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Navigating New Landscapes: The Contribution of Socio-Legal Scholarship in Mapping the Plurality of International Economic Law and Locating Power in International Economic Relations[1]

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1. INTRODUCTION

The evolution of international economic law[2] in the past three decades has been characterised by three notable features: the expansion in the substantive areas governed by international law, the growth and diversification of international economic actors, and, crucially, the proliferation of multiple sites of international economic governance. These characteristics reflect both the heterogeneity of contemporary international economic engagements as well as the complex interplay of geopolitical and economic power that structure such legal and economic relations.

The critical role played by law in constituting international economic relations has meant that the development of international economic law has mirrored the transformations in the global economy, especially since the advent of economic globalization. In translating economic policy into practice, international economic law has not only provided the normative framework for transnational economic activity, it also served as a narrative of the contests and conflicts underlying international economic relations.

The challenge for international legal scholarship therefore rests not only in mapping this web of multi-layered international economic governance but also in unmasking the power dynamics inherent in international economic relations. Locating and analysing these power relations is crucial to understanding the constitutive role of international economic law, particularly in unmasking the embedded discourses of international economic rules and the normative practices of international economic institutions.

Traditional legal scholarship with its doctrinal focus meets this challenge only to a limited extent. Classical, formalistic accounts of international law, while useful in providing the foundational basis for analysis, cannot adequately capture this complexity of contemporary international economic law and international economic relations. Socio-legal approaches may be able to overcome these epistemological limitations by supplying: a) the methodologies to study

[1] This is a working paper for discussion. Please do not cite without consultation with the author. Comments and suggestions are welcome.
[2] The term international economic law is used extensively to refer to a vast array of regulatory subject matter incorporating both public and private international legal relations, including international trade law, international law of finance and investment, international commercial law and the regulation of intellectual property rights and transnational business (see for example, Loibl, 2006). Borrowing from the definition by Ortino and Ortino (2008), I use the term international economic law to denote broadly to the rules and institutions regulating economic relations 'that cross or have impacts across the boundaries of a single legal and economic system' and which 'operate in or impact the global economic system' (Ortino and Ortino, 2008: 89).

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international economic law beyond a focus on rules and institutions (and hence, to understand norm compliance beyond adherence to formal rules and towards other regulatory regimes); and b) the critical theoretical lens to understand the power dynamics inherent in international legal relations in order to locate sites of domination and, conversely, of resistance.

The objective of this paper is therefore twofold: firstly, it will seek to identify the challenges posed by the study of contemporary international economic law and the contributions of socio-legal approaches towards overcoming these challenges; and secondly, the paper explores how socio-legal scholarship can provide a methodological and theoretical framework to construct an understanding of the changes in the constitution of contemporary international economic law and its underlying contextual power dynamics. In this respect, the paper argues that the transformations in the structure of international economic law has been accompanied by a shift in disciplinary force of international economic law – the power of law to regulate the behaviour of economic actors – from that is premised on hierarchical coercion and compliance towards one that is reproductive in nature.

Accordingly, the following section will map the landscape of international economic law today. The next section will identify the challenges facing scholarship in this area and sketch out the limitations of classical approaches to international law in the face of such challenges, followed by considerations of the contributions of socio-legal research in providing the technical and theoretical arsenal to tackle this complex area of law. Finally, by way of conclusion, the paper will consider the value of juxtaposing an empirical methodology for mapping legal regimes with a critical normative approach for analysing power relations in international economic law.

2. MAPPING CONTEMPORARY INTERNATIONAL ECONOMIC LAW

a) Moving from the Periphery

One of the most striking features of the current landscape of international law and international economic relations has been the transformation of international economic law from a marginal subset of public international law into a highly specialised field of academic study and legal practice within a relatively short temporal space. Within the span of three decades, scholarship on and practice of international economic law have progressed rapidly beyond its confinement to perfunctory chapters and illustrative footnotes in international law textbooks towards embracing a diversity of specialist reflections and professional expertise on the disciplinary subsets of international economic law, such as trade, finance, investment and intellectual property.

The growing importance of international economic law as a domain of professional specialism and academic study can be measured by the three indicative characteristics of contemporary international economic identified by Faundez: the increasing *volume* of new international economic rules; the expanding *scope* of such rules; and the increased *efficacy* of these rules in regulating the behaviour of international economic actors (Faundez, 2010: 10 -11). Of these three measures, the latter characteristic has served, more than the others, to shift international economic law from the periphery to the core of international law today. The existence of mechanisms for the enforcement of rights and obligations has long been perceived of as a hallmark of a properly constituted legal system. Accordingly, the rapid development of formal frameworks dedicated to resolving international economic disputes – notably in the area of international trade and investment – and the correspondingly growing body of jurisprudence stemming from such tribunals have been instrumental to cementing its validity and veracity as a formal system for ordering relationships between its legal subjects.

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At the same time, the surge to prominence of international economic law in recent years is reflected not just in the proliferation of rules, institutions and jurisprudence but also in its heightened influence, if not, dominance, over other areas of international law and international relations as well as over the intersections between this international sphere and the domestic domain of law and regulation. It is this increased normative authority of international economic law not only over matters outside its immediate sphere of influence[3] and over those traditionally considered the preserve of 'the exclusive domestic jurisdiction of states' (ibid), that exemplifies the preeminence of international economic law today.

