Interrelationships: International Economic Law and Developing Countries

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INTERRELATIONSHIPS: INTERNATIONAL ECONOMIC LAW AND DEVELOPING COUNTRIES

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Abstract: This Article is an introduction to six articles that were presented at a symposium entitled "Interrelationships: International Economic Law and Developing Countries," held in Washington, D.C. in October 2002 by the American Society for International Law's International Economic Law Group.

What should be done to further development? All nations,1 international economic organizations,2 and most major non-governmental

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1 Every country devotes itself to development simply by seeking to improve the standard of living of its population. In the international arena, for example, each country seeks to not only manage its own economy but also to attract investors from outside. See generally UNCTAD, WORLD INVESTMENT REPORT 2003: FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES (2003), available at http://www.unctad.org/en/docs/wir2003_en.pdf. This report addresses the need governments feel to seek out international investment agreements (such as bilateral investment agreements), even though they appear to curtail their ability to control their own policy choices. The report focuses on how such agreements should be written, structured, and implemented in order to focus on countries' development objectives.
2 The most obvious examples are the WTO and the World Bank. The WTO is currently in the midst of the Doha Round of negotiations. The Doha Declaration established development as the theme of this set of negotiations. Ministerial Conference, 4th Sess., MINISTERIAL DECLARATION, WT/MIN(01)/DEC/1 (Nov. 20, 2001), para. 2 ("International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.").
WTO Members are currently struggling to restart the Doha negotiations after the inconclusive end to the Cancún meeting in late 2003. According to WTO Director General Supachai Panitchpakdi:
organizations that focus on economic, labor, and environmental issues are now analyzing and working to answer this question. Most of the countries in the world are developing countries. What to do about development—given their particular histories, resources, and needs—is what drives their existence. Likewise, the forces of globalization have challenged developed countries to engage with their poorer counterparts as never before. International economic law plays a major role in the development process, initially by fashioning agreements and facilitating projects, and then in resolving disputes that might arise from any such agreements and projects.

bership chose the interrelationships between this field and developing countries as a topic for the 2002 Conference because it is one of the most pressing issues facing governments, international organizations, and scholars.

The Opening Session and the two Plenary Sessions of the 2002 Conference were built around the following major themes: (1) "The Challenge of Developing Countries and the Realities of Globalization"; (2) "How Do Developing Countries Experience International Economic Law and Organizations and What Does International Economic Law Need from Developing Countries?"; (3) "Governance, Democracy, Legitimacy, Rule of Law, Corruption and International Economic Law"; and (4) "Developing Countries, International Economic Law and Development."

The articles in this symposium issue were presented in the Opening Session and in the panels listed above. Daniel Bradlow's article, Development Decision-Making and the Content of International Development Law, sets out a short history of international development law, the current competing views of that field, and how these views alter the way development decisions are and should be made. The traditional view—that development is about the economic growth of a country—

Int'l & Comp. L. Rev. 187 herein presents six out of the sixteen papers presented at the Seventh Conference.

The IELG chooses the papers presented at its conferences from those submitted by scholars, lawyers, and government and international organization officials in response to a Call for Papers issued by the conference planning committee. The Call for Papers for this conference on international economic law and developing countries solicited papers for panels focusing on the legal, economic, political, and social aspects of the relationship between international economic law and developing countries.

The Opening Session and one of the Plenary Sessions were held at Georgetown University Law Center and co-sponsored (along with the IELG) by that law school's Program on International Business and Economic Law. The other Plenary Session was held at the Hilton Washington Embassy Row Hotel.

These themes came from the Call for Papers for the Conference. The Planning Committee then established sessions and panels built around the themes. The Conference included one additional panel, entitled "Developing Countries and Regionalism." For a program of the Conference, see 2002 ASIL International Economic Law Annual Conference, at http://www.international-economic-law.org/ASIL%202002%20Conference%20Program.htm (last visited Apr. 18, 2004).

The Opening Session featured presentations by the Deputy General Counsel of the World Bank, W. Paatii Ofosu-Amaah; Ambassador Richard Bernal, Director General of the Caribbean Regional Negotiating Machinery; and Professor Daniel D. Bradlow, Director of the International Legal Studies Program at American University, Washington College of Law. Professor Bradlow's article appears in this symposium.

structures decision-making regarding investment and development projects around the power of the host state and the investors and focuses largely on whether the project is technically and economically feasible. The modern view—that development involves not only economic growth but also its effects on and consequences for the host state population and the environment—would include all affected groups in a country in the decision-making process. Bradlow argues that the modern view may be better adapted to the globalized world in which states have less power over the economic and political affairs within their borders.

Inaamul Haque and Ruxandra Burdescu’s article, Monterrey Consensus on Financing for Development: Response Sought from International Economic Law,9 was presented as part of the first panel focusing on the global realities faced by developing countries. The article details the joint initiative between developed and developing countries (the Monterrey Consensus), which aimed at the financing needed for development. The Monterrey Consensus hopes to achieve this by: (1) increasing the volume and geographical coverage of foreign direct investment; (2) reaffirming the commitment to trade liberalization through completion of the Doha Development Round; (3) increasing and targeting the use of development aid; and (4) resolving the external debt problems of developing countries and creating a debt workout mechanism. Citing the high levels of poverty that continue to plague the globalized world, Haque and Burdescu describe the pledges made by world governments and international organizations to improve the current situation. They also analyze just how much effort this will require both in terms of new legal instruments and commitments as well as financial resources and support.

