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The Field of International Economic Law

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ABSTRACT

In a journal analyzing developments in the theory and practice of international economic law (IEcL), it is appropriate occasionally to reflect on the changing meaning of IEcL and its relation to public and general international law. After an introductory excursus of the three terms—international, economic, and law—this article examines the evolution of the field as such. First, there is a discussion of the key institutional innovations achieved in the early 20th century. Second, there is an overview of the foundational IEcL writings of Ernst Feilchenfeld, Georg Schwarzenberger, and John H. Jackson. The historical contributions of Feilchenfeld, a Georgetown University scholar, have heretofore received little attention in the IEcL literature. Next, the article discusses the burgeoning IEcL scholarship of the past few 25 years and notes the still ongoing efforts to develop a theory of IEcL to explain its purpose in regulating the global economy and achieving a world public order of human dignity.

I. INTRODUCTION

Although its roots go back to ancient civilization,[1] 'international economic law' (IEcL)[2], termed as such, emerged as a topic of law in the mid-20th century. Over a half century later, the meaning of IEcL is still unsettled.[3] Indeed, no two definitions of the field are identical. For example, a treatise by Ignaz Seidl-Hohenveldern explains that IEcL 'refers to those rules of public international law, which *directly* concern economic exchanges between the subjects of international law…', and his study specifically

1 The roots of modern IEcL can be found in natural law and lex mercatoria. Mark W. Janis, *An Introduction to International Law*, 2nd ed. (Boston: Little, Brown and Company, 1993), at 274–78; Benn Steil and Marcus Hinds, *Money, Markets, and Sovereignty* (New Haven: Yale University Press, 2009), at 11–26.

2 Because the acronym 'IEL' is often used for international environmental law, I employ IEcL as a new acronym for international economic law.

3 See Detlev F. Vagts, 'International Economic Law and the *American Journal of International Law*', 100 *American Journal of International Law* 769 (2006), at 769 (noting that the scope of international economic law is controversial).

omits 'aspects of international law as are *indirectly* affected by economic activities….'[4] According to David Bederman, IEcL 'subsumes a host of issues. At the minimum, it includes (1) the background rules of private international commerce, (2) the architecture of the global trading and monetary systems, and (3) the principles for international development and investment'.[5] Anthony Aust suggests that IEcL 'is a convenient term to cover mainly the multitude of bilateral and multilateral treaties made since the Second World War on trade, commerce and investment'.[6]

Obviously, these three definitions are inconsistent with each other. Bederman includes the United Nations (UN) Convention on Contracts for the International Sale of Goods (CISG) in his treatment of IEcL while Seidl-Hohenveldern does not. Seidl-Hohenveldern does not explain how to distinguish between activities that directly and indirectly affect economic exchange. Moreover, he includes a short chapter on 'Human rights of economic value', a set of rights which many would say only indirectly affect exchange. Aust does not include the rules of the International Monetary Fund (IMF) as part of IEcL, while Bederman and Seidl-Hohenveldern do. Perhaps the difficulty of mapping the field is why some scholars who organize projects about IEcL appear to dodge the knotty task of definition.[7]

An alternative approach is to emphasize IEcL as process. Commencing his masterful treatise 'International Economic Law' (2002), Andreas Lowenfeld ponders 'whether there is such a thing as international economic law, a body of law that can be subjected to systematic treatment between the covers of a book'.[8] Over 900 pages later, Lowenfeld concludes that IEcL 'is a process' and that 'Any attempt to define the law as of a given moment cannot help but distort'.[9] As Harold Koh has noted, Lowenfeld and colleagues had central roles in conceiving and championing the view of international law as international legal process.[10] This viewpoint enabled Lowenfeld, Abram Chayes, and others to seek to predict when transnational actors would comply with international law and to explain the nature of the international legal authority.

4 Ignaz Seidl-Hohenveldern, *International Economic Law*, 3rd rev. ed. (The Hague: Kluwer Law International, 1999), at 1 (emphasis added). The 'subjects' of international law are defined broadly in his book to include international organizations, multinational enterprises, NGOs, and individuals.

5 David J. Bederman, 'International Economic Law', in Bederman (ed.), *International Law Frameworks* (New York: Foundation Press, 2001), ch. 13, 141.

6 Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), at 372.

7 For example, see Meredith Kolksy Lewis and Susy Frankel (eds), *International Economic Law and National Autonomy* (Cambridge: Cambridge University Press, 2010) (lacking any definition of IEcL); Todd Weiler and Freya Baetens (eds), *New Directions in International Economic Law. In Memoriam Thomas Wälde* (Leiden: Martinus Nijhoff Publishers, 2011) (lacking any definition of IEcL); Chios Carmody, Frank A. Garcia and John Linarelli (eds), *Global Justice and International Economic Law* (Cambridge: Cambridge University Press, 2012) (lacking any definition of IEcL); Freya Baetens and José Caiado (eds), *Frontiers of International Economic Law* (Leiden: Brill Nijhoff, 2014) (lacking any definition of IEcL).

8 Andreas F. Lowenfeld, *International Economic Law*, 2nd ed. (Oxford: Oxford University Press, 2008), at v. Lowenfeld, an original member of the editorial board of this Journal, and mentor to many IEcL scholars, passed away in June 2014.

9 Ibid, at 926.

10 Harold Hongju Koh, 'Why do Nations Obey International Law', 106 *Yale Law Journal* 2599 (1997), at 2618.

In this article, I explore the nature of IEcL. Defining IEcL starts with the ordinary meaning of those three words. In being *international,* IEcL is law that applies to transactions that cross borders. A crossed border can mean anything spatially from a land frontier to transcending the entire planet. Once there is a crossing of a border, then the transborder matter is no longer within the sole jurisdiction of one state. As more and more matters cross borders, the province of international law will grow. This trend was apparent even by 1925 when William E. Rappard predicted that 'Little by little the boundaries of what is held to be solely within the domestic jurisdiction of individual States are receding and the realm of what is governed by international law is expanding'.[11]

The *economic* in IEcL refers to the economy itself and perhaps also to economic analysis. Production in an economy is a function of how efficiently the four factors of production—land, labor, capital, and management—are used. Economics becomes international when it considers external effects on a domestic economy.