The tentacular reach of international economic law into the domestic realm of nation states is both expansive as well as intimate. Expansive in that the regulatory coverage of international economic rules (broadly conceived, see discussion below) now extend to a broad range of economic and non-economic activities within the territorial jurisdiction of states. International economic law is also intimate in coverage in that these regulatory intrusions seek to reorganise fundamental aspects of the domestic social, economic and political constitution. For example, the regulatory scope of international trade law is no longer confined to border controls on imports and exports of goods and services but include a vast array of internal policies, including agricultural and industrial subsidies, intellectual property rights, competition policy and government procurement. Consequently, the breadth and depth of international economic regulatory penetration into states not only reorders what economists term the 'policy space' (see Akyüz, 2010; Chang, 2005) within the domestic sphere but also reorganises the political, socio-cultural and ecological landscape impacted by this intrusion.

An important postscript at this juncture (and I shall return to this point later in section 3(a)) is that the effect of these domestic penetrations of international economic law has been uneven. States' ability to influence and be influenced by the normative agenda established by international economic law depends on their power to: a) set this normative agenda at the outset; and/or b) resist the imposition of norms established by a particular regime (see Braithwaite and Drahos, 2000; also Faundez, 2010). Consequently, the porousness of states to the authority of international economic regulatory regimes depends on the efficacy of their representations at this rulemaking level. The ongoing marginalisation of many states, notably those from the third world[4], from sites of global economic governance, has meant that these states have been more susceptible to external legal and policy influences than more geopolitically or economically dominant states (see further discussion below; also Akyüz, 2010; Faundez and Tan, 2010).

b) <u>Systemic Shifts</u>

Accompanying the expansion in the scope of international economic law have been the changes internal to the constitution of international economic law itself. This international economic legal 'revolution' has both been a contributor to and beneficiary of the evolving structure of the rules

[3] The impact of international economic law on other areas of international law, such as human rights and environmental law, is largely manifested through conflicts between states' obligations under international economic regimes and their obligations under other international legal orders.

[4] While the term 'third world' has been characterised by some quarters as anachronistic in today's global context and discarded in favour of the more geographically attributed 'north/south' terminology, this term has particular resonance for many scholars and activists from the 'third world' itself who have retained its use as a continuing form of resistance to hegemonic attempts to disperse the collective voice and organising unity of third world states and third world peoples (see for example, Chimni, 2003: 49). In spite of these efforts to aggregate the collective experiences of the third world, there remains a commonality of legal and non-legal features that continue to structure the third world's engagement with the international legal order and the term is used here in recognition of this reality.

and institutions which shape its authority, many of which represent departures from the classical liberal model of international law. Most notably, the collapse of spatial and temporal boundaries brought on by processes of economic, cultural and technological globalization has had the effect of similarly obscuring traditional doctrinal boundaries of international law (see Boyle and Chinkin, 2007: 19 – 24; Santos, 2002: 178 – 187; Picciotto, 2006: 1 – 4).

Both the scholarship and practice of international law have seen a progressive conceptual movement away from a statist assumption of a legal system premised on hierarchical state command and focused solely on regulating state behaviour towards an emphasis on 'transnational legal processes' encompassing a multiplicity of normative actors and regimes and aimed at regulating a diversity of state and non-state actors (see for example, Berman, 2005; Cutler, 2003; Koh, 2006 & 1996; Merry, 1992; Picciotto, 2006; Raustiala, 2002; Slaughter and Zaring, 2006; Wai, 2005). This transnational legal process – also cast varyingly as regulatory regimes or regulatory networks – occupies a regulatory space beyond state-based and state-made law, recognising that the space for governance in a globalized and interdependent international order comprises not just of nation states and international organisations narrowly construed[5] but also of a plethora of public and private entities, such as government agencies, non-governmental organisations (NGOs), multinational enterprises (ibid).

This change is most keenly felt in the conduct of international economic relations. Crucially, the import of external economic norms, many of those which have the effect of constraining the aforementioned space for domestic governance, have taken place not as the result of state practice in the classical liberal sense – such as accession to international agreements, acquiescence to principles of customary international law or adherence to judicial decisions – but have, instead, been the result of less hierarchical forms of regulation – rules of conduct and other regulatory devices collectively defined (for convenience inasmuch as for doctrinal classification) as 'soft law'[6] – as well as other informal external pressures – the discipline of credit ratings and development assistance for example – brought to bear on national authorities.

Accordingly, the framework of contemporary international economic law reflects this multiplicity of normative orders, resulting in a messy and often incongruent landscape of legal and non-legal regulatory regimes with disparate, sometimes competing, sites of normative authority. Formal legal and economic governance systems – such as multilateral and regional trade regimes of the World Trade Organisation (WTO) and the North American Free Trade Agreement (NAFTA, the criss-crossing web of bilateral investment treaties (BITS) and the Bretton Woods institutions of the International Monetary Fund (IMF) and the World Bank – occupy the same regulatory realm as a plethora of transgovernmental networks and private (including non-profit and non-governmental) ordering systems – such as the Financial Stability Board (FSB), the Basel Committee on Banking Supervision and the International Accounting Standards Board (IASB) – many of which exert a far more dominant influence on the behaviour of international economic actors than the former formal arrangements despite their lack of legal coercion in the classical sense.

[5] A narrow definition of international organisation would cover intergovernmental organisations or public international organisations representing collectives of sovereign states created under 'a constitutive international agreement' and 'governed by international law' in pursuit of 'certain defined common ends' (Alvarez, 2005: 1). It distinguishes such organisations from other transnational organisations which may or may not include governments and/or government officials which have not been established by treaty and which are not accorded with the legal personality necessary to distinguish its operations from that of its constituent states (see Alvarez, 2005: 9; also Raustiala, 2002).

