

LINKAGES BETWEEN ETHICS AND INTERNATIONAL ECONOMIC LAW

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1. INTRODUCTION

When I first discussed the possibility of presenting a paper on the linkages between ethics and international economic law, the conference organizers agreed that the subject was important but did not know quite where to place it. I subsequently became the final speaker at the conference, on the panel concerned with teaching linkages. I first thought this arrangement was sub-optimal, to borrow a term used by our economics-oriented colleagues. Upon further reflection, however, I realized it was most appropriate.

First, ethics, in many respects, underpins the discussion of international economic law and linkages. The conference panels have been grappling with the pursuit of values in the economic system. Conference participants have spoken of justice, right order, global social welfare, the moral basis of human rights, intellectual property as a moral imperative, and the use of trade policy for constructive purposes, among other themes. Thus, closing the conference with a direct consideration of ethics serves to highlight and integrate these ideas.

Second, the focus on teaching has prompted me to find a simple way to package a very complicated topic. I suggest four themes in approaching the linkage between ethics and international economic law. Taking a cue from other teaching devices which strive for ease of recall, I have dubbed these the "four C's." They are conduct, context, content, and criteria. Before turning to these themes, it is fitting to ask the more general question of whether there is a place for ethics in international economic law. Already, the discussions during the course of this conference have helped refute three key arguments against forging such a linkage.

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The first argument centers around the traditional separation between economics and ethics. Classic theory holds that each individual, by pursuing his own self-interest, will maximize the good to society as a whole. This model, which upholds efficiency and wealth maximization as the ultimate goal of economic life, has been challenged. It is clear that other underlying moral assumptions and objectives are also at work.

Conference participants inquired about the appropriate presentation of economic theory as an introduction to international economic law. We are all familiar with the charts and graphs and explanations of comparative advantage which preface textbooks.¹ But it is worth reflecting on alternative responses to the question "why do nations trade?" To quote one jurist, none other than our proverbial father of international law, Hugo Grotius:

God did not bestow all products upon all parts of the earth, but distributed His gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another. And so He called Commerce into being, that all men might be able to have common enjoyment of the fruits of the earth, no matter where produced.²

A second argument against linking ethics with international economic law centers upon cultural and economic differences, which are said to preclude any universal applicability of norms across societies. Anthropological research, however, shows that there is a substantial convergence of norms worldwide. For example, it has been argued that the natural law basis of human rights overrides attempts to use custom or traditional practice to excuse certain violations.³

A third argument against linking ethics with international economic law urges respect for state sovereignty; state sover-

¹ See, e.g., JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (3d ed. 1995).

² HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [On the Law of War and Peace, 1625] (Francis W. Kelsey trans., 1925), Book II, Ch. II, XIII, 5 (emphasizing the desire for social relationships and mutual assistance among nations as a ground-spring for commerce).

³ See Elizabeth M. Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 J. ANTHROPOLOGICAL RES., 319-47 (1997).

eignty, however, is not without limits. There has been a clear movement toward global cooperation and responsibility, as many problems and their solutions do not stop at borders. Our discussions have also conveyed an expanded sense of participation in the international system, as well as a trend toward institutional democratization. Non-governmental organizations, such as consumer and environmental groups, trade associations, development and relief agencies, and the like, are all playing a greater role in shaping international economic law and policy.

With this by way of introduction, I now consider how the linkage between ethics and international economic law might be taught in a law school setting. As mentioned, one approach is to consider the “four C’s”—conduct, context, content, and criteria.

2. TEACHING LINKAGES BETWEEN ETHICS AND INTERNATIONAL ECONOMIC LAW

2.1. *Conduct*

The issue of conduct looks to professional responsibility. This is the basis of any legal ethics course taught within a law school curriculum. It may, however, be useful to integrate the question of ethics into a given type of legal practice.⁴ Here, we could, for example, examine the special challenges of the practice of international economic law in areas such as conflict of interest, effective client communication, and segregation of funds.

Several distinctive aspects of this type of practice, in contrast to most other fields of law, further underscore the importance of ethics. For one, we play a pseudo-diplomatic role. We are representatives of our country, organization, company, firm, and so forth, in an international context. Whether we like it or not, we are judged in this larger setting.

Secondly, we serve in an advisory capacity. As others will act on our opinions, our sense of responsibility must expand. Also, we help shape some more or less permanent features of the international economic system including new laws, government regulations, corporate policy, and institutional structures. The values we pursue in our practice of law leave a lasting legacy.

⁴ See generally Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 *FORDHAM INT’L L.J.* 53 (1992) (presenting a discussion of this subject).

2.2. Context

As discussed throughout the conference, a wide range of values is pursued through the international economic system. Linkages are part of the context for understanding economic law and the new demands which are placed upon it. In a classroom setting, it may be instructive to examine recent media reports. These will help identify various values, and show public demand for an economic system that is responsive to them.

