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SYMPOSIUM

INTRODUCTION

THE TRADE LINKAGE PHENOMENON: POINTING
THE WAY TO THE TRADE LAW AND GLOBAL SOCIAL
POLICY OF THE 21ST CENTURY

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From December 5-7, 1997, the International Economic Law Interest Group ("IELIG") of the American Society of International Law ("ASIL") sponsored a conference on linkages, titled *Linkage as Phenomenon: An Interdisciplinary Approach*. While the fact of linkages between trade and other areas of social concern is not new,¹ the number of linkages asserted, studied, advocated, es-

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¹ As Dr. Frieder Roessler points out in his article, links between trade and labor, for example, were explicitly recognized at the formation of the post-war trade system, and this and other links had been discussed considerably earlier. See also Virginia Leary, *Workers' Rights and International Trade*, in 2 FAIR TRADE AND HARMONIZATION 177, 183 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (noting the link between trade and labor rights raised in mid-18th century); David P. Fidler, *The Globalization of Public Health: Emerging Infectious Diseases and International Relations*, 5 IND. J. GLOBAL L. STUD. 11, 24 (1997) (noting that the relationship between trade and public health, involving the spreading of diseases through international commerce, was recognized as early as at least 1851).

established, or resisted has grown,² as has the level of public interest in trade linkage generally.³ There is also a growing awareness that linkage conflicts both conceal and reveal conflicts over fundamental values at stake in contemporary international economic law and its intersection with other areas of social concern, as noted in Jeffrey L. Dunoff's article,⁴ raising normative issues which have been little studied in the international economic law context,⁵ but which will have a profound effect on the contours of future international trade policy and international social policy generally.

For these reasons, the IELIG concluded that the subject of trade linkages deserved sustained attention, but from a somewhat uncommon perspective. While many trade linkages have themselves been the subject of conferences and symposia, the phenomenon of linkage has not been studied in a sustained comparative fashion across the spectrum of linkage areas. Rather than simply adding another account of the relationship between trade and the environment or trade and human rights to the existing literature, the goal of the conference was to examine linkage itself, to facilitate a deeper understanding of linkage and what the phenomenon of trade linkages might reveal and presage about international economic law and international social policy generally.

The Articles appearing in this symposium represent a significant contribution towards such an inquiry. Collectively, their authors suggest that the trade linkage phenomenon is changing not only the way we understand trade law and policy, but also the formulation and direction of trade policy itself. The recognition, assertion, or rejection of particular trade linkages alters the way we negotiate and design trade rules, the role and nature of interna-

² For an overview of recent literature concerning the various "trade and" areas, see Jeffrey L. Dunoff, "Trade and": *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1997).

³ The GATT "Tuna/Dolphin" decisions are widely credited with igniting public opposition and concern regarding linkage issues and their treatment within trade law and institutions. See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 268 nn.1-6 (1997).

⁴ See also Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 659-60 (1996).

⁵ See Lea Brilmayer, *Trade Policy: The Normative Dimension*, 25 N.Y.U. J. INT'L L. & POL'Y 211 (1993) ("Does trade policy have a normative dimension? We don't usually think of the issue in those terms. . . . Trade policy. . . has largely escaped the attention of moral critics.").

tional economic law institutions' response to linkage issues, the extent to which the international trading system upholds or defeats basic democratic values and calls into question or affirms its own legitimacy, and the manner in which international economic law is taught in the classroom.⁶ Moreover, since linkage brings most major areas of global social concern into the ambit of trade law and institutions, linkage issues, and, through them, the international trading system, will have a far-reaching impact on the future of global social policy generally.

The opening keynote address at the conference, presented by Frieder Roessler, concedes that linkage issues have always played a role in trade law and policy, but issues a cogent challenge to proponents of linkage rule making: Justify the utility of the linkage exercise from the point of view of both the social goals and values at stake in the linked area, and the well-being and efficiency of the trading system itself. Based on a historical analysis of several recognized links within the GATT/WTO system, such as trade and development and trade and competition, Roessler argues that, in each case, accepting the linkage in the GATT/WTO system resulted in the adoption of policy measures that were sub-optimal in terms of the linked areas and posed a risk to the trading system. According to Roessler, the burden of proof lies with proponents of current and future linkage candidates, such as trade and the environment, to explain why those linkages will not operate according to the same flawed dynamic because, in Roessler's view, there is ample reason for concern that they will.⁷ Accordingly, Roessler's analysis sounds an important cautionary note that must be kept in mind with regard to any linkage issue, even if one concludes that the benefits of linkage outweigh the costs and risks in a given area of social concern.

If one is willing to concede the validity or desirability of trade linkages to any extent, then a fundamental starting point for analysis of the linkage phenomenon is the central role which rule

⁶ The particular focus of each paper reflects its place among the several panels representing what organizers believed would be a useful subdivision of the issues presented: *Linkages as Achieved by Rule Making*, *The Institutional Response to Linkages*, *The 'Trade and' Phenomenon*, *Democracy and Legitimacy*, and *Teaching Linkages*.