[6] See note 8 below.

Rulemaking, or more precisely, norm creation, in the sphere of international economic law thus transcends the traditional dichotomies of international law, notably between the domestic and the international, between public and private, and between 'hard' and 'soft' law[7] (see further discussion in section 3 below). This blurring of normative boundaries, in turn, redefines the nature of coercion (and compliance) in international law and marks a shift in the disciplinary modalities of international economic law. As the sources of international economic norms become increasingly derived from informal and/or private institutions and non-legally binding instruments and regulatory authority is increasingly vested in non-traditional actors, such as networks of regulators or institutional bureaucrats, the coercive nature of these norms also changes. Enforcement of international economic rules has thus shifted from reliance on traditional modes of norm compliance – observance of treaty obligations and directives of international organisations – towards less legal, more instrumental but no less coercive forms of supervision – economic sanctions or incentives, socialisation, institutionalised habits, modelling, complex interdependency and normative commitments based on reputational concern (Djelic and Sahlin-Anderson, 2008: 4 – 6; Braithwaite and Drahos, 2000: 554- 556; Koh, 199 – 201).

3. CONFRONTING THE NEW LANDSCAPE OF INTERNATIONAL ECONOMIC LAW

a) Mooring the Multiplicities

In light of the aforementioned rapid expansion in the scope, substance and form of international economic law, the first task facing scholars (and practitioners) in the new landscape of international economic law is unifying its disparate regulatory strands and reconciling its inchoate categorisations. However, the multiplicity of economic governance regimes and patchwork sites of regulatory authority supervising international economic relations today sit uncomfortably within a classical model of international law. This movement from what Picciotto terms 'hierarchy to polyarchy' (Picciotto, 2006: 2) in international economic law and governance raises two key epistemological challenges for conventional international legal scholarship.

Firstly, formalistic theories of international law pivot around the notion of a nation state and the primacy of territorial integrity and state sovereignty as its governing principles. This is manifested in two presumptive assertions of international legal scholarship: a) the state holds the monopoly on 'making, interpreting and enforcing law' (Cotterrell, 2002: 641) so that states remain the chief architects of international law; and b) international law is primarily concerned with constraining the exercise of state power, both at the international and domestic level. This limited focus on the acts of nation states, as operationalised through governments and acts of government officials discounts the significant changes to the constitution of the nation state in the wake of globalization and international economic integration. Developments in global society and the international economy brought about by the intensification of cross-border social, cultural, technological and economic relations, as discussed in the preceding section, has not only shifted the contours of international law but has, importantly, altered the role and organisation of the nation state.

[7] The terms 'hard' and 'soft' law is often used more as a heuristic device than a reflection of the normative nature of the legal principles subject to such categorisations. 'Hard' law is often used to refer to legally binding obligations that are precise (or can be made precise through judicial interpretation and executive directives) and that are justiciable in an appropriate adjudicatory tribunal while 'soft law is used to denote commitments that are not legally justiciable but which may possess normative force due to the attraction of non-legal sanctions for failure of compliance.

Specifically, globalization has resulted in the so-called 'decentering' of the state from its regulatory and functional roles. This transformation has taken place on two fronts. First, there has been a progressive decentralisation of national law-and-policymaking whereby the regulatory functions of the state have been either delegated downwards 'through principles of subsidiarity or devolution' or upwards to supranational or international organisations (Muchlinski, 2003: 229 – 230) or dispersed to semi-autonomous public bodies (Picciotto, 2006: 13 – 15; 1998; 3 – 4). Second, there has been a move towards privatising regulation through the outsourcing of the state's prescriptive and enforcement functions to private entities or quasi-public regulatory authorities (see Stephan 2011; Picciotto, 2006: 13 – 15). The internationalisation of this disaggregation has contributed towards the emergence of the aforementioned transnational sphere of governance with decentralised and privatised entities performing their legal and functional roles across territorial boundaries (see ibid).

The second epistemological challenge posed by a narrow construction of international law to a fuller understanding of contemporary international economic law is its doctrinal reliance on rigid normative categories and hierarchies of normative relationships. In particular, classical international law's emphasis on formalism in norm construction and adjudication fail to account for the diversity of normative authority in international economic law. Although much of international economic law is still derived from the traditional sources of law identified by **Article 38 of the Statute of the International Court of Justice (ICJ)** – treaties, custom, general principles of law and judicial decisions and writings of publicists – an increasing proportion of international economic norms, as discussed previously, originate from what international law conventionally terms 'soft law' – such as standards, codes, political declarations, memoranda of understandings (MoUs).

The normative impact of these 'informal' regulatory norms is often considered peripheral to the obligations enshrined in the aforementioned 'formal' sources of law for two reasons: 1) the lack of precision in defining rights and obligations of signatory parties; and 2) the absence of explicit consent by states that the commitments enshrined in such normative documents are legally binding. In this manner, 'soft law' is often described as a set of political norms as these instruments are regarded as prescribing rules of conduct without having a binding effect so that failure to comply with commitments do not incur a violation of international law per se. This reluctance to accord a formal status to non-traditional modalities of regulatory discipline is also reflected in international law's traditional distinction between 'diplomatic' and 'legal or judicial' means of international dispute settlement, the outcomes of the latter regarded as having greater disciplinary effect on the behaviour of international legal actors than the former.