One of the early users of the term 'world economy' was Josef Grunzel who in 1916 observed that 'There cannot be a world economy or international economy' then existing 'because a world-will which would rank above the national wills and in which they would find expression does not exist'.[12] Ten years later, Grunzel's nihilism had been passed by. For example in 1925, Albert Thomas, the Director of the International Labour Office (ILO) called for intergovernmental efforts to develop a 'world economy … out of the interdependence of national economies,' and to give a 'formal status' to the world economy.[13]

Once the world economy is acknowledged, a core question of international economics is what policies are most conducive to boosting economic growth and human welfare. Some of the needed policies will be macro (e.g. addressing currency imbalances) while many others will be micro (e.g. tax incentives for innovation). Still other needed policies are institutional (e.g. clear property rights). Problems arise when actions in one polity or in one market imposes uncompensated effects on another polity or market. This phenomenon is referred to as international externalities. When there is a need for law to govern such national or international policies, that law is part of IEcL. Indeed, Eric Posner and Alan Sykes go so far to argue that 'most international law may be understood as an effort to orchestrate cooperation in the face of international externalities …'.[14]

The word *law* in IEcL includes treaty and customary law, as well as soft law. In contrast to other areas of public international law, IEcL tends to be positive law rather than customary.[15] A law of the world economy could possibly apply to three phenomena: (i) rules as between states, (ii) rules for how states treat individuals,

11 William E. Rappard, *International Relations as Viewed from Geneva* (New Haven: Yale University Press, 1925), at 127.

12 Josef Grunzel, *Economic Protectionism* (Eugen von Philippovich ed., Oxford: Oxford University Press, 1916), at 3.

13 Albert Thomas, *International Social Policy* (Geneva: ILO, 1948), at 108.

14 Eric A. Posner and Alan O. Sykes, *Economic Foundations of International Law* (Cambridge: Belknap Press, 2013), at 20.

15 Yusuf Aksar, 'International Economic Law', in Y. Aksar (ed.), *Implementing International Economic Law Through Dispute Settlement Mechanisms* (Leiden: Martinus Nijhoff Publishers, 2011), at 5, 31.

and (iii) rules for individual to individual transactions. Rather than being included in IEcL, this third category, the law of individual private transactions, is often called 'private international law' and is distinguished from *public* international economic law. Although such a distinction can be justified, the better argument is that the basic treaties authored by the UN and its Commission on International Trade Law (UNCITRAL), such as the CISG and the New York Convention,[16] are important laws for the world economy and hence are part of IEcL.[17] In addition, law in IEcL needs to go beyond so-called hard law and also include the vital nongovernmental standard-setting that effectively regulates private economic actors.[18]

Using the above definitions of international, economic, and law, we can begin to map out the province of IEcL. It would include legal norms in the law of World Trade Organization (WTO) such as alien investor rights (Mode 3 services), anti-counterfeiting, bounties/subsidies, commodities and raw material, competition/antitrust, conservation of nature, copyright, currency and exchange, customs and publicity, development and development assistance, double taxation, government procurement, multilateral economic sanctions, patents, sanitary measures, services regulation, state enterprises, technical standards, telecom, temporary migration (Mode 4 services), trademarks, and transit. It would also include international legal norms that are not part of the WTO such as those regulating banking, belligerent occupation,[19] civil aviation, corruption, data privacy, emigration, energy security, expropriation, fisheries, forestry, the internet, maritime and shipping, odious trade (e.g. sodium pentothal), population, rivers, sex trafficking, sovereign lending, space, statistics, transborder insolvency, weights and measures, and wildlife trade. In other words, the intersection of international + economic + law yields a very broad body of law.

Yet perhaps too broad. Consequently a reconsideration of method may be required. To keep IEcL from swallowing everything, a fourth delimiter can to be brought into play. One possibility is to insist that a body of law have internal coherence. In other words, a body of law needs to be based on unifying principles (e.g. economic logic) or motivated by an underlying theory of law. In that regard, some authors have made a distinction between the core of IEcL with its so-called direct economic dimension and the 'penumbra' of 'indirect economic implication' including, for example, environmental concerns.[20]

Is that the character of IEcL? Thirty years ago, a leading scholar of IEcL opined: 'No general theory of international economic law has yet been fully developed in the

16 See Diane P. Wood, 'Private Dispute Resolution in International Economic Law', in Andrew T. Guzman and Alan O. Sykes (eds), *Research Handbook in International Economic Law* (Cheltenham: Edward Elgar, 2007), 575–97 at 578–81.

17 Matthias Herdegen, *Principles of International Economic Law* (Oxford: Oxford University Press, 2013), at 10.

18 Steil and Hinds, above n 1, at 26–32 (terming this 'Modern Lex Mercatoria').

19 See Ernst Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington: Carnegie Endowment, 1942).

20 Asif H. Qureshi and Andreas R. Ziegler, *International Economic Law*, 2nd ed. (London: Sweet & Maxwell, 2007), at 14. The authors devote laudable attention to defining IEcL.

literature.'[21] Today, I would reach the same conclusion while noting a literature has emerged on the core principles of the WTO and world trade law.[22]

Rather than a careful build out of IEcL as a concept, the emphasis of most international scholars and practitioners has been to fructify specialized bodies of public international law without necessarily classifying them as part of IEcL. Over the past century, this has happened with the law of culture, development, environment, human rights, intellectual property, labor rights, monetary and currency issues, the sea, and telecom. Each of these areas of law has its own treaties, international organizations, and regimes. Some are regularly invited by the WTO to cooperate (e.g. the IMF); some are only rarely invited (e.g. the ILO). The growth of these bodies of law has been inspirited by new technology and better communication for the transmission of norms. The importance of this functional approach to international governance was recognized by the political theorist Leonard Woolf in 1916 and the political scientist David Mitrany in 1933. Philip C. Jessup championed a 'functional approach as applied to international law' in 1928 when he defined the functional approach as 'an attempt to correlate rules of law with the forms of human activity which they purport to regulate or from which they spring'.[23]

The remainder of this article will proceed as follows: Section II provides a partial timeline for some of the key human activity pointing the way toward the development of rules for the world economy. Although this essay will not seek to reframe IEcL, Section III will discuss the historical development of the term and meaning of IEcL and highlight the most important scholarship written in English.[24] In Section IV, this article will conclude with a discussion of the 'linkage' challenge to IEcL, and will offer some thoughts as to the road ahead.

II. MILESTONES TOWARD BUILDING THE WORLD TRADING SYSTEM

As context for a discussion of the scholarship on IEcL beginning in the mid-20th century, it will be useful to make available a timeline for the policy developments that preconditioned that scholarship. A timeline for all of IEcL would be too lengthy for a short essay, but it would be possible to construct a timeline underlying the

21 Pieter VerLoren van Themaat, *The Changing Structure of International Economic Law* (The Hague: T.M.C. Asser Institute, 1981), at 13. In a 2008 contribution to the literature, Tomer Broude argues that IEcL purports 'to be the *legal expression and practical transduction of economic theory*, the body of international rules that enables the discipline of economics to transform itself from theory to practice'. Tomer Broude, 'An End of the Yellow Brick Road: International Economic Law Research in Times of Uncertainty', in Colin Picker, Isabella D. Bunn and Douglas W. Arner (eds), *International Economic Law. The State and Future of the Discipline* (Oxford and Portland: Hart Publishing, 2008), 15–28 at 20.