The article by Frank Garcia, Beyond Special and Differential Treatment,10 was part of the second panel devoted to how developing countries experience international economic law and organizations. He chose to focus on the World Trade Organization (WTO) and the concept of special and differential treatment (S&D) for developing countries as it has developed in the WTO (and the General Agreement on Tariffs and Trade) since the 1950s. Garcia chronicles exactly how the developing countries of the WTO lost ground during the last major

set of negotiations (the Uruguay Round) on all three of the aspects of S&D: market access (the ability of developing countries to sell enough of their products into developed country markets); market protection (the ability of developing countries to protect sufficiently their weaker, less competitive markets); and technical assistance (the aid developing countries need to implement all of the legal obligations imposed by WTO membership). Garcia's article proposes remedying this by reworking all aspects of S&D to concentrate on the key concepts of development (rather than adjustment to trade rules) and fairness (whether WTO rules operate to make economic inequalities work to the benefit of the least advantaged). Garcia also offers concrete suggestions for how all aspects of S&D should be negotiated in the current Doha Round.

Karen Halverson's article, *China's WTO Accession: Economic, Legal, and Political Implications*, was presented in the third panel aimed at examining governance, democratic legitimacy, rule of law, corruption, and international economic law. Her comprehensive case study of how China has acceded to the WTO and the vast changes this process has forced upon this communist state illustrates each one of the enumerated themes. She reveals how the Chinese leadership has altered its governance style, how opening up to an international organization has exposed problems with the Chinese government's claims of legitimacy, how WTO membership and its obligations (transparency and procedural due process) have caused China to embrace Western notions of rule of law, and how difficult all of these changes are, given China's existing political structure and its difficulties with corruption.

The articles by Eugenia McGill and Todd Weiler were presented as part of the fourth panel devoted to the relationship between international economic law (particularly trade and investment) and the law of development. McGill's article, *Poverty and Social Analysis of Trade Agreements: A More Coherent Approach?*, focuses on how the World Bank has tried to pursue its top priority—poverty reduction—while also supporting the trade liberalization assumed necessary for development. She examines and critiques three recent trends in World Bank actions: (1) the "mainstreaming" of trade issues into the development and poverty reduction strategies pursued by developing countries and supported by the World Bank; (2) the recent adoption

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and operation of "trade capacity building" programs (a variation on technical assistance programs); and (3) the conducting of assessments of how trade policies affect those on the fringes, such as poor and/or politically vulnerable groups. One way to assess the true effects of trade and poverty reduction programs, according to McGill, would be by adapting existing tools for analyzing poverty and society and using them to assess and evaluate trade agreements and policies and their effects on different groups, particularly women.

Todd Weiler's article, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*,\(^\text{13}\) argues for a way to give true enforcement to corporate conduct rules that are now simply voluntary. Weiler suggests that the existing arbitration system for protecting investor rights (which is part of bilateral investment agreements and NAFTA) could be adapted to accommodate human rights claims. Weiler's normative thesis is that individuals should receive no less protection for their rights than investors do for their investments. He explains how the legal liability theories could be established, what kind of human rights would be protected, and how the arbitration system itself could be adapted. Weiler concludes by examining the types of objections that would be raised to this new legal order and how most of them could be satisfied or addressed in ways that would allow such human rights claims to go forward.

Certain themes recur throughout these articles. First, the stakes on what must be done about development have never been higher.\(^\text{14}\) Globalization has forced all developing countries to engage in world trade and to seek foreign direct investment in order to pursue development. Second, international economic organizations, such as the WTO and the World Bank, are necessary for assisting countries trying to find a successful path towards development. Most international economic organizations, however, are also struggling and recently failing to listen to and thus truly meet the needs of developing coun-

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\(^{14}\) See Garcia, *supra* note 10, at 302–17 (cataloguing the changes that must be made to S&D during the Doha Development Round at the WTO for developing countries to recover from the bad bargain struck during the Uruguay Round); Halverson, *supra* note 11, at 319–39 (explaining how China's size and status as a communist country generated large and intrusive commitments for gaining WTO accession); Haque & Burdescu, *supra* note 9, at 241–83 (presenting a complete outline of the Monterrey Consensus reached in 2002 and its goals and objectives); McGill, *supra* note 12, at 373–84 (outlining all of the recent progress, and lack thereof, by the WTO and World Bank and critiquing the World Bank/IMF approach to trade).
tries. Third, international economic law must concern itself not only with what aids economic development but also with what furthers human rights and sustainable development. Finally, and most importantly, action—not just study and analysis—is required if the world community is serious about furthering development for most of its population.

15 See generally Bradlow, supra note 8; Garcia, supra note 10; Haque & Burdescu, supra note 9; McGill, supra note 12.

16 See generally Bradlow, supra note 8 (development project decision-making should cover environmental and human rights effects as well as economic consequences); Halverson, supra note 11 (WTO accession is linked in China’s case to adoption of the rule of law and will bring greater advantages to the Chinese people); McGill, supra note 12 (poverty and gender effects should be used to analyze trade agreements); Weiler, supra note 13 (human rights should be enforced the same as investment rights).

17 See generally Bradlow, supra note 8 (advocating a shift to the modern view of international development law); Garcia, supra note 10 (developing countries must negotiate for true reform of S&D and a better bargain from the WTO through the Doha Round); Haque & Burdescu, supra note 9 (the governments and international organizations participating in the Monterrey Consensus must achieve all of its goals in order to deal effectively with poverty and development); McGill, supra note 12 (governments and international organizations should analyze impacts of trade agreements on different groups—particularly women and the poor—in order to fully understand trade effects upon societies); Weiler, supra note 13 (advocating for a human rights arbitration system as part of investment agreements).