Consequently, the liberal theoretical framework of international law conflicts with much of the reality of contemporary international economic law described in the previous section. The nature of conventional international rulemaking and norm compliance often eschews this traditional framework. For example, transgovernmental networks – involving specialised domestic officials interacting directly with their counterparts in other states and collaborating on specific regulatory areas[8] through 'frequent interaction rather than formal [state-to-state] negotiations' (Raustiala, 2002: 5) – are responsible for the creation and implementation of a substantial portion of international economic law. Aside from developing discrete soft law instruments, such as standards , codes and best practice guidelines, transgovernmental networks also facilitate what Raustiala terms 'regulatory export' (Raustiala, 2002: 7) or what Braithwaite and Drahos term 'modelling' (Braithwaite and Drahos, 2000: 539), that is the reproduction of regulatory rules and practices from regulatory regimes to another. In this manner, the internationalisation of a

[8] For example, banking regulation, money laundering, or environmental cooperation (see Raustiala, 2002).

particular rule of international economic law can be achieved without necessarily enrolling conventional mechanisms of inter-state lawmaking, either of formal treaty negotiation and ratification or as a consequence of supranationalism (international law which has direct applicability to legal persons within their jurisdiction, such as European Community law).

The epistemological limitations of formalist approaches to international law to account for these multiple systems of regulation in international economic law can be overcome by adopting the time-honoured methodological tool of socio-legal scholars, that of legal pluralism. Legal pluralism, a methodology first employed by legal anthropologists studying the relationship between so-called 'formal' state law and non-legal normative orders that guide individual and communal conduct, has provided a useful framework 'to identify hybrid legal spaces, where multiple normative systems occup[y] the same social field' (Berman, 2009: 226). Borrowing from 'social systems', the approach of legal pluralism 'utilize[s] both binding principles and substrata of non-binding principles that are not and need not be incorporated into formal law-making processes, but still create normative standards and expectations of appropriate behaviour' (Chinkin, 2003: 24 – 25).

The concept of coexisting state and non-state legal orders without a necessary hierarchy and operating semi-[autonomously from each other and yet possessing the same disciplinary clout over the behaviour of their subjects of regulation can be similarly applied to international law, specifically international economic law. This broadening of legal pluralism to a consideration of the multiplicity of regulatory orders in international economic law has increasingly been considered by both legal theorists as well as scholars of international economic law. The notion of 'global legal pluralism' is increasingly being used to capture this diversity of international economic normative regimes and understand the relationship between formal international law, constituted through official inter-state dialogue and negotiations and informal law or 'soft law', constituted through transgovernmental and private processes.

As Berman argues:

> ... we can conceive of a legal system as both autonomous and permeable; outside norms affect the system but do not dominate it fully. The framework thus captures a dialectical and iterative interplay that we see among normative communities in the international system, an interplay that rigidly terrritorialist or positivist visions of legal authority do not address (Berman, 2009: 236).

A legally pluralist approach to international economic law recognises that despite globalization, nation states remain the primary form of social and political organisation and that the inter-state system remains central to the constitution of international economic law. It does not discount the continuing relevance of territorial boundaries but allows for the mapping of the shifting contours of these boundaries and a changing conception of the state (see discussion in section 3(b) below). It does also acknowledge that these political formations 'have become an inherently contested terrain', viewing 'the state and the interstate system as complex social fields in which state and non-state, local and global social relations interact, merge and conflict in dynamic and even volatile combinations' (Santos, 2002: 94).

Consequently, adopting a legally pluralist perspective to the study of international economic law not only supplies the theoretical lens through which to conceptualise the phenomena of transgovernmental law and analyse the privatisation of law itself, it also allows space for the conceptualisation of difference and resistance. Again, as Berman argues, such an approach treats

'the multiple sites of normative authority in the global legal system as a set of inevitable interactions to be managed, not as a problem to be solved', (Berman, 2009: 237), thereby providing not just a heuristic device for conceptualising the new reality of international economic relations but also a theoretical platform for mapping future directions of international economic law.

b) Constituting Globalization

An important exercise in the mapping of contemporary international economic law is examining the link between international economic law and economic globalization and, relatedly, the contestation of power underlying this relationship. International economic law has played a significant role in facilitating the globalization of economic relations by providing the regulatory framework for such global integration. At the same time it has also been instrumental in validating the discourses of globalization by sanctioning its normative narratives. Thus, a consideration of the power dynamics inherent in this process of translating economic policy into practice is pivotal to understanding how certain phenomena is sanctified within international economic law.

It has been no coincidence that the surge to prominence of international economic law has taken place at the same time as the globalizing transformations in the international economy. The term 'globalization' remains somewhat contested and it is beyond the scope of this paper to engage in a detailed discussion of these debates surrounding the conceptualisation of 'globalization' phenomenon. However, for the purposes of an analysis of the relationship between international economic law and globalization, it is important to note that the ongoing process of economic globalization is driven primarily by a comprehensive agenda for economic integration, in particular, one aimed 'at incorporating developing countries into the global economy' and that international economic law has played a prominent role in this process of economic integration supplying the main vehicle through which the principles of globalization are translated into binding rules and policies (Akyüz, 2010: 34 – 35; Faundez, 2010: 10 – 11; Faundez and Tan, 2010: 1).
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The role played by international economic law in constituting globalized economic relations has been twofold: firstly, it has provided the mechanisms of globalization – the 'processes that increase the extent to which patterns of regulation in one part of the world are similar, or linked, to patterns of regulation in other parts' (Braithwaite and Drahos, 2000: 17) – by structuring the regulatory framework under which these mechanisms operate; and secondly, in doing so, it has legitimised these mechanisms and its outcomes, thereby justifying the regulatory interventions of economic globalization. In other words, by supplying the rules and procedures for the conduct of international economic affairs within strictly controlled parameters, international economic law does not only act as 'a mode of social control' it also represents 'a constitutive system that creates conceptions of order and enforces them' (Merry, 1992: 360). International economic law thus fulfils two essential functions vis-a-vis the constitution of economic globalization: *regulation* and *legitimation*, the former referring to 'its sanctioning and limiting role' and the latter referring to its 'culturally productive role' (ibid: 362).