22 For example, see José E. Alvarez (ed.), 'Symposium: The Boundaries of the WTO', 96 *American Journal of International Law* 1 (2002); Donald H. Regan, 'What Are Trade Agreements For? – Two Conflicting Stories Told by Economists, With a Lesson for Lawyers', 9 *Journal of International Economic Law* 951 (2006); and the ongoing American Law Institute Project on Legal and Economic Principles of World Trade Law (organized by Lance Liebman and Petros Mavroidis).

23 Remarks of Professor Jessup, in *Proceedings of the Third Conference of Teachers of International Law* (Washington: Carnegie Endowment, 1928), at 134.

24 One clear omission is the German scholars such as Georg Erler and Rolf Stödter.

construction of the world trading system in the late 1940s. From the scholarship that I am aware of, the trading system is a common element of everyone's concept of IEcL.

The core nondiscrimination standards of most-favored-nation (MFN) treatment and national treatment hark back many centuries. According to Georg Schwarzenberger, writing in 1945, a nonreciprocal MFN guarantee had become a fixture of treaties concluded by England by the end of the 15th century.[25] Looking at early 20th-century practice, Schwarzenberger further explained that 'exceptions on grounds of international public policy are overriding and suspend the operation of the m.f.n. standard'.[26] As an example, he pointed to import or export prohibitions that were obligations of international agreements (e.g. opium).

For centuries, some leading governments have negotiated treaties on commerce and amity that covered not only tariffs and customs, but also fair treatment of persons operating abroad as merchants, commercial associations, or commercial travelers.[27] For example, a US–Venezuela Treaty of 1860 provided that citizens of either country could 'enter, sojourn, settle and reside' in the territory of the other with the right to engage in business; to hire and occupy warehouses; to employ agents and brokers; and to have free access to the tribunals of justice on the same terms as native citizens.[28] The Treaty also provides a minimum standard of 'perfect liberty of conscience' for citizens of one party residing in the other.[29] The Peace, Friendship, and Commerce treaty between China and Great Britain signed in 1858 contained a labor market provision committing the Chinese government to place no restrictions on the employment (in any lawful capacity) of Chinese workers by British nationals in China.[30] Looking back at this mountain of treaty practice from the perspective of the mid-20th century, Georg Schwarzenberger took note of how 'A good many of the minimum standards fixed in these treaties grew into rules of international customary law and thus became available to the other subjects of international law'.[31]

In 1890, governments constituted the International Union for the Publication of Customs Tariffs. Today, this Union operates under the name of the International Customs Tariff Bureau. The Bureau publishes translations of customs tariffs into five official languages and was the rudimentary beginning of the world trading system.

The first convention and international organization to address the problem of subsidies in international trade was the International Sugar Union of 1902 and its

25 Georg Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice', 22 *British Year Book of International Law* 96 (1945), at 97.

26 Ibid, at 120.

27 William Smith Culbertson, *International Economic Policies* (New York: D. Appleton and Company, 1925), at 26; William Malkin, 'International Law in Practice', 49 *Law Quarterly Review* 489 (1933), at 500; Georg Schwarzenberger, 'International Law in Early English Practice', 25 *British Year Book of International Law* 52 (1948), at 86.

28 Treaty of Amity, Commerce, Navigation, and Extradition, 27 August 1860, 2 Malloy 1845, Article III.

29 Ibid, Article IV.

30 Treaty of Peace, Friendship, and Commerce between Great Britain and China, 26 June 1858, *Handbook of Commercial Treaties* 50 (3rd ed. 1924), Article 13.

31 Georg Schwarzenberger, 'The Protection of Human Rights in British State Practice', in George W. Keeton and Georg Schwarzenberger (eds), *Current Legal Problems* 1948 (London: Stevens and Sons, 1948), vol. 1, 152–69, at 162 (footnote omitted).

Permanent Commission. Members were bound to conform their sugar bounties to the Convention and to impose countervailing duties against nonsignatory States. The Commission acted by majority voting and by 1920, disagreement among members led to its dissolution.[32]

The first decade of the 20th century saw the introduction of treaties prohibiting trade in a particular product for public policy reasons. For example, in 1902, the Convention for the Protection of Birds Useful to Agriculture forbade the importation and sale of designated birds. In 1906, a Convention was agreed to for the Prohibition of the Use of White Phosphorus in the Manufacture of Matches. The Convention prohibits the importation of such matches and their domestic sale. The main purpose of the Convention was to protect match workers from a noxious occupational disease, but there was also some indication that the phosphorus was harmful to consumers.

In 1913, a multilateral agreement was effectuated to establish an International Bureau on Commercial Statistics.[33] The Bureau published a bulletin reporting import and export data. According to one source, the Bureau was dissolved in 1935 at one of the low points of international trade cooperation.

In 1916, the British economist John A. Hobson, wrote an important book titled *Toward International Government*. After taking note of the 'immense and ever-growing field of constructive international co-operation', Hobson called for an International Council to restructure this cooperation 'to a common, intelligible, and reliable system, with provisions for periodical revision and improvement…'.[34] Hobson was a creative thinker who saw connections among different aspects of economic policy. For example, he pointed out that 'The utilization of the economic resources of the world for the benefit of the world demands the open door, not only for trade and for capital but for labour.'[35] He also took note of the 'tendency of powerful States to domineer over Weaker States', and suggested that this problem 'can only be remedied by a more intelligent co-operation of the weaker members on the one hand, and by an increasing sense of human solidarity upon the other'.[36]

The Peace Treaties of 1919 (Treaty of Versailles) contained many economic provisions. The Covenant of the League of Nations committed the Members of the League to 'make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League'.[37] The Peace Treaty also gave Germany an opportunity to make commitments to the Allied and Associated States regarding foreign trade. Specifically, Germany agreed not to discriminate with respect to customs regulations, import duties, internal

32 Bob Reinalda, *Routledge History of International Organizations* (London: Routledge, 2009), at 126–28.

33 Convention for the Establishment of an International Office of Commercial Statistics, with common list of goods, regulations of the Office, and protocol, 31 December 1913, 116 BFSP 575; 'International Bureau of Commercial Statistics' in League of Nations, *Handbook of International Organizations* (Geneva, League of Nations, 1938) 362.

34 J. A. Hobson, *Towards International Government* (New York: The MacMillan Company, 1916), at 117.

35 Ibid, at 142.

36 Ibid, at 145–46.

37 Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919, Article 23. The Peace Treaty with Austria (Treaty of Saint-Germain contained a provision that was interpreted by the Permanent Court of International Justice in 1931 as forbidding Austria from entering into a Customs Union with Germany.

charges, import prohibitions, and export duties and prohibitions.[38] These disciplines were asymmetrical as the Allies did not take on parallel commitments to Germany or to each other.

The Treaty of Versailles also contained the constitutional provisions of the ILO which contained several substantive understandings and procedural innovations that were to influence international law over the ensuing century. Among the substantive understandings were: (i) a recognition that 'differences in climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment' and (ii) a recognition that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries'.[39] Among the procedural innovations were: (i) the establishment of an elected ILO Governing Body, (ii) tripartite representation of States by delegates from governments, workers organizations, and employer organizations, (iii) the use of an Annual Conference to adopt conventions through voting based on a two-thirds majority requirement, and (iv) the establishment of a detailed system for the resolution of complaints by governments, the ILO itself, workers and employers.

