

INTERNATIONAL ECONOMIC LAW

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Names and naming are important and interesting phenomena. The editors of the *University of Pennsylvania Journal of International Business Law* have renamed their publication the *University of Pennsylvania Journal of International Economic Law*. The change signifies a claim to a broader and deeper role in the development of the field that is today the most dynamic area of law in the world.

The global economy has not been created by law. Economic activity may be aided or hindered by laws and legal institutions, but the energy source is found in entrepreneurial and market activities. Growth and maturity of such economic activities depend upon the presence of an infrastructure of law and legal institutions to facilitate, to support, and to regulate the activity of the primary actors. That body of law, seen in its largest perspective, will be the domain of the new *Journal*.

The broad field can be divided usefully into three major segments. The first segment, of course, is laws that relate to cross-border exchange transactions and international trade in goods and services. A second segment is laws that relate to foreign direct investment, hence to multinational enterprises ("MNE"s). Laws in this sphere serve to overcome resistance to the creation of MNEs by so-called "greenfield" investment as well as by acquisition of existing businesses or by merger. A host of new legal issues follows from recognition that MNEs are "international persons" of a kind not previously known. A third segment focuses on "small-C" or "large-C" constitutional concerns. International economic law requires international legal institutions to create and to enforce the law and the legislative, administrative, and judicial functions that exist in domestic legal systems. These three legal segments can be described functionally as transactional law, enterprise law, and constitutional or institutional law.

The most developed of these segments is the first. Cross-

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border transactions between parties located in different nations can be and are being facilitated by laws that enable efficient negotiation and performance of exchange transactions. An excellent example is the mature body of law undergirding international letters of credit. The Convention on International Contracts for the Sale of Goods, now some eight years old, and the complementary Limitations Convention are becoming more and more visible in litigated cases. International transactional law, over time, will reduce the necessity to resort, by choice-of-law doctrine, to some nation's domestic law as the law governing international transactions.

The second segment is generally undeveloped. In the nineteenth century, the modern concept of the corporation was established in the United States as a subject of state, not federal law. The growth of the so-called developed countries has been attributable, in large measure, to the enormous economic power of that concept to enable a legal entity to assemble and deploy human and capital resources on a scale that would be utterly impossible in other legal forms of enterprise structure. The twentieth century revolutions in communications and transportation have made it feasible for an entity to expand its activities geographically, virtually without limit. The feasible thus has become the actual: there are now some 40,000 MNEs, up from 3,500 MNEs three decades ago. MNEs as parent firms have 250,000 foreign affiliates. The explosive growth in the number and the reach of multinational enterprises in the past few years is not yet appreciated in the legal world. Marginal aspects of this change have been noted, as in Pat Buchanan's presidential campaign, California's unitary tax, or Tony Blair's theme of corporate stakeholders, but the truly fundamental legal consequences of the "internationality" of these enterprises have not yet been perceived.¹

¹ In business terms, the development of MNEs poses a whole new set of issues on how these enterprises can be managed most efficiently. One of the world's foremost MNEs, Coca Cola Corporation, recently restructured to eliminate national markets, including the U.S. market, as an organizing principle for corporate management. Another major MNE, the Ford Motor Company, has been investing billions of dollars to design a "world car" that can be manufactured and driven anywhere. See ALAN S. GUTTERMANN, *THE LAW OF DOMESTIC AND INTERNATIONAL STRATEGIC ALLIANCES: A SURVEY FOR CORPORATE MANAGEMENT* (1995); Eric W. Orts, *The Legitimacy of Multinational Corporations*, in *PROGRESSIVE CORPORATE LAW* (Lawrence E. Mitchell

Institutional development moves inexorably forward, despite the considerable drag of the complex idea of national sovereignty. A great deal has been accomplished already in regard to transactional law by bodies like the International Chamber of Commerce ("ICC"), whose international arbitration system has become a standard mechanism for dispute resolution. The ICC is also the parent of the normative standards that govern international letters of credit, mentioned earlier. The United Nations Commission on International Trade Law ("UNCITRAL") has contributed the International Sale of Goods Convention and other bodies of law that take effect through the process of national ratification of multinational treaties brokered by UNCITRAL. Similar products have been promulgated, for national adoption, by private or quasi-public organizations like the International Institute for Unification of Private Law ("UNIDROIT"), the Hague Conference on Private International Law, and the International Organization for Standardisation. The newest institution is the World Trade Organization ("WTO"), now in its second year. The WTO's primary role as overseer of the GATT system will be to regulate national governments, whose inclinations to take actions that distort or impair international trade led such governments to agree collectively to set up an international body to discipline themselves.²

Large pieces of law, however, are missing from the picture. First, at the transactional level, long-term credit provided by suppliers or lenders is difficult because of the lack of an international legal system to secure such debt. UNCITRAL recently launched a project for receivables lending, but an effective body of international credit law would be a significant factor in further

ed., 1995); John Farley & Steve Kobrin, *Organizing the Global Multinational Firm*, in REDESIGNING THE FIRM (Edward Bowman & Bruce Kogut eds., 1994); PHILIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* (1993); KENICHI OMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY* (1991); JANET LOWE, *THE SECRET EMPIRE: HOW 25 MULTINATIONALS RULE THE WORLD* (1992).

² Anyone interested in the past and future of the nation state should read John G. Ruggie, *Territoriality and Beyond: Problemizing Modernity in International Relations*, 47 INT'L ORG. 139 (1993); Kenichi Omae, *The Rise of the Region State*, FOREIGN AFF., Spring 1993, at 70; Kenichi Omae, *Putting Global Logic First*, HARV. BUS. REV., Jan.-Feb. 1995, at 119; *The Myth of the Powerless State*, ECONOMIST, Oct. 7, 1995, at 7; *The Nation-State is Dead: Long Live the Nation-State*, ECONOMIST, Dec. 23, 1995-Jan. 5, 1996, at 15.

trade expansion. Second, the world completely lacks even a rudimentary judicial system to which parties to international transactions can take disputes; the international arbitration system coupled with enforcement of arbitrators' awards in national courts is not sufficient. Third, at the enterprise level, there are multiple pressing issues, such as appropriate income taxation, enterprise insolvency, aggregation of dominant economic power, and anticompetitive conduct. Many, if not most of these, seem to require government institutions that have a jurisdictional reach at least as great as the scale of the enterprises to be governed. The current mode is to harness national government in cooperative ventures for "harmonized" enforcement of national laws, but the severe limitations of such *ad hoc* regulatory efforts are obvious.

Through exploration of these and other issues in the international arena, the *University of Pennsylvania Journal of International Economic Law* will have a rich and exciting future. I wish it great success.