Once again, a doctrinal approach to international law cannot effectively deconstruct this constitutive role of international economic law and the discourses of economic globalization. The self-referential lens of formalist legal theory focusing on purely textual and interpretative aspects of international rules and institutions fail to account for the contemporary reality of what Berman describes as 'the multifaceted ways in which legal norms are disseminated, received, resisted and imbibed', thereby 'missing much of the complexity of how law operates' (Berman,

205: 492). Like Berman, it is argued here that casting a socio-legal eye is necessarily in order to capture this constitutive function of law, especially how law influences 'modes of thought' inasmuch as it shapes the conduct of legal actors (ibid: 494). In this manner, we can deconstruct the organising rationality behind contemporary international economic law and seek to understand how certain regulatory instruments are privileged over others and how a singular, universal construction of international economic law can have different applications for different actors within the global economy.

Many socio-legal theorists have long conceived of law and legal regimes as systems of symbols and signification, creating meaning and normalising or delegitimizing images and presentations of social, political and economic relationships (see Berman, 2005; Fitzpatrick, 1992; Merry, 1992; Rittich, 2006; Tarullo, 1985). Tarullo, notably, perceives of international economic law as 'a set of myths' – legal texts that 'communicate 'facts about the world even as they purport to regulate it', the effect of which 'is to sanctify one way of knowing events in the world' (Tarullo, 1985: 547 – 548).He argues that 'the myth of normalcy' is used to sanctify the image of what is 'normal' for states participating in the international economy, with the norm modelled on 'an industrialized nation with a capitalist, welfare-state economy' and departures from this norm seen aberrations that need to be corrected (ibid: 547 – 552).

International economic law provides the means through which these differences – either of third world states which have not attained the normative model of economic organisation (the 'adolescence myth') or which are departing from the norm due to temporary crises (the 'sickness myth') – can be eradicated (ibid). This can be achieved through the conscription of affected states – developing countries or economies in financial crises – into respective disciplinary regimes, such as the liberalisation of domestic markets under international trade or investment law to facilitate the development of a free market economy or the adoption of fiscal austerity under IMF conditionality to facilitate return access to international capital markets. International economic law thereby sanctions external interventions into nation states in pursuit of the policies of globalization –notably those referred to as the Washington Consensus[9] – by creating an imagery of economic relationships 'that seem natural and fair because they are endowed with the authority and legitimacy of the law' (Merry, 361 – 362). At the same time, framework of neoliberalism that permeates economic policymaking under globalization provides the conceptual authority upon which international rules are negotiated and implementation so that the choice of regulatory design is legitimised by the economic policies it supports.

The mutually reinforcing roles of international economic law and policies of economic globalization is clearly illustrated in the overlapping ways in which these two processes have influenced the aforementioned disaggregation of the nation state and the corresponding reduction in its policy and regulatory space (see section 2(a) and 3(a) above). The contraction of this capacity of national authorities to deploy strategic measures to achieve economic and other objectives has been a prevalent, yet highly contested feature of contemporary international economic law and one that singles it out from other areas of international law. The efficacy of international economic rules means that the ability of national authorities to intervene in domestic economies – for purposes of stimulating economic activity or stymieing economic

[9] The 'Washington Consensus' is a term often misrepresented and misunderstood. The term itself is coined by US economist John Williamson who used it to refer to a set of ten economic reforms– including fiscal austerity, trade and financial liberalisation, deregulation and privatisation - which Williamson felt were necessary in order to redress the economic problems faced by Latin America in the 1980s and which could be deployed in these countries with 'a reasonable degree of consensus' in policymaking circles in Washington DC (Williamson, 2004: 2; 2002). The term has been used since as a catch-all phrase to encompass the policies espoused by Williamson.

crises – has been significantly constrained by their conscription into the international economic legal regime.

The enrolment of the principles of the Washington Consensus as organising principles for international economic law (see Faundez, 2010: 11 – 12) over and above other alternative approaches to economic organisation has contributed to the fragmentation of the state by reconceptualising the role of the state in the economic sphere. Critically, the conceptual movement away from the role of the state as a provider of goods and services to that of an enabler or regulator of markets has meant that the fragmentation of the state's policy and regulatory authority has, to a large extent, been catalysed by the disaggregation of the state's functional authority. The cumulative effect of these developments has been a widening gap between the formal authority that states maintain over national policymaking as an expression of the principle of state sovereignty (*de jure* 'policy autonomy') and their effective control of these processes (*de facto* policy autonomy)[10].