ILO lawmaking addressed a myriad of issues relating to the international economy. For example in 1925, the ILO adopted the Equality of Treatment (Accident Compensation) Convention (No. 19) to require national treatment with respect to workmen's compensation following an industrial accident injuring a foreign worker.[40] In 1919, the ILO adopted the Anthrax Prevention Recommendation (No. 3) that called on governments to make arrangements for the disinfection of wool infected with anthrax spores either in the country exporting such wool or at the port of entry.

The League of Nations moved quickly to set up committees to address its policy responsibilities. There was an Economic Committee, a Financial Committee, a Communications and Transit Committee, and many others. The Economic Committee was especially active. One of its early successes was to spearhead the diplomatic conference adopting the International Convention relating to the Simplification of Customs Formalities of 1923. As John H. Jackson has noted, this Convention covered many matters now treated in the General Agreement on Tariffs and Trade (GATT).[41]

The year 1927 was an incubus for international economic cooperation. The Economic Committee worked to organize a diplomatic conference that adopted the International Convention for the Abolition of Import and Export Prohibitions and Restrictions. Although ratified by the United States, this Convention failed to come into force definitively. At the same time, the Economic Committee worked to organize the World Economic Conference of 1927 which was convened as an expert rather than a diplomatic conference. Thus, the attending delegates did not speak for

38 Treaty of Versailles, Articles 264–70.

39 Ibid, Part XIII Preamble and Article 427.

40 Convention Concerning Equality of Treatment for National and Foreign Workers as Regards Workmen's Compensation for Accidents No. 19, 5 June 1925, 3 Hudson 1616.

41 John H. Jackson, *The World Trading System. Law and Policy of International Economic Relations* (Cambridge, MA: The MIT Press, 1989, 1992), at 31.

governments even when they were government officials. The Conference issued a number of proposals for future multilateral action—for example, a treaty for execution of arbitral awards and a systematic customs nomenclature. The 1927 Conference also called on governments to 'remove or diminish those tariff barriers that gravely hamper trade' and to 'refrain from having recourse' to 'direct or indirect subsidies'.[42]

The Economic Committee spent years studying MFN and seeking ways to improve its legal language.[43] When the GATT was drafted in 1947, MFN was formulated as being unconditional,[44] and this rule has been strengthened through interpretation in many GATT and WTO dispute cases. Most recently in 2010, a trade law panel for the first time held that GATT Article I:1 would cover an import ban.[45]

The other League committees also left important legacies to IEcL. For example, the Communications and Transit Committee laid the groundwork for the Barcelona Conference of 1921 which produced the Convention and Statute on Freedom of Transit and the Convention on the Regime of Navigable Waterways of International Concern. The Financial Committee promoted the negotiation of the Convention for the Suppression of Counterfeiting Currency of 1929.

In 1933, the League of Nations Assembly convened the International Monetary and Economic Conference (London Conference). True, the Conference did not succeed in achieving trade and currency stability, but in my view the Conference has been unfairly maligned as a failure. Looking back, it is clear that the Conference left an important policy legacy[46] including: groundwork on the production and marketing of commodities that led to the negotiation of several intergovernmental commodity agreements (e.g. wheat and sugar); agreed-upon principles of monetary policy and the role of gold as the international measure of exchange value; agreed-upon principles on the need for independent central banks with requisite powers to carry out currency and credit policy; and recognition of the need for a diplomatic conference to address indirect protectionism via veterinary standards. The ensuing diplomatic conference was held in 1935, and three international conventions were signed for animal sanitary standards and the transit and trade of animal products.

Besides what was going on within the League of Nations, there was also international economic cooperation being accomplished elsewhere. For example in February 1923, an international conference of Central American countries was held in Washington, DC where 14 treaties were signed. The most trade-related among

42 Report of the World Economic Conference, 134 Annals of the American Academy of Political and Social Science 174 (1927), at 188, 191.

43 John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: The Bobbs-Merrill Company, Inc., 1969), at 250–51.

44 See VerLoren van Themaat, above n 21, at 333 ('Thus GATT is the logical conclusion of the centuries-old most-favoured-nation clause'.).

45 WTO Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China,* WT/DS392/R, adopted 25 October 2010, para 7.410. In my view, this holding was teed up when the panel perceived (or misperceived) the US. measure as coming under GATT Article XI rather than Article III:4.

46 Norman Hill, *The Economic and Financial Organization of the League of Nations* (Washington: Carnegie Endowment, 1946), at 64–67.

them were the Convention on the Establishment of Free Trade and the Convention on the Practice of the Liberal Professions.

In 1940, at the Annual Meeting of the American Society of International Law, Secretary of State Cordell Hull introduced Huston Thompson to make an Address calling for 'An International Trade Tribunal'.[47] Back in 1919, Huston had advised President Woodrow Wilson to seek a World Trade Tribunal at the Paris Peace Conference. After the Conference, Wilson told Huston, according to Huston, that the language in the Treaty about the economic role of League of Nations could be a sufficient foundation for such a Tribunal. In his 1940 Address, Huston lamented that such a Tribunal had not been set up and renewed his call for its establishment. Huston's proposed Tribunal was to have jurisdiction over economic questions between individuals of nations, such as price fixing, theft of trademarks, dumping, and quotas.

My timeline will end with the UN Conference on Trade and Employment of 1947–48, and will not say much about it because most readers will be familiar with the Havana Charter and its sad fate. But I do want to underline the broad regime that the Charter of the International Trade Organization envisioned. Besides the commercial policy matters now in the GATT, the Charter covered employment policy and fair labor standards, economic development and reconstruction, restrictive business practices, and intergovernmental commodity agreements.

III. CHAMPIONS OF 'IEcL'

Section III identifies the early adopters of the term 'international economic law' and provides a brief overview of the contributions of the leading exponents of IEcL who have defined, developed, and redefined the field.[48] The first publicist for the term 'international economic law' that I have been able to uncover was Ernst Feilchenfeld in his 1938 book *The Next Step. A Plain Man's Guide to International Principles*.[49] A major argument in his book is that the State has a responsibility to maintain adequate legislation and organization both in its domestic interest and to prevent spillovers of economic misery to other countries.

According to Feilchenfeld, the role of IEcL is to provide 'coherent legislative solutions for interdependent problems…'.[50] Perhaps because it was written for the plain man of 1938, a casual reader today will find the book eccentric. A more careful reader will see some nuggets of wisdom as the book manifests early insights into future challenges of international economic policy. For example, the book discusses the problem of getting States to accept proposed solutions and notes that sometimes States see 'what the reformer often does not see, that certain measures (such as for

47 Huston Thompson, 'An International Trade Tribunal', 34 *Proceedings of the American Society of International Law* 1 (1940). Secretary Hull also found time to serve as the President of the ASIL.