Over the last two years, I have collected several large files of newspaper clippings which point to a linkage between ethics and international economic relations. The headlines include: the adoption of corporate anti-bribery codes, a ban on trade in land mines, consumer outrage over the use of child labor, the closing down of ports to protest live animal exports, the boycott of a major oil company over plans to dump potentially toxic chemicals at sea, and the rising importance of so-called ethical funds in investment portfolios.

Even the classified advertisement section is not immune from this linkage. I recently spotted a job opening for an "Ethical Trading Manager" in *The Guardian*. This is indicative of a new initiative to encourage the British government, trade unions, major corporations, and suppliers to develop standards for improving and monitoring working conditions abroad. Even a year ago, such a position probably did not exist.

To understand the ethical context of linkages in international economic relations one must also look to other disciplines. This concept has received comment with respect to historical and sociological institutionalism in the analysis of the World Trade Organization.⁵ It is worth noting that the emergence of a "global ethic" governing international business and economics is being recognized by a variety of commentators. These include the prominent German theologian Hans Küng and the management expert John Naisbitt.⁶

⁵ Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, in, Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998).

⁶ See HANS KÜNG, *A GLOBAL ETHIC FOR POLITICS AND ECONOMICS* (1997); JOHN NAISBITT, *GLOBAL PARADOX: THE BIGGER THE WORLD ECONOMY, THE MORE POWERFUL ITS SMALLEST PLAYERS* (1995).

As an aside, which may nonetheless be relevant to a class of aspiring lawyers, it bears mention that these issues translate into potential areas of international economic legal practice. This review of the ethical context reveals a whole new range of clients to advise and problems to solve.

2.3. *Content*

The third factor to consider is that of ethical content. What ethical consensus is emerging as a basis for the conduct of international economic relations? What is the status of these principles under international law? Three issues may be identified, each of which has been discussed during the course of this conference, and each of which carries a very rich ethical tradition.

The first issue is the respect for human rights, equality, and fundamental freedoms. In legal terms, we often think of the United Nation's Universal Declaration of Human Rights and related covenants. Certainly, the increased emphasis on the promotion of economic and social rights, in addition to civil and political rights, holds major implications for lawyers involved in international economic matters.

However, it is worth recalling a pre-legal understanding of human rights grounded in human dignity. Early philosophers posited a connection between God and man, allowing nothing to detract from the inherent value of the individual. In the Judeo-Christian tradition, men and women are made in the image of God. Much of today's human rights jurisprudence is based on natural law theory, where reflection upon human nature yields an understanding of moral duties. For many, this remains expressly linked to God's divine plan for mankind.

Second is the protection of the environment. Vast political and legal resources have been devoted to this problem in recent years. Several of the panelists have analyzed the need for global regulation. An important effort in this regard is the Kyoto summit on global warming, at which nations are attempting to reach agreement on new standards to safeguard the environment.⁷

Again, some ethical background may be instructive. Both the words 'economy' and 'ecology' derive from the Greek word

⁷ See, e.g., Leyla Boulton, *UN Summit Looks to Gore for Concessions, EU says US Must Match its Softer Stance on Greenhouse Gas Emissions at Talks on Global Warming*, FIN. TIMES, Dec. 12, 1997, at 4; Bethan Hutton, *Kyoto Compromise Move on Gas Agreement*, FIN. TIMES, Dec. 4, 1997, at 3.

oikos, meaning household. This carries the connotation of stewardship. We are to be caretakers of the earth, holding it in trust for the use and enjoyment of our fellow members of the global household, and for that of future generations.

Third is the creation of an equitable economic order. It is a sad truism of international relations that the rich are getting richer and the poor are getting poorer. We have spoken of the largely unsuccessful efforts of the international community, under the banner of the "new international economic order," to redress the imbalances between the developing and the developed world.⁸ Notwithstanding several so-called development decades and the work of various international, national, and non-governmental aid agencies, the statistics speak for themselves. It is estimated that over one billion people throughout the world live in abject poverty. Currently, there is renewed impetus to approach these problems under the rubric of a "right to development."⁹

Again, moral teachings such as those of the Catholic Church, provide some insight on the urgent need for international social and economic justice.¹⁰ Special concern is expressed for the poor, the oppressed, and those who do not have a voice. Indeed, there is a call for a "preferential option for the poor" in all economic relations and for an understanding of development as a new name for peace.

Certain fundamental principles, such as the sovereign equality of states, peaceful settlement of disputes, good faith in the fulfillment of international obligations, and so forth, are deemed to be the ethical philosophy for international law.¹¹ It is claimed that

⁸ See Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 6 (Anne O. Krueger ed., 1998), reprinted in, Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998) ("Today, the new international economic order is long forgotten, and the Charter [on the Economic Rights and Duties of States] lies in the wastebasket of history.").

⁹ *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, at 18b, U.N. Doc. A/41/53 (1986); see also IAN BROWNLIE, *THE HUMAN RIGHT OF DEVELOPMENT* (1989).