These changes in the manner in which international economic law affects social and economic relations within states, particularly third world states, reflects the change in the role and purpose of international economic law over the past three decades. There has been a discernible shift in the rationale for international economic rules and institutions since the late 1970s, especially since the collapse of the Bretton Woods system of mandatory financial supervision. As Akyüz notes, the postwar international economic architecture was premised on the management of cross-border economic relations and on constraining domestic economic policies of states which may have ramifications outside their territory (Akyüz, 2010: 39 – 40). However, contemporary international economic law has been driven primarily by 'a desire to achieve a deep and broad global economic integration' through policies of liberalisation and deregulation (ibid: 40). The international economic legal system is therefore no longer premised on the facilitation of an orderly with rules for multilateral cooperation in an era of economic interdependence but have, especially in the areas of trade and investment, increasingly been based on the need to facilitate access to global markets (ibid).

Additionally, a significant part of international economic law today is focused on the harmonisation and standardisation of domestic economic regulatory regimes, mainly to achieve the aforementioned global integration of markets. While some regulatory harmonisation and standardisation takes place is achieved through independent and mutually negotiated norms, a significant portion is undertaken through the process of regulatory export (see discussion in section 3(a) above). This entails primarily the 'export of regulatory rules and practices from major powers to weaker states', thereby promoting global policy coherence and convergence based a regulatory model of major industrialised countries (Raustiala, 2002: 7). Such convergence represent what Santos terms 'globalized localism' – the process by which a given phenomena is successfully transplanted in another jurisdiction and 'develops the capacity to designate a rival social condition or entity as local'[11] (Santos, 2002: 178 – 179). As discussed previously, the 'diffusion of regulatory ideas, rules and practices' (Raustiala, 2002: 7 in this manner, undertaken substantially through transgovernmental networks, alters the nature of international legal engagement, reconstituting not only the form of international norm creation (and consequently adjudication over norm conflicts) but also the forms of disciplinary power that structure these relationships between international economic actors.

c) <u>Law and the Contestation of Power</u>

[10] The terms '*de jure*' and '*de facto*' policy autonomy are borrowed from Akyüz, 2010.

[11] The counterpart of a globalized localism is that of a 'localized globalism' – the alterations in local conditions to accommodate the transplanted entity or concept (Santos, 2002: 178 – 179).

A key theme emerging from the foregoing discussion on the nature and scope of contemporary international economic law is the relationship between regulatory regimes and the reality of geopolitical and economic power underpinning their design and implementation. The transformations that have occurred within the global economy and the changes in international economic law have largely been the outcomes of contests of power between international economic actors or, at the very least, reflect the exercise of power by these entities. As will be discussed below, the choice of economic regulatory regimes and the substantive content of international economic law today is largely determined by those entities wielding the most geopolitical and economic power in a globalized world.

The dynamics of power in international relations are marginalised, if not ignored, in traditional conceptions of international law. Power here is viewed not as an integral part of law and the lawmaking process but is seen, paradoxically, as a means of constraining the exercise of state power – either domestically or internationally – and is seen instead as 'external and opposed to law' (Cotterrell, 2002: 643). International law's emphasis on this control of power is evident in the fact that it places state consent at the heart of the international legal system. Doctrinal international legal scholarship views state consent as a key indicator of the validity of international rules and the legitimacy of international organisations without considering the nature of the consent itself, that is, whether such consent was secured in the course of an exercise of power by some states or other entity over another state or entity. This approach is contrasted with socio-legal scholarship which places power at the heart of the study of law and legal institutions and examines the mechanisms by which the exercise of power structure social and economic life.

According to Cotterrell:

> Most sociolegal work explores the power of law: how it is structured and organized, its consequences and sources, and the way people and organizations seek to harness it, have differential access to it or find themselves differentially affected by it ... Sociolegal scholarship ... has shown how law as institutionalized doctrine formalizes and channels power rather than controlling it, making its effects more predictable and precise and its exercise more orderly' (ibid).

An analysis of power is vital to understanding the cause and effect of international economic governance. As discussed in the previous sections, the web of multi-layered international economic law and its supporting institutions is underpinned by complex dynamics of power that structure the legal and economic relations between the subjects of international economic law and other actors impacted by international legal rules and regulation. The capacity of international economic law to balance competing interests of international economic actors and other non-legal stakeholders[12] rests, in many respects, on the outcomes of what Braithwaite and Drahos term 'contests of principles' between such actors (Braithwaite and Drahos, 2000).

The central thesis of the authors' landmark study of global business regulation is that the process of globalization of legal and non-legal norms can be 'best conceptualised in terms of the relationships between actors, mechanisms and principles[13]', with actors articulating, supporting

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[12] By other stakeholders I mean actors who are not formally constituted in status as international legal subjects for the purposes of international economic law but who are nonetheless affected by international economic rulemaking, including individuals and groups of individuals, such as indigenous peoples, as well as the environment.

[13] Braithwaite and Drahos define principles as norms derived 'from the values and practices of a given community of actors', which may or may not be juridical in nature, that inform the construction of rules in the globalization of

and seeking to entrench principles in regulatory systems in different ways (ibid:15 – 19). As the 'successful weighting of one principle over another' within a regulatory regime has consequences 'at both the level of conduct and for regulatory change' (ibid: 16), the outcome of these contests of principles is crucial to the choice and content of international economic normative orderings. Braithwaite and Drahos argue that international economic actors 'seek, through principles, to incorporate into regulatory systems and social practices changes that are consistent with their general values, goals and desires' (ibid: 19). At the heart of this process of regulatory development is the relative power of each actor, whether that power is manifested in the ability of actors to control 'webs of reward and coercion' or 'dialogic webs' or both (ibid: 551).