48 For reasons of space, I exclude some contemporary writers whose full impact on the field will need to be judged by future scholars.

49 Feilchenfeld was born in Berlin and studied at the London School of Economics. He worked for the US Treasury Department prior to World War II and after the War became a Professor of International Organizations and Law at Georgetown University.

50 Ernst H. Feilchenfeld, *The Next Step. A Plain Man's Guide to International Principles* (Oxford: Basil Blackwell, 1938), at 22–23.

instance free trade) are not acceptable unless a number of other problems are solved simultaneously…'.[51] A year later, Feilchenfeld became the first person to use the term IEcL in the *American Journal of International Law*. He did so in a book review where he juxtaposed IEcL with international law.[52]

Feilchenfeld later served as Director of the Institute of World Polity in Washington, DC from its formation in 1945 until his death in 1956.[53] The Institute was part of the Georgetown University School of Foreign Service, with the stated purpose of creating 'an organization for systematic research and discussion of questions affecting international relations and the foreign policy of the United States'.[54] Listed among the Institute's nine 'Immediate Problems' to address was the 'Legal Balance Sheet of the United States', which Feilchenfeld described as 'the rights and obligations of both the American Government and American citizens in the financial and economic field'.[55]

The Institute also listed several 'Long Range Problems' relating to IEcL, including public finance and monetary systems; economic demobilization post-World War II; international commercial policy, tariffs, reciprocal trade agreements, and foreign trade; international loans and investments; and cartels.[56] Although the Institute published three volumes under the title *World Polity*, the Institute never fully realized its imagined role and languished after the death of Feilchenfeld in the mid 1950s.[57] The Institute ceased operation in the late 1960s.[58]

If anyone should be recognized as the father of IEcL, it is Georg Schwarzenberger (1908–91), a Professor of International Law at the University of London, who began writing on IEcL in 1942[59] and authored seminal articles over three decades. In 1948, he pointed out the need for establishing special branches of international law and sought to define the province of IEcL within public international law. In his view, IEcL included MFN[60] and national treatment, commercial treaties, protection of

51 Ibid, at 69.

52 Ernst H. Feilchenfeld, 'Book Review of *World Finance* by Paul Einzig', 33 *American Journal of International Law* 427 (1939), at 428.

53 See Bulletin 5 of the Institute of World Polity: Institute Plans for the Creation of a Foreign Law Division of the United States Government, List of Members, 25 May 1946; see also Georgetown University Library, Professor Ernst H. Feilchenfeld Memorial Book Endowment Fund, available at http://www.library.georgetown.edu/giving/endowments/feilchenfeld (visited 12 August 2014).

54 The Institute of World Polity, *World Polity*, Volume I (Georgetown University: Spectrum Publishers, 1956). The Institute strived to conduct independent research to counterbalance that of international organizations, which the Institute criticized as overly dominant in academic fields and as subject to government influence. Ibid.

55 Minutes of the First Meeting of the Institute of World Polity, 13 June 1945. Feilchenfeld further noted that with the end of the Second World War, 'we face the problem of finding new levels of stability in financial and economic intercourse'.

56 Institute of World Polity, Institute Agenda, 20 January 1945. Other problems identified by the Institute include international public aid, armistice terms, belligerent occupation, state succession, education, and social justice.

57 The three yearbooks were published in 1957, 1960, and 1964.

58 Available administrative correspondence and other materials end on in 1966, although the Institute was listed on the Georgetown University Register until 1976.

59 Georg Schwarzenberger, *The Development of International Economic and Financial Law by the Permanent Court of Justice*, Juridical Review LIV, April 1942. Thanks to Dame Rosalyn Higgins for sharing her recollections of Professor Schwarzenberger.

60 Three years earlier, Schwarzenberger had written an article on MFN noting that it 'answers to constant needs of international society, and it suggests that the functions fulfilled by the [MFN] standard are not

property abroad, the Calvo Clause, the Porter Convention, monetary agreements, State loans and other State contracts, methods of international financial control, trading with the enemy, the economic law of military occupation, protection of neutral property, the law of reparations, and the law of international economic and financial institutions.[61] IEcL was largely treaty law for the 'same social purpose',[62] he explained, because the offshoots modified the baseline of international customary law. In some areas, however, IEcL had become customary law; for example, he pointed to new rules establishing minimum rights of foreigners. Schwarzenberger was among the earliest scholars to appreciate how legal commitments to afford rights to resident foreign nationals would lead to a transformation of municipal law in order to endow similar rights to nationals.[63]

Writing in 1948, Schwarzenberger devoted considerable attention to the new GATT. He predicted that the effect of the GATT would be 'to limit—however slightly—economic sovereignty by the silken cords of *pacta de contrahendo*', and to create 'an international economic organ not condemned merely to study, report and recommend, but authorized to act and decide'.[64] It is also interesting to note that Schwarzenberger may have been the first commentator to have 'singled out for special comment' GATT Article X:3 as an international minimum standard that 'makes it incumbent on States to grant a certain minimum of justice and judicial protection to foreign nations and companies…'.[65] His article also explains that while IEcL 'may be very junior as an academic discipline', it may 'lay claim to considerable seniority' because the relevant treaty practice going back 800 years.[66]

In 1966, Schwarzenberger gave a Hague Academy lecture on IEcL that refined his previous scholarship. On the matter of definition, he explained:

> …it is probably advisable to exclude from International Economic Law topics, which, in the abstract might be included, such as International Labour Law, International Social Law, International Transport Law, and the Law of International Copyrights and Industrial Design. These aspects of International Economic Law in the widest sense are sufficiently coherent, self-contained and important to form specialized branches of international law on their own.[67]

essentially affected by the peculiarities of time or place or by differences in social and economic systems'. Schwarzenberger, above n 25, at 98.

61 Georg Schwarzenberger, 'The Province and Standards of International Economic Law', 2 *International Law Quarterly* 402 (1948), at 405. The Porter Convention is also known as the Drago Doctrine on the nonuse of force to recover debts.

62 Ibid, at 409.

63 Schwarzenberger, above n 25, at 106.

64 Schwarzenberger, above n 61, at 420.

65 Ibid, at 417.

66 Ibid, at 409.

67 Georg Schwarzenberger, 'The Principles and Standards of International Economic Law', 117 *Recueil des Cours* 1 (1966 I), at 8. In an article written in 1971, Schwarzenberger showed continued indecision about the dividing line by arguing that International Labor and Social law 'are merely on the fringes of International Economic Law'. Georg Schwarzenberger, 'Inequality and Discrimination in International Economic Law (I)', 25 *Yearbook of World Affairs* 163 (1971), at 171.