¹⁰ Papal encyclical letters are an important source of Catholic social teaching. See, e.g., *PACEM IN TERRIS* (1963); *SOLLICITUDO REI SOCIALIS* (1987); see also CHRISTOPHER MCOUSTRA, *LOVE IN THE ECONOMY: SOCIAL DOCTRINE OF THE CHURCH FOR THE INDIVIDUAL IN THE ECONOMY* (1990) (presenting a helpful collection of excerpts).

¹¹ See Dorothy V. Jones, *The Declaratory Tradition in Modern International Law*, in *TRADITIONS OF INTERNATIONAL ETHICS* 42, 42-61 (Terry Nardin & David R. Mapel eds., 1992).

respect for human rights and fundamental freedoms is the most recent element of this moral philosophy. The protection of the environment and the creation of an equitable economic order are in the process of being defined by the international community but are not yet fully accepted. The coming years will provide rich opportunities for scholars of international economic law to shape these principles.

2.4. *Criteria*

The final theme to consider is that of ethical criteria, both in the development of trade law and policy and in the evaluation of their results. As trade policy is increasingly used as a tool for advancing certain moral values, it is appropriate that the policy process itself be subjected to ethical scrutiny. Several areas suggest themselves as a focus for ethical-trade policy linkage.

First is a rethinking of the free trade versus fair trade debate. Part of this will center on broad issues of protectionism and the balancing of global and domestic interests. Also, as has been suggested, it is likely that the concept of what is unfair in international trade will expand beyond current formulations. No longer will the emphasis be solely on market or price-related criteria, such as dumping or subsidies. This may lead to a new range of remedies in trade law against so-called "social dumping," designed to counter certain practices overseas such as environmental degradation and worker exploitation.¹²

Second, the increasing tendency of nations to impose trade restrictions, or to withhold trade and financial incentives for the achievement of non-economic objectives, should be considered. Already, these are in place for national security and foreign-policy goals related to the limitation of nuclear weapons, containment of terrorism, promotion of human rights, and so forth. Both the U.S. Congress and the President have often looked to trade restrictions as leverage for exerting pressure on a target country to change its practices. One recent example was the proposed denial of Most Favored Nation status for China unless certain conditions

¹² Related to the debate on social dumping is the complex notion of harmonization of laws in areas such as working conditions and environmental standards. *See, e.g.*, *FAIR TRADE AND HARMONIZATION* (Jagdish Bhagwati & Robert E. Hudec eds., 1996). In addition to national legislation, the WTO has also discussed the adoption of a so-called "social clause," although support for such a measure appears to be waning.

were met, including improvements in human rights. Controversy currently surrounds sanctions imposed against Iraq for failing to comply with UN Security Council resolutions on weapons inspection.

A third example of the ethics-trade policy linkage is in the regulation of transnational corporations. Such firms are under increasing public pressure to improve their global operating standards. There is an obvious tension between a government's possible implementation of mandatory regulations, and voluntary improvement efforts on the part of companies and trade associations. More and more companies are adopting formal policies and codes of conduct in areas ranging from human rights to environmental protection to transparency in transactions. It is fair to predict that expanded notions of corporate social responsibility will demand the attention of the international economic lawyer.

As mentioned above, while ethical criteria are integral to the development of trade policy, further criteria should be used to judge or evaluate the results of the policies. For example, we return to the issue of using economic sanctions to promote human rights. Certainly the question of whether sanctions are effective in changing a target country's behavior holds both practical and moral implications.¹³

Further difficult moral questions are posed if it appears such sanctions may be counter-productive. For example, sanctions may cause a crackdown on freedoms of citizens in the target nation as the economic situation in that country deteriorates. Propaganda and international tension may increase. As contacts are closed off, fewer individuals involved in business, media, education, and aid may serve as observers to keep the situation in check. The economic burdens are likely to be deflected from the ruling elite, causing harm to the poorest and most vulnerable members of society. In short, even a well-intended human rights policy may actually harm the very people it was meant to protect.

An interesting exercise in the classroom context may be to suggest criteria for the development and evaluation of trade law

¹³ It bears mention that other reasons to impose sanctions include their symbolic value and the desire to "punish" a target nation for unacceptable behavior. For useful treatments of the scope and effectiveness of sanctions, see BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME* (1988); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED* (1985).

and policy. A further element may be the consideration of ethical trade-offs in the pursuit of foreign policy or business goals. It may also be possible, if the structure of the course or seminar permits, to consider the philosophical basis of moral theories more formally. For example, to examine Aristotelian notions of distributive or corrective justice, the Kantian categorical imperative, the limitations of utilitarian analysis, the contribution of natural law reasoning, and the place of virtue and character in the legal profession. These theories, of course, could be useful in an exposition of each of the four ethical areas outlined.

3. CONCLUSION

In closing, it is worth reiterating that ethics are important to the development and practice of international economic law. Four areas of such linkages—conduct, context, content, and criteria—have been highlighted in this Article. The task of finding a place to advance these linkages, as the organizers of this conference envisioned, may well rest with the teachers of the subject.

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