Braithwaite and Drahos' empirical methodology enables us to locate sites of normative authority within international economic law through their establishment via contests of power between international economic actors. The ability of actors to effect compliance with regulatory change – such as reforms in international economic rules to facilitate globalization – rests on their power to weave webs of reward and coercion (available only to states with the economic and military power to support compensation and/or threats) or the power to dominate dialogic webs or webs of persuasion (ibid: 551 – 554). Thus, the ability of actors to influence the content of regulatory regimes as well as to determine which regime or forum is designated as the regulatory arena for a particular subject matter will rest on their power relative to other competing actors within and outside that regime.

Historically, it is clear that it is the powerful state actors which dominate the development of legal norms and determine the normative orderings. In international economic law, as in other areas of international law, this has created a fairly clear demarcation between those states that constitute the rule-*makers* and those that constitute the rule-*takers* of the respective legal systems. The initial insertion of third world states into an international order outside their design and influence[14] and their continuing marginalisation from the sites of contemporary international economic governance has meant that for the most part, these countries have constituted the former and remained *objects* rather than *subjects* of the international legal system (see Faundez and Tan, 2010: 2).

Although the dominance of the nation state has waned marginally in the contemporary international economic order due to the phenomena of decentralisation, this has not reduced dominant states' hegemony over the process of international rulemaking. Instead, the power of dominant states have appeared relatively weakened in light of the emergence of powerful non-state actors, notably transnational corporations, and their role in constituting global economic relations. Consequently, these actors, individually or collectively, significantly influence the direction of international economic regulation in a globalized economy. Braithwaite and Drahos argue that while weak states and non-governmental organisations (NGOs) 'can effectively tug at many of the strands of dialogic webs of influence', these regulatory coalitions remain dominated by hegemonic actors who have the capacity to 'escalate webs of reward and coercion' (Braithwaite and Drahos: 551).

business regulation (Braithwaite and Drahso, 2000: 18). Principles are so-called because they constitute 'an agreed standard of conduct' and 'propel action in a certain direction' so that once this direction has been set by actors in a regulatory system, 'processes for generating the detailed rules of conduct (or changing them)', such as through international economic law, can take place (ibid: 18 – 19).

[14] The nature of the incorporation of third world states into the postcolonial international legal order has been examined by numerous scholars of international law, notably Anghie, 2004, Balakrishnan, 2003, and more, recently, Pahuja, 2010.

The dynamics of power relations can be illustrated by reference to two aspects of international economic: 1) the prevalence forum-shifting; and 2) the impact of transgovernmental networks. In the former, hegemonic actors seek to optimise their success in operationalising their regulatory principles by seeking out favourable regulatory regimes (Braithwaite and Drahos, 2000: 564 – 565). They do so via three strategies: 'moving an agenda from one organization to another; abandoning an organization and pursuing the same agenda in more than more than one organization' (ibid). Forum-shifting as a strategy in international economic law is one that is limited to 'the powerful and well-resourced' (ibid) and therefore the choice of forum for regulating certain aspects of international economic law can sometimes be contingent not on the mutual consent of all the actors involved but on the strategies undertaken by a dominant actor. For example, the US, often at the behest of its pharmaceutical lobby, has shifted the global regulation of intellectual property rights (IPRs) from the World Intellectual Property Rights Organisation (WIPO) and back again as it suited their interests (ibid: 564; see also Dutfield and Suthersanen, 2008).

Power is also deeply embedded within transgovernmental networks which fall into the aforementioned category of dialogic webs of influence described by Braithwaite and Drahos. Although there is no hierarchy of command within networks – as discussed above, networks effect regulatory change through 'persuasion' rather than 'command' (Raustiala, 2002: 51) – the propensity of these networks to be dominated by powerful actors renders them susceptible to the same power dynamics inherent in conventional forms of international lawmaking (ibid: 7 – 8; 51 – 52). In fact, as Raustiala's study of these networks demonstrates, 'power plays a critical role' in the export of 'regulatory ideas, rules and practices' from economically dominant states to weaker states, with 'economically weak jurisdictions' frequently embracing 'as substantial part of the regulatory models of the dominant powers' (ibid: 51; 59 – 60). While this is due to a variety of reasons, including the potential for reducing transaction costs in establishing a regulatory regime from scratch as well as market pressures, the modelling of regulatory regimes after the rules and practices of dominant industrial economies represent an exercise of 'soft power' ('the power to attract' versus the 'hard power' to coerce), channelling diffusion clearly from the US and EU states to less advanced economies (ibid).

The choice of utilising transgovernmental networks and 'soft law' instruments as a means of international economic regulation over conventional modes of rulemaking and adjudication can also be the result of an exercise of power by dominant international economic actors. Using regulatory systems outside formal institutions of international law enables actors to bypass the rigid process of international rulemaking and respond to current events more efficaciously but it also allows them to circumvent the democratic safeguards of international law, enabling hegemonic actors to embed their preferred principles with little opposition. An analysis of power therefore helps explain why certain regulatory regimes are preferred over others and why there is there is a preference for soft law versus hard law in some regimes but not others.

Akyüz, for example, points to the lack of coherence in the structure of international economic rules as a reflection of how dominant states have structured the international legal order to suit their interests (Akyüz, 2010: 35). He argues that while 'international trade is organised around a rules-based system with enforceable commitments', there 'are effectively no multilateral disciplines over macroeconomic and exchange rate policies of countries which have a disproportionately large impact on international monetary and financial conditions' (ibid). Instead, in spite of this lack of international legal rules on cross-border finance constituting a significant source of instability for the international economic system, major industrialised countries have preferred to regulate international financial flows through transgovernmental

networks and non-binding standards and codes rather than accept a binding multilateral regime which will constrain their financial markets (ibid: 42 – 50).

