

# The Historical Lens in International Economic Law<sup>†</sup>

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## ABSTRACT

In recent years, scholars of international law have reemphasized historical research in new writings. The essay by Rafael Lima Sakr takes note of this scholarly trend in international economic law, and offers some cogent thoughts on the benefits and disadvantages that have eventuated from such use of historical material. Because the scholarship of Steve Charnovitz regarding the field of international economic law serves as a focal point in Sakr's essay, this short article provides me an opportunity to respond. This article explains why my scholarship has deployed a historical lens to analyze public policy challenges and to analyze the international institutions that have been established to help governments and private actors address those challenges. In addition, my article expresses my agreement with Sakr that scholars should be careful to avoid an unduly narrow perspective on what history is relevant for any particular project.

The editors have invited me to comment on the thoughtful article by Rafael Lima Sakr, 'Beyond History and Boundaries: Rethinking the Past in the Present of International Economic Law'. His article notes that '[s]ince the early 2000s, history has become a major theme in international law scholarship' (at 86). Such 'history lessons organize and mould legal knowledge and techniques, which in turn affect law-making and interpretation' (at 72). The aim of Sakr's article is 'to provide a better map of the conditions of possibility that frame legal decision-making about and under IEL' [the author's acronym for international economic law] (at 91).

Sakr summarizes what he calls the 'traditional approach', 'traditional style', and 'dominant approach' in scholarship on 'the history and boundaries of international law' (at 58–9, 73). Sakr explains that the traditional approach 'is employed to draw spatial lines, separating which substantive and formal elements fit in and out the IEL discipline' (at 73). He further claims that 'the traditional approach is employed to narrow the intellectual history ...' (at 76). As explained by Sakr, the traditional approach 'has

\* This article is a response to 'Beyond History and Boundaries: Rethinking the Past in the Present of International Economic Law' by Rafael Lima Sakr, which appears in this issue of the *Journal of International Economic Law*.

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enabled the past to be told as present teachings to support jurisprudential and institutional projects for governing transnational economic affairs' (at 89). Furthermore, he asserts that the traditional approach 'has excessively limited the IEL imagination, thus preventing lawyers from offering inventive solutions to dealing with contemporary issues' (at 89).

As a way to 'avoid some of the shortcomings inherent to the traditional style', his article offers an 'Alternative Approach' (at 80). This alternative approach would widen the historical frame to look at 'other international economic policymaking domains existing between 1944 and 1994' (at 80) that were 'contenders for governing the world economy' (at 81 at footnote 84). Specifically, the author points to the United Nations Conference on Trade and Development (UNCTAD) and to the Council for Mutual Economic Assistance (COMECON) (at 81). Furthermore, he suggests that 'the mainstream canons of IEL literature either overlook or side-line the existence and function of the United Nations Conference on Trade and Development (UNCTAD), the United Nations Industrial Development Organisation (UNIDO), and the International Labour Organisation' (at 73 and footnote 63). The proposed approach would widen the 'contextual frame' by giving more attention to social justice and economic redistribution (at 82).

Sakr notes three additional aspects of the proposed alternative approach: first, the alternative approach would 'combine an analysis of IEL as an intellectual enterprise with an investigation of lawyers as builders and managers of IEL as a profession' (at 84). Second, the new approach would avoid 'working backwards' (at 84), so as to expose the ways in which IEL boundaries 'have constrained legal imagination by continually embedding the conventional narratives and lessons through history-telling' (at 85). Third, the new approach would depart from Anglocentrism.

One focal point for Sakr's article is my essay titled 'The Field of International Economic Law' published in the September 2014 issue of this journal.<sup>1</sup> He states that my essay, while 'neither novel nor controversial' (at 70), provides a 'brief but compelling account of institutional and jurisprudential developments of IEL that elucidate our contemporary understanding of the field' (at 64). Furthermore, he says that my essay 'embodies the disciplinary consensus on the history of international law of the world economy' (at 64). For most of his article, he appears to position my essay within the 'traditional approach' (at 72, 75, 90). Yet in one footnote, he admits that the 'far-reaching storyline [in my essay] differs not only from the institutional story but also from the conventional literature' (at 68 footnote 40).