⁷ Professors Daniel Esty and Ileana Porras delivered additional addresses at the conference on the topics of NGO participation in the WTO as it relates to linkage matters, and the role and limits of harmonization as a response to linkage issues and trade policy generally.

making will play in legal responses to the social fact of intersecting policy goals and domains, and the critical challenges that will be posed, by linkage issues, to the already complex task of multi-lateral formation of international legal rules. Michael P. Ryan and Samuel K. Murumba, in their respective articles, emphasize that, because linkage rule making necessarily involves the regulation of areas outside the traditional expertise of trade-liberalization specialists, linkage rule making must be applied cautiously, in a manner which gives appropriate recognition to the epistemic and normative particularities of the linked area.⁸ Ryan argues that the optimal process for rule making in linkage areas is knowledge-driven or "function-specific" diplomacy, within the epistemic base most appropriate to the linked subject area, such as the World Intellectual Property Organization for intellectual property matters. Given the fact that effective linkage rules are likely to be negotiated through the more typical cross-sectoral or "linkage-bargain" diplomacy common to multi-lateral trade organizations, such as the GATT/WTO system, the challenge becomes how to preserve the benefits of subject-area expertise in linkage rule making.

Murumba emphasizes the normative context of linkage regulation. He argues that the proliferation of universally-applicable legal standards through contemporary linkage rule-making practices is defective to the extent that it takes rules and legal processes that, in their domestic context, are deeply embedded in a social, normative context and attempts to propound them internationally on the simple basis of a minimalist context, of transactional similarities and negotiated bargains across social communities. Instead, Murumba argues that linkage rule making should be rooted in a more fundamental trans-social context, a normative universality based on the roots of linkage issues (such as intellectual property rights in internationally recognized human rights instruments), and that developing such a "justice constituency" would properly ground international rule making in a global distributive analysis.

⁸ Dr. Jonathan Putnam, in a paper not appearing in this symposium issue, echoes the same concern regarding the contextual problem in linkage rule making by arguing that, from an economic perspective, there is an optimum balance of intellectual property protection in each state, given the state's levels of innovation, development, and desired rate of growth; multilateral linkage rule making in this area may not be capable of reaching an agreement that strikes the proper balance for each affected state.

In another article, C. O'Neal Taylor suggests that behind any successful exercise in rule making, there is a necessary consensus on such elements as the core rights to be protected, the nature of the linkage to trade, and the proper institutional role in rule making and enforcement. Taylor argues that the presence or absence of such a consensus is a determinative factor in why certain linkages such as trade and investment are relatively well-received, while other linkages, such as trade and labor rights, encounter significant resistance.

As the international economic law system becomes increasingly juridical in nature, the likelihood that linkage rules will be subject to interpretation and adjudication by international economic law institutions increases as well. Thus, the impact of linkage issues is felt not only in the trade rules created and how they are created, but in the ways in which international economic law institutions operate and in the reasons to have recourse to them.¹⁰ In his article, Steve Charnovitz echoes Roessler in recognizing that linkage issues have always been part of trade negotiation and trade regimes, but reaches a different conclusion on the merits: he suggests that including linkage issues within trade treaties and trade institutions can play a valuable role in furthering inter-governmental cooperation by enhancing the effectiveness of domestic policies, rebalancing domestic policies, building international coalitions, and achieving economies of scale. In another article, Philip M. Nichols focuses more on the study of institutions which may play important linkage roles, arguing that the focus by trade scholars on regime theory and institutional economics ignores two other schools of institutionalism, historical institution-

⁹ Mark A. A. Warner, of the Organisation for Economic Co-Operation and Development ("OECD"), delivered a paper also focusing on comparisons between linkage areas, in particular assessing the role of the OECD in trade and investment and trade and competition matters.

¹⁰ Joel P. Trachtman presented a paper based on his article, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L. 32 (1997), in which he surveys existing trade-off mechanisms used by international economic law institutional dispute settlement mechanisms, such as the following: national treatment, simple rationality, necessity, less-restrictive alternative, balancing, proportionality, and cost-benefit analysis. Trachtman concludes that while what he terms comparative cost-benefit analysis may be the optimal adjudicative trade-off device, it was unlikely to be adopted by trade institutions. Andrew Strauss and Elizabeth Zechenter delivered papers focusing on institutional challenges faced by the WTO in an attempt to address trade and environment and trade and human rights issues, drawing in Zechenter's case on anthropological studies of rights enforcement in traditional societies.

alism and sociological institutionalism, which suggest important historical and sociological limits on the range of options an institution may effectively choose in its response to linkage issues and trade policy generally.