This incoherence is also present in the substantive content of international economic rules which Akyüz argues 'are not neutral' in their design and incorporation into legal orders. Reference to economic analysis enables us to understand the economic imperatives behind the regulatory measures implemented international economic law and go beyond the rules and institutions to understand the motivations behind the architects of the process. For example, international trade law promotes 'deep integration' is pursued in areas where advanced economies have comparative advantage: 'free movement of industrial products, money and capital, and enterprises' while protecting 'areas where liberalisation would generally benefit the developing world: agricultural goods, labour mobility and technology transfer' (Akyüz, 2010: 40). This selective approach to international economic regulation therefore reinforces the importance of considering power relations as part of the study of international economic law and highlights the function of law as constitutive of social and economic relations, in this case, of highly asymmetrical international relations.

4. Towards a New Cartography of International Economic Law

The rapid expansion of international economic law over the past three decades has been matched by an equally rapid proliferation of international legal scholarship on the subject. While there has been a significant preponderance of doctrinal research on international economic law, there has also been an incipient but growing body of socio-legal scholarship focused on drawing out the complexities of contemporary international economic rules and the practices of international economic institutions. These studies recognise, above all, that international economic law, more than any other area of international law, remains a contested terrain of policy, practice and scholarship. In particular, regardless of orientation, international economic legal scholars have generally recognised that international economic law has to balance twin conflicting objectives – the *stability and predictability of rules* to ensure efficacious international economic transfers and security of cross-border economic transactions and the imperative to *respond quickly and equitably* to the demands of a globalized economy in a technological age.

Reconciling the tensions inherent in international economic law and mapping its impact on social, economic and political relations globally is difficult without its contextualisation within the geopolitical and economic realities of the global economy. Accordingly, adopting a socio-legal approach to the study of international economic law has enabled us to discern two key related trends: 1) the emergence of new sites of normative authority for international economic rules and regulation outside the traditional inter-state system and recognition of their importance in shaping the conduct of international economic actors; and importantly, 2) the shifting modalities of power, signifying a change in the manner in which power is formalised and channelled in international economic governance to enable dominant actors to embed and globalize their models of economic organisation. Understanding the latter development is key to analysing the future directions of international economic law, including future directions for reform and resistance.

Elsewhere I have argued that there has been a discernible shift in the disciplinary apparatus of international economic law, representing shifting modalities of power at the global level (see Tan, 2011: 218 - 220). The evolution of various structural aspects of international economic law – notably its movement away from hard coercive power as a mechanism of enforcing compliance towards a subtle, more reproductive form of persuasive power, marked by the aforementioned transition from hierarchical, inter-state law to plural, transnational law – signals a shift in the way

that power is institutionalised within international economic law. This has occurred in tandem with the evolving rationality of international economic law, away from the imperative to secure transnational economic order and towards facilitating integration through harmonisation and standardisation of economic norms (see section 3(b) above). This transition requires a significant revision of the terms of engagement of weaker parties within the system, primarily third world states and their constituents but also, increasingly, communities from within decentred states in the industrialised north.

I have argued that these developments within international economic law represent the beginnings of a transition from what Foucault terms the 'technologies of dominance' to 'technologies of self', the two poles from which 'the organisation of power of life' is deployed, or in other words, the movement from a disciplinary society' to a 'society of control' (see Foucault, 1991: 220 – 221; 1991: 261 – 263; Tan, 2011: 14). Here, the movement is away from the disciplinary supervision of societies– that is, through establishing normative frameworks for behaviour and the exclusion/penalisation of departures from such norms – towards the establishment of a 'biopolitical' power in which the objects of power (societies or states) reproduce these norms and seek to insert themselves into the very relationship of power (ibid).

This dovetails with Braithwaite and Drahos' analysis of the processual shifts in global business regulation today which sees the movement away from remunerative and coercive webs of influence towards the use of dialogic webs in securing both adoption and compliance with norms in the aforementioned contest of principle (Braithwaite and Drahos, 2000: 563).Although Braithwaite and Drahos admit to not subscribing to postmodern analyses of discourse, their analysis of dialogic regulatory sequences resonates with Foucault's conception of power, inasmuch as it resonates with Foucault's discourse politics and the power of discursive technologies. As Braithwaite and Drahos contend: 'Hegemony means that within dialogic webs there is more reason to hear the voices of those with a capacity to escalate webs of reward and coercion' (ibid: 551).Thus, insofar as dialogic webs remain dominated by powerful actors within the regulatory fora, compliance with the norms advanced by these actors by weaker actors in the system through such mechanisms of dialogue indicate the reproductive nature of the power inasmuch as it demonstrates continuity with the overt disciplinary force of power.

Combining Braithwaite and Drahos' empirical methodology for mapping sites of global regulation with Foucault's critical conception enables us to critically evaluate not just the effects of power relations on the constitution of international economic law but also the changes in how these power dynamics are channelled through mechanisms of law. Adopting this approach to the study of international economic law will hopefully furnish us with a more substantive technical and theoretical arsenal in which to tackle the increasing complexity of international economic law and regulation and more effectively map the landscape of international economic law in this globalized era.

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