditional international commercial arbitration to see whether it will be able to offer the same advantages of the older system—party autonomy[29] and enforceability.[30]

Patrick Kelly's article examines the current WTO dispute settlement system in part to determine its parameters (the limits of WTO power) and in part to assess whether it functions effectively. Kelly argues that the WTO Appellate Body (AB) should resist invitations to engage in judicial activism, particularly regarding issues of social policy (e.g. environmental issues and human rights).[31] Given the contractual nature of WTO membership, Kelly contends that the AB should focus on using its authority to fill in pro-

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[24] *See* Ryan, *supra* note 12; Biukovic, *supra* note 14.

[25] *See* Kelly, *supra* note 18.

[26] Ryan, *supra* note 12, at 404.

[27] Biukovic, *supra* note 14, at 323-326.

[28] Ryan, *supra* note 12, at 404.

[29] Biukovic, *supra* note 14, at 323-341. According to Biukovic there are many aspects of party autonomy that distinguish commercial arbitration as opposed to civil litigation. Among them are the ability to determine jurisdiction and choice of law, to maintain privacy, confidentiality and security, to keep costs down and move more quickly, and to choose the place and language used to obtain independent, neutral and knowledgeable arbitrations. The new on-line compares favorably to off-line arbitration with respect to cost and speed. *Id.*

[30] International commercial arbitral awards are enforced through the New York Convention on the Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38 (1959). By contrast there is no international convention for the enforcement of judgments in civil and commercial litigation. There are ongoing negotiations at the Hague Conference on Private International Law to complete a convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters. The Hague Conference has produced two draft conventions, one in 1999 and the other in 2001. *See* www.hcch.net/e/workprog/jdgm .html (site last visited April 23, 2002) for the draft conventions and all preliminary documents related to the negotiating process.

[31] Kelly, *supra* note 18, at 365-79.

cedural gaps in the dispute settlement process rather than creating substantive law when interpreting WTO rules and standards.[32]

III. INSIGHTS ABOUT INTERNATIONAL ECONOMIC CONFLICTS AND RESOLUTION

In examining an international economic conflict and its resolution, each author in this volume contributed to the discourse about this important topic. Some common themes emerge from these articles. First, while international organizations are critical in forestalling and resolving international economic conflicts, great effort must be made by those organizations to get it right. The two articles which analyze the WTO dispute settlement system illustrate this point.[33] The WTO must constantly decide what kind of power to allocate to the dispute settlement system as opposed to rule making.[34] In addition, the WTO must continue to reexamine its system and its efforts to see whether it remains legitimate and effective.[35]

Second, examining conflicts and their resolution makes it possible to create new dispute settlement that will function properly.[36] Existing dispute settlement mechanisms can provide useful models for future systems. Third, international economic arrangements may require innovative means to avoid or resolve conflicts. Fourth, studying conflicts and their resolution can reveal how and why international economic law is created and how it affects interest groups within countries. Finally, these articles contribute to the ongoing scholarly debate about the relationship of international economic law to international law,[37] to international relations[38] and to the nature of the WTO as an organization.[39]

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[32] *Id.*

[33] *See id.*; Ryan, *supra* note 12.

[34] *See* Kelly, *supra* note 18.

[35] *See* Ryan, *supra* note 12; Kelly, *supra* note 18.

[36] *See* Ryan, *supra* note 12; Biukovic, *supra* note 14.

[37] *See* Ryan, *supra* note 12.

[38] *See id.*

[39] *See id.*; Kelly, *supra* note 18.