Sakr's article concludes by presenting an alternative research agenda for international economic law (IECL<sup>2</sup>) that would, *inter alia*, 'seek to lessen its disciplinary frontiers in order to produce alternative ways to reform and transform the international

1 My essay was part of a Symposium in Honour of John H. Jackson. Given the quick publishing timetable for the Symposium, the editors asked me to update an essay that had been commissioned by Professor Jackson in 2010. The original essay was published in 2011 as the introductory essay for volume 14 of this journal. The original essay was titled 'What is International Economic Law?'

2 I have used the IECL acronym in my writings to distinguish international economic law from international environmental law.

economic order' (at 89). His 'new agenda would seek to resituate the foundation and development of IEL within a wider temporal trajectory and spatial context' (at 90).

I am happy to endorse this new research agenda aimed at lessening the disciplinary boundaries and finding better ways to reform the international economic order. From my perspective, looking more closely at the contributions of UNCTAD would be an interesting project.<sup>3</sup> The 1970s era scholarship on the proposed 'new international economic order' also warrants a re-examination in light of the current heightened attention<sup>4</sup> to the quest for equitable growth.

Having offered that endorsement, I need also to express puzzlement or disagreement about some arguments made by Sakr. One is his repeated emphasis on the temporal period between 1944 and 1994 as the proper era for research (see id. at 70, 79–80, 90). For decades, I have urged junior scholars seeking to do historical analysis in IECL to start no later than the mid 19th century. Increasingly, good IECL scholarship looks back at least a century.<sup>5</sup> Another puzzle is why he seeks to ground a critique of my work<sup>6</sup> on merely one publication. In his conclusion, Sakr declares 'Through the analyses of the scholarly work of Robert Howse and Steve Charnovitz, I demonstrated that the traditional style is pervasively used to instrumentalize history in support of boundaries' (at 90). In my view, that claim about Howse and Charnovitz is hardly justified. Professor Howse is amply capable of speaking for himself, so I will offer a brief rejoinder about my own scholarship.

I agree with the sentiment in Sakr's title that thinking about the *past* can play a key role in writing about the *present* of international law. One of the most famous quotations about the past and present urges us to remember the past.<sup>7</sup> Yet for practical reasons, the critical task for the policy scholar will often be to learn the past, rather than merely to remember it. For over four decades, my writings on global issues have typically begun by discussing the history of the issue that I was writing about. In doing so, my purpose was to inform readers about facts and trends in the past that could be useful in formulating solutions to current problems 'in the real world where people live and work and die'.<sup>8</sup>

For my scholarship, history is a lens that can be used to visualize a problem more clearly and to predict what effects proposed solutions would have. To recall the writings

3 I do not know enough about COMECON to have an opinion on the payoff from greater scholarly attention to it.

4 See, for example, Jonathan D. Ostry, Prakash Loungani & Andrew Berg, *Confronting Inequality. How Societies Can Choose Inclusive Growth* (foreword by Joseph E. Stiglitz; Columbia University Press, 2019).

5 For example, see Georgios Dimitropoulos, 'The Promises and Perils of Interpreting International Law as Administrative Law', in *Comparative Approaches to International Administrative Law* (Oswald Jansen ed.; Intersentia, forthcoming 2019).

6 He says 'Reflecting on Charnovitz's work in the light of that of Howse's allows grasping the operation of what I have called the traditional approach, a characteristic style of history-telling and boundary-drawing that widely dominates the field of international economic law' (at 17).

7 'Those who cannot remember the past are condemned to repeat it' (1905–06), [https://en.wikiquote.org/wiki/George\\_Santayana](https://en.wikiquote.org/wiki/George_Santayana).

8 Borrowing the memorable phrase in the WTO *Hormones* case. See Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26,48/AB/R, adopted 13 February 1998, at 72.

of Albert Thomas: 'Is not history indeed the science of the future?'<sup>9</sup> A historical lens is not something that every scholar needs to employ. Moreover, historical analysis does not preclude other methods or frames. And while for some, history may be bunk or myth, I am not aware of any example of good international legal scholarship that proclaims the merits of being history-blind.