He also pointed out how the treaty-based rules for the treatment of foreign merchants laid the foundation for the rule on the minimum standard of treatment of foreign nationals in customary international law. Looking back at the Havana Charter, he remembers it as 'the high watermark in the post-1945 world of liberal and social democratic thinking in the field of international economic relations'.[68]

Although Schwarzenberger became the leading scholar of IEcL in the late 1940s, there were also other writers who used that term. For example, in a book review written in 1949, Leslie C. Green noted 'the growing significance of international economic law', and pointed to the problem of double taxation.[69] In 1950, D. Hughes Parry heralded the appearance of 'A new branch of "International Law" called "International Economic Law" ' and noted that it had become a popular course at the University of London.[70]

One does not see the term 'international economic law' used extensively in international law literature during the 1950s, 1960s, or 1970s. But it does occasionally appear. For example in 1968, Stephen A. Silard wrote an article on international monetary cooperation, especially in the IMF, in which he sees 'a growing body of practices which may well be recognized some day as rules of customary international economic law'.[71]

The IEcL term was reborn in the early 1980s perhaps as a result of the 1981 treatise by Pieter VerLoren van Themaat titled *The Changing Structure of International Economic Law*. In that book's Preface, VerLoren van Themaat explained that he chose this title in memory of Wolfgang Friedman and in honor of Friedman's *The Changing Structure of International Law*.[72] VerLoren van Themaat defines IEcL as the 'total range of norms (directly or indirectly based on treaties) of public international law with respect to transnational economic relations', a definition that excludes customary international law and international private law.[73] His treatise seeks to update Schwarzenberger's definition[74] by adding in the regulation of energy and raw materials, transport, telecom, aid to developing countries, control of multinational enterprises, and environmental protection. His book also examines international economic organizations and dispute settlement, and he is attentive to the fact that 'non-governmental economic parties often have an even greater influence on the international economic process than the states themselves'.[75]

68 Schwarzenberger, 'The Principles and Standards of International Economic Law', ibid, at 89.

69 Leslie C. Green, 'Book Review of *International Arbitral Awards* and *International Tax Agreements*', 1 *Journal of the Society of Public Teachers of Law* 322 (1949), at 324.

70 D. Hughes Parry, 'The Place of Constitutional Law and International Law in Legal Education', 2 *Journal of Legal Education* 428 (1950), at 432. The course was taught by his colleague Professor Schwarzenberger. The topical syllabus appears Georg Schwarzenberger, 'On Teaching International Law', 4 *International Law Quarterly* 299 ((1951) at 305 (Appendix).

71 Stephen A. Silard, 'The Impact of the International Monetary Fund on International Trade', 2 *Journal of World Trade Law* 121 (1968), at 132.

72 VerLoren van Themaat, above n 21, at xxiv. Friedman, a renowned international law professor at Columbia University, had been murdered during a daytime robbery in 1972 in Morningside Heights and bled to death in a notorious episode of bystander apathy.

73 VerLoren van Themaat, above n 21, at 320.

74 VerLoren van Themaat stylizes Schwarzenberger's definition as including reciprocity, MFN, open door, preferential treatment, cooperation, and equity and fair treatment. Ibid, at 322.

75 Ibid, at 353.

Shortly thereafter, the term IEcL began seeing greater use. In 1982, Norbert Horn authored a thoughtful article on the New International Economic Order which employs the term 'international economic law' in a relaxed way without attention to definition.[76] In 1983, an Interest Group on International Economic Law was established within ASIL. In 1987, the *Revue Internationale de Droit Economique* begins publishing.[77] In 1990, excellent teaching material is published under the title *Basic Documents of International Economic Law*.[78] In 1991, Ernst-Ulrich Petersmann authored a book with the term 'International Economic Law' in the title.[79]

The second treatise (in English) on IEcL is written in 1989 by Ignaz Seidl-Hohenveldern based on Hague Academy lectures delivered in 1979 and 1986. His treatise contains chapters on the subjects of law, sovereignty, sources of law, the State, the individual in IEcL, State responsibility, and dispute settlement in IEcL, among others. Seidl-Hohenveldern concludes that 'the rules of international economic law… belong to the category of international law rules based on reciprocity whose prospect of being respected is relatively greater than that of rules based either on the mere authoritarian *fiat* of a "leading" power, or on altruistic enthusiasm for a noble ideal'.[80]

Perhaps the greatest champion of the concept of IEcL has been John H. Jackson. Jackson wrote an entry on that term in the *Encyclopedia of Public International Law* of 1985 and also employed the term at the beginning of his well-received 1989 book, *The World Trading System*.

Jackson began that discussion by noting that the IEcL term 'is not well defined', and pointing to both a very wide and a more restrained definition.[81] Jackson does not specify a definition, but notes that he will avoid the rigid bifurcation between monetary and trade law and between international and domestic rules.

In 1994, the ASIL Interest Group held a conference on Interdisciplinary Approaches to IEcL where Jackson's contributions are celebrated by David Kennedy who had written a nice essay with the memorable title of 'The International Style in Postwar Law and Policy'. In that essay, Kennedy examined the contributions of two texts: Hans Kelsen's *Law and Peace in International Relations* (1941) and Jackson's *World Trading System*. Although Kennedy notes Schwarzenberger's work over four decades earlier, he credits Jackson with introducing and presenting a 'New Discipline of International Economic Law'.[82]

76 Norbert Horn, 'Normative Problems of a New International Economic Order', 16 *Journal of World Trade Law* 338 (1982), at 345, 350.

77 Stephen Zamora, 'International Economic Law', 17 *University of Pennsylvania Journal of International Economic Law* 63 (1996), at 65 n 4.

78 Stephen Zamora and Ronald A. Brand (eds), *Basic Documents of International Economic Law* (Chicago: Commerce Clearing House, 1990).

79 Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community, and Switzerland* (Boulder: Westview Press, 1991).

80 Seidl-Hohenveldern, above n 4, at 169.

81 Jackson, above n 41, at 21, 312 (referencing recent works in French and Italian on IEcL).

82 David Kennedy, 'The International Style in Postwar Law and Policy', 1994 *Utah Law Review* 7 (1994), at 63, 67–69.

At the ASIL Interest Group conference, Kennedy extracted and presented the portion of his essay discussing Jackson.[83] Jackson also participated in the conference and his conference paper is published with the title 'International Economic Law: Reflections on the "Boilerroom" of International Relations'.[84] In that article, Jackson explains that IEcL embraces the law of economic transactions, government regulation of economic matters, and litigation and international institutions for economic relations. Because so much of international law work 'is in reality international economic law in some form or another',[85] Jackson notes, IEcL cannot be separated from public international law. In addition, he points to the value of a multidisciplinary approach to IEcL which embraces not only economics, but also political science, cultural history, anthropology, and geography. In another essay published from that same conference, Joel Paul suggests that IEcL includes 'all national and international legal norms that affect transnational movement of goods, services, capital and labor'.[86] Although there is much attractive in Paul's functional definition, the result is that IEcL seems to lose any internal coherence.