In addition to its effects on the nature and formation of trade rules and the role of trade institutions, the linkage phenomenon calls for a reconsideration of the basic nature of international economic law. Jeffrey L. Dunoff challenges his audience to consider how linkages call into question the assumptions underlying the dominant economic efficiency model of international economic law, as well as those underlying the influential game theoretic and political science models, suggesting that linkage issues presage a reformulation of our basic conceptions of the trade regulation endeavor. Elaborating on a theme touched on by Murumba and Isabella D. Bunn, among others, my article focuses on the inevitable normativity of linkage issues, suggesting that the "trade and" phenomenon reveals the link between international economic law and the traditional concept of justice, and that principles of justice underlie any linkage claim and any claim in international economic law generally. Arthur E. Appleton and Raj Bhala both focus on particular linkages, telecommunications services and national security, respectively, analyzing what each linkage reveals about the linkage phenomenon generally and discussing future developments in trade policy. Appleton notes the relative success which "sectoral" linkages such as telecommunications have had when compared to "social policy" linkages such as labor; however he argues that even sectoral linkages can play unexpected roles in advancing certain related social values, such as the role which telecommunications trade can play in the development of an informed global society. Bhala examines the problematic link between trade and national security, as illustrated by his analysis of the relatively ineffective constraints imposed by GATT Article XXI on measures justified on national security grounds, suggesting that in areas of overriding domestic social concern, linkage may consist of little more than institutionalized deference on the part of trade law.¹¹

¹¹ David Fidler, in a paper not appearing in this symposium issue, examines another historic linkage between trade and public health concerns, which underlies areas of trade law such as sanitary and phyto-sanitary measures, not traditionally considered to be linkage areas.

Owing in part to the centrality of normative issues in linkage areas, and to the fact that linkage represents numerous conflicts between trade rules and rules in other areas of social concern with profound domestic resonance, linkage issues directly raise questions about the relationship between trade rules and other rules emerging from legitimate democratic processes, and about the democracy and legitimacy of the trade regime itself.¹² Jeffery Atik proposes a mechanism for the careful screening of claims that trade norms and decisions represent anti-democratic outcomes, in particular because of the risk that democratic rationales will be advanced for what are essentially efforts to externalize the costs of domestic policies. He concludes that national measures advanced with democratic rationales should be entitled to deference to the extent that such measures are widely endorsed within their political community, and internalize their economic cost to the state that is advancing the measure.

In another article, Andrea K. Schneider surveys the principal models of international dispute resolution, with particular attention to the rights and status of individuals. Schneider concludes that international trade dispute resolution must create a larger role for individual participation if it intends to more effectively accomplish its goals, embody the commitment to liberal internationalism, and respond to serious charges about its legitimacy.¹³

Not surprisingly, new issues and newly relevant disciplines call for changes in how international economic law in general, and linkage issues in particular, are taught. Linkage issues not only introduce many new substantive areas—such as public health, environmental science, and competition law—into the basic trade curriculum, but also suggest the relevance, if not indispensability, of disciplines—such as anthropology and political and

¹² Democracy and legitimacy issues have become increasingly important in international economic law and international law generally, in particular due to the pathbreaking work of Thomas Franck. See, e.g., THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Robert F. Housman, *Democratizing International Trade Decisionmaking*, 27 CORNELL INT'L L.J. 699 (1994); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

¹³ Paul Stephan, in a paper not appearing in this symposium issue, analyzes the Helms-Burton law as an exercise in rebellion by the United States that may be justifiable because it operates as a check on norm creation at the multilateral level, thus in effect reinforcing its own legitimacy. Sol Picciotto and Gregory Schaffer delivered papers examining the MAI and the WTO as they relate to the effectiveness and legitimacy of global governance.

moral philosophy—which have not been emphasized in traditional approaches to teaching international economic law. Spencer Weber Waller offers a pedagogic model based on simulations which he has used with considerable success in his efforts to teach linkage issues as part of a general course in international trade law. Bunn, continuing the theme of the normativity of linkage issues, offers concrete suggestions on how courses in international economic law might incorporate the insights of ethical theory.

Due largely to the success of the “international economic law revolution,” as chronicled in part by the *University of Pennsylvania Journal of International Economic Law*,¹⁴ contemporary international economic law is undergoing a process of thorough reevaluation within domestic and international political constituencies and academic and policy circles alike. The many “trade and” debates currently underway are a critical part of this examination, and suggest the range of issues to be addressed in the international economic law of the twenty-first century. The conference organizers would like to express their thanks to the symposium authors, other conference participants, Charlotte Ku and Sandra Leibel of the ASIL staff, and the staff of the *University of Pennsylvania Journal of International Economic Law* for their help in preparing and producing this contribution towards that process.

¹⁴ See, e.g., Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 33-61 (1996) (discussing the change in name of this journal and pointing out that “economic organization includes more than business”).