I do not doubt that in my scholarship comprising over 200 publications, some of my works as published failed to take a wide enough look at the intellectual history. Indeed, I can easily recall several instances when editors insisted that I drop information for the reader that I thought were important or even worse when editors without notice to me rewrote my paper to change my intended meaning. And there are certainly sentences I penned years ago that I would write differently today. Nevertheless, for my scholarship as a whole, I am skeptical of the suggestion that my work is 'preventing lawyers from offering inventive solutions' (see id. at 89).

Looking back from the present, I can group the bulk of my scholarship into four topics, and for each of those topics, the major articles featured a substantial historical dimension. A frequent focus of my research has been promoting sustainability in the world economy. One key challenge that I addressed is the need for international trade law to accommodate distinctions based on processes and production methods.<sup>10</sup> When I urged that result in the early 1990s, my writings were decidedly not 'embedding the conventional narratives' (see Sakr at 85). A second topic of my scholarship has been promoting economic growth combined with social justice. To quote Sakr '[w]hen international lawyers retell the history of the world trade system (as exemplified by Charnovitz's account above)', their writings reinforce the 'GATT/WTO history while rejecting or marginalizing questions and takeaways related to (non-trade) social justice and economic redistribution' (at 82 and footnote 87). Although I agree with Sakr that much of the IECL literature overlooks or sidelines the ILO (see id. at 73 and footnote 63), he is wrong to imply that my own writings do so. Instead, my scholarship has regularly called attention to the role of the ILO and to its actual and potential contributions to world economic governance.<sup>11</sup> Two other topics of my research have been enhancing the role of non-state actors in global governance

9 Albert Thomas, 'Preface' to *The International Labour Organization. The First Decade* (George Allen & Unwin Ltd. 1931) at 10. Thomas was the first director of the ILO.

10 See, for example, 'Exploring the Environmental Exceptions in GATT Article XX', *Journal of World Trade*, 1991 (Issue 5); 'Competitiveness, Harmonization and the Global Economy', in *Agriculture, Trade and the Environment: Discovering and Measuring the Critical Linkages* (Maury E. Bredahl, Nicole Ballenger, John C. Dunmore, & Terry L. Roe eds.; Boulder, CO: Westview Press, 1996); 'The Law of Environmental PPMs in the World Trade Organization', *Yale Journal of International Law*, Winter 2002; 'The WTO's Environmental Progress', *Journal of International Economic Law*, September 2007; 'Border Tax Equalization' in *The World Trade System. Trends and Challenges* (Jagdish Bhagwati, Pravin Krishna & Arvind Panagariya eds; Cambridge: MIT Press, 2016).

11 For example, see 'The Influence of International Labour Standards on the World Trading System: A Historical Overview', *International Labour Review*, September 1987; 'Promoting Higher Labor Standards', *The Washington Quarterly*, Summer 1995; 'The International Labour Organization in its Second Century', in *Max Planck Yearbook of United Nations Law* (J.A. Frowein & R. Wolfrum eds; The Netherlands: Kluwer Law International, 2000); 'The ILO Convention on Freedom of Association and Its Future in the United States', *American Journal of International Law*, January 2008; 'The U.S. International Labor Relations Act', *ABA Journal of Labor & Employment Law*, Winter 2011.

and improving mechanisms for compliance with international law.<sup>12</sup> Typically, the historical material in my articles explores the past, but occasionally I have opined on the future.<sup>13</sup>

For all four of those topics, the gravamen of my writings has been to question and expand boundaries, not to reinforce them. My historical accounts are a caution to readers against uninformed 'legal imagination'. Like any applicant for a patent, a scholar should be careful about falsely claiming 'inventive solutions' (see Sakr at 89) when instead what's going on is a reinvention of the wheel.

- 12 Interested readers are referred to two published collections of my writings: *Trade Law and Global Governance* (with foreword by John H. Jackson; Cameron May, 2002) and *The Path of World Trade Law in the 21st Century* (with foreword by James Bacchus; World Scientific, 2015).
- 13 See, for example, 'The World Trade Organization in 2020' 1 *Journal of International Law & International Relations*, Spring 2005.