The term IEcL becomes further solidified in 1996[87] when the *University of Pennsylvania Journal of International Economic Business Law* is rechristened to the *University of Pennsylvania Journal of International Economic Law*. The first issue of the newly-named journal contains several excellent short articles on IEcL. For example, Ron Brand defines IEcL as embracing the rules governing relationships among private parties (including rules promulgated by the International Chamber of Commerce), as the rules governing relationships among sovereigns, and the rules governing relationships among sovereigns and private parties.[88] Robert Hudec reminds scholars that IEcL has a 'political theatre dimension' in which conflicting national positions are papered over without being resolved.[89] Joel Trachtman suggests that IEcL is revolutionary in collapsing the distinctions between international public and private law and by changing the underlying assumptions in public international law regarding the domain reserved to the state.[90] Stephen Zamora notes that IEcL is 'still striving towards increased recognition and definition', and offers his own succinct definition, namely that IEcL 'comprises a broad collection of laws and practices

83 David Kennedy, 'The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law', 10 *American University Journal of International Law and Policy* 671 (1995).

84 John H. Jackson, 'International Economic Law: Reflections on the "Boilerroom of International Relations', 10 *American University Journal of International Law and Policy* 595 (1995).

85 Ibid, at 596.

86 Joel R. Paul, 'The New Movements in International Economic Law', 10 *American University Journal of International Law and Policy* 607 (1995), at 609 n 9.

87 Also that year, Volume 18 of the *Cardozo Law Review* contained a symposium on 'The Decline of the Nation State and its Effect on Constitutional and International Economic Law'. None of the articles have much to say about IEcL.

88 Ronald A. Brand, 'Semantic Distinctions in An Age of Legal Convergence', 17 *University of Pennsylvania Journal of International Economic Law* 3 (1996), at 4.

89 Robert E. Hudec, 'International Economic Law: The Political Theatre Dimension', 17 *University of Pennsylvania Journal of International Economic Law* 9 (1996).

90 Joel Trachtman, 'The International Economic Law Revolution', 17 *University of Pennsylvania Journal of International Economic Law* 33 (1996).

that govern economic relations between actors in different nations'.[91] And there is also an essay by Jackson distilling four characteristics of IEcL.[92]

In 1998, Jackson launched this *Journal* as an international and interdisciplinary journal on IEcL. Over the past dozen years, the *Journal* has featured many essays exploring the meaning and evolution of IEcL. For example, in the first volume, Jackson postulated that IEcL can be divided into two broad approaches: viz., transactional and regulatory.[93] Also that year, a team of European scholars put forward the proposition that IEcL needed a 'human face'.[94]

In the 2000s, the scholarship on IEcL mushroomed beyond this author's capacity to stay current with it. With that said, a few scholarly markers should be noted. In 2001, Ernst-Ulrich Petersmann gave a comprehensive treatment to the relationship between IEcL and human rights.[95] In 2007, John Jackson offered a detailed list of the enormous challenges facing IEcL.[96] In 2009, Thomas Cottier called for a rethinking of IEcL following the financial crisis.[97] In 2012, Petersmann identified methodological and research questions for developing a common theory of IEcL, calling upon future contributors to the *Journal* to engage in a debate on this issue.[98]

A few other recent developments should be noted. In 2004, the *Manchester Journal of International Economic Law* commenced publication. In 2006, Joel Trachtman and WorldTradeLaw.net launched the influential International Economic Law and Policy Blog. The blog features posts on trade law, investor–state arbitration, currency issues, and development.[99] In 2008, the Society of International Economic Law (SIEL) was launched in Geneva and a fourth biennial conference will be held next year in Bern.[100] The idea for SIEL was initially floated at the November 2006 ASIL Interest Group conference, and was later implemented by some of the

91 Zamora, above n 77, at 63.

92 John H. Jackson, 'Reflections on International Economic Law', 17 *University of Pennsylvania Journal of International Economic Law* 17 (1996).

93 John H. Jackson, 'Global Economics and International Economic Law', 1 *Journal of International Economic Law* 1 (1998), at 8–9. It is also interesting to note that a *Festschrift* in Jackson's honor, published in 2000, was titled: *New Directions in International Economic Law*.

94 Friedl Weiss, Erik Denters and Paul de Waart (eds), *International Economic Law with a Human Face* (The Hague: Kluwer Law International, 1998).

95 Ernst-Ulrich Petersmann, 'Human Rights and International Economic Law in the 21st Century', 4 *Journal of International Economic Law* 3 (2001).

96 John H. Jackson, 'International Economic Law: Complexities and Puzzles', 10 *Journal of International Economic Law* 3 (2007).

97 Thomas Cottier, 'Challenges Ahead in International Economic Law', 12 *Journal of International Economic Law* 3 (2009).

98 Ernst-Ulrich Petersmann, 'JIEL Debate: Methodological Pluralism and its Critics in International Economic Law Research', 15 *Journal of International Economic Law* 4 (2012). Petersmann sets forth six possible conceptions for justifying IEcL: justice in dispute settlement, justice as efficiency, justice as libertarian freedom, justice as priority of constitutional rights over the common good, justice as communitarian democracy, and cosmopolitan justice.

99 International Economic Law and Policy Blog, http://worldtradelaw.typepad.com/ielpblog/ (visited 12 August 2014).

100 Society of International Economic Law, available at http://www.sielnet.org/ (visited 12 August 2014). The theme of the Bern Conference is 'Regulatory Challenges in International Economic Law: Convergence or Divergence'.

conference participants.[101] SIEL's mission is to serve as an umbrella organization that is 'academically focused, genuinely global in its reach, and highly inclusive—not only in its membership, but also in terms of the expertise and interests of participants'.[102] In 2010, a new European Yearbook of International Economic Law was launched.[103]

Recent scholarly works include international economic law in their titles and appear to favor a broad conception of IEcL. The editors of the 2011 book *The Politics of International Economic Law*[104] devote a footnote to the definition of IEcL, observing that although IEcL potentially encompasses a wide range of topics, it is usually identified with international trade law.[105] The editors adopt an inclusive definition of IEcL for the purposes of the book, including trade and investment law, economic integration law, private international law, business regulatory law, financial law, tax law, intellectual property law, and development law.[106] This broad definition gives liberty to the contributing authors to address the book's primary concern of the political dimension of international economic law-making and legal practice.[107]

In another recent work, *International Economic Law in the 21st Century*, Ernst-Ulrich Petersmann takes issue with the conventional concept of IEcL as concerned primarily with State actors to the exclusion of any theory protecting public international goods and human rights.[108] Petersmann does not expressly define IEcL, but observes that the current understanding of the term includes the multilateral trading system established after World War II, the WTO, the IMF, the World Bank, and UNCTAD.[109] This understanding, according to Petersmann, 'faces an unprecedented crisis requiring new thinking'.[110] In particular, Petersmann notes that IEcL lacks a theory of justice and should be designed to better protect 'global aggregate public goods' such as a 'mutually beneficial trading, financial and environmental system preventing climate change'.[111] His overall conclusion is that IEcL should be

101 Ibid. SIEL's founding Executive Council includes several scholars mentioned in this article, including John H. Jackson, Ernst-Ulrich Petersmann, and Thomas Cottier.

