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Foreword

International Economic Law in the Third World

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This issue is devoted to International Economic Law in the Third World. The articles are written from a variety of theoretical, doctrinal and legal perspectives. It is our sense that issues of international economic law continue to be important particularly in this early part of the twenty first century. Take for example the area of international arbitration particularly as it relates to investor-State arbitrations. In the recent past much ink has been poured challenging the closed door and often secretive nature of the arbitral process, mostly because many international actors continue to resist transparent arbitral processes. Recently, the Economist dramatized this critique in an article with the subtitle “A Hard Struggle to Shed Some Light on a Legal Gray Area.”¹ This subtitle is reminiscent of similar critiques leveled at the World Trade Organization’s dispute settlement process. In response to such criticisms there have been a variety of changes to procedural rules of international arbitration to allow certain public disclosures at various stages in the arbitral process. Recently, the Abyei Arbitration before the Permanent Court of Arbitration, comprised of some of the leading arbitrators in the world, opened up the proceedings to a live broadcast. Roger Alford has declared the Abyei Arbitration “a watershed in that it represents one of the most transparent examples of international arbitration in history.”² Indeed, in some quarters, there is a growing acceptance of public disclosure particularly in arbitration proceedings involving the public interest. Yet in others, there continues to be a lack of transparency in the arbitral process.

Beyond public disclosure of information in arbitral proceedings, an even more topical and knotty subject is a second type of transparency issue that involves the substantive rules and their applications in arbitration proceedings. This relates to

¹ The Economist, London: Apr. 25, 2009, Vol. 391, Issue 8628; p. 63.

² Roger Alford, ‘The Gold Standard of Transparency’ online: Kluwer Arbitration Blog, <<http://kluwer-arbitrationblog.com/blog/2009/05/06/the-gold-standard-of-transparency/#more-672>>.

the scope of authority of arbitration tribunals particularly in cases involving sovereign prerogatives and private actors' commercial interests. In the nineteenth and twentieth centuries, Latin American countries rejected the broad sweep of international