102 Ibid.

103 Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law* (Berlin: Springer, 2010).

104 Tomer Broude, Marc L. Busch and Amelia Porges (eds), *The Politics of International Economic Law* (Cambridge: Cambridge University Press, 2011).

105 As an example, the editors point out that although the *Journal of International Law* has 'worthy ambitions' of covering a wide range of law concerning international economic activity, the Journal's contents have predominantly been devoted to trade law issues. Ibid, at 1, n 1.

106 Ibid.

107 As the book explains it: 'Bismarck famously quipped that the less people know about how sausages and laws are made, the better they would sleep. This easily applies to international treaties, decisions of international institutions, and rulings of international tribunals. Along these lines, the request we made of our authors was not to help explain why sausages are made (or what international economic law is for), but rather to engage in the explicit study of sausage making (the making of law and law-based behavior).' Ibid, at 5 (internal citations omitted).

108 Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford and Portland: Hart Publishing, 2012).

109 Ibid, at 7.

110 Ibid, at 1. Petersmann is concerned with the prevailing 'Westphalian conception' of IEcL as an 'instrument for promoting national interests'. Ibid, at 4.

111 Ibid, at 32.

conceived as a 'layered, multilevel legal order' based on respect for legitimate constitutional pluralism as a framework for rule making, rule administration, and rule clarification, and for 'peaceful settlement of disputes for the benefit of citizens and their constitutional rights'.[112]

IV. NORMATIVE INFLUENCES TO AND FROM IEcL

Groupings can always lead to rigidities. A few decades ago, some scholars perceived international trade law as 'self-contained' or isolated from public international law.[113] No one would dare say that today, as there are so many examples in WTO jurisprudence of the way in which general and specialized international law have influenced WTO law. Less well appreciated, but equally important, is the way that trade law influences public international law. A spotlight was shined on that area of study by Don McRae's excellent Hague Academy lecture in 1996.[114]

The problem of coordination between economic and other fields has been given considerable attention, but no effective solution has been put in place. In 1939, the League of Nation's Bruce Committee[115] issued a report on 'The Development of International Co-operation in Economic and Social Affairs' which called for better coordination of these dual activities of the League of Nations.[116] These recommendations laid the groundwork for the establishment of the UN Economic and Social Council (ECOSOC), but ECOSOC has not been a successful coordinating institution.

In 1951, Wilfred Jenks wrote a masterful study of the overall problem pointing out that:

> The penalty for ignoring the numerous interacts between the different branches of public policy when framing plans for international action is that it becomes impossible to deal effectively on an international basis with any one of the branches of public policy which are thus artificially disassociated. Political, economic, and social objectives which are mutually incompatible cannot be successfully pursued simultaneously for indefinite periods. Co-ordination between the different branches of public policy must be secured at some level, for a greater or lesser area, if complete chaos and frustration are to be avoided.[117]

Jencks, who later served as Director-General of the ILO, died in 1973. One wonders what he would have thought of the WTOs Seattle Ministerial Conference in 1999

112 Ibid, at 497.

113 John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006), at 48.

114 See Donald M. McRae, 'The Contribution of International Trade Law to the Development of International Law', 260 Recueil des Cours 1 (1996).

115 The Bruce Committee, chaired by former Australian Prime Minister Stanley Bruce, was formed in 1939 to assess potential reforms to the League due to its growing ineffectiveness. The Committee's work came to a halt with the outbreak of World War II.

116 Hill, above n 46, at 110–119; Reinalda, above n 32, at 367.

117 C. Wilfred Jenks, 'Co-ordination in International Organization: An Introductory Survey', 28 *British Year Book of International Law* 29 (1951), at 30.

and the chaos and frustration that reigned there in part because of public apprehension about the relationship between the WTO and both worker rights and environmental protection.

Over the past twenty-five years, there has been a great deal of literature (sometimes denoted 'Trade and') on how the norms of other bodies of law have or should influence world trade law.[118] By contrast, there has been much less literature on how the norms of world trade law or IEcL have influenced and should influence other fields of public international law.[119] And there is a small but growing body of literature on harmonizing norms between regimes.[120]

Looking ahead, the research agenda for IEcL should include how the norms of international trade law should influence the norms of international environmental law, international labor law, and other fields parallel to IEcL. As a veteran of the clash between environmental and trade interests during the early 1990s, I saw firsthand how the GATT epistemic community resisted the influence of environmental norms (Professor Jackson being the most notable exception). But I also observed another sad phenomenon that has not been given as much discursive treatment, that is, how the environmental epistemic community can also be jealous of its normative turf, and sometimes resistant to progressive development coming from IEcL.[121]

In conclusion, new founts of scholarship can rebalance IEcL by discovering possible gains in coherence from non-economic norms. Such scholarship might also lead to new insights into one of the core doctrinal puzzles of IEcL—namely, whether it is separate from or overlapping with other fields such as international environmental law. If there is a pathway for a conceptual unification of IEcL, even in the broad way defined by Professor Paul,[122] it has to be by re-imagining the individual economic and social actor as the basic building block of all international law and rebuilding the edifice upward from individual rights and human dignity.

118 For example, Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime', 126 *International Labour Review* 565 (1987); Daniel C. Esty, *Greening the GATT* (Washington: Institute for International Economics, 1994); Jagdish Bhagwati and Robert E. Hudec (eds), *Fair Trade and Harmonization. Prerequisites for Free Trade?* (Cambridge, MA: MIT Press, 1996), vol. 2 Legal Analysis; 'Symposium: Linkage as Phenomenon: An Interdisciplinary Approach', 18 *University of Pennsylvania Journal of International Economic Law* 201 (1998).

119 One example is Steve Charnovitz, 'Trade Law Norms on International Migration', in T. Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (The Hague: T.M.C. Asser Press, 2003), at 241–53.

120 For example, Steve Charnovitz, 'Competitiveness, Harmonization, and the Global Ecolonomy', in Maury E. Bredahl et al. (eds), *Agriculture, Trade & the Environment. Discovering and Measuring the Critical Linkages* (Boulder: Westview Press, 1996), at 47–58; Joost Pauwelyn, *Conflicts of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003); Ernst-Ulrich Petersmann, 'Human Rights and International Trade Law: Defining and Connecting the Two Fields', in Thomas Cottier, Joost Pauwelyn and Elizabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005), at 1–26; Lamy calls for mindset change to align trade and human rights, *WTO Press*, 13 January 2010.

121 One notable exception has been the embrace of emission trading by the international climate regime.

122 See text accompanying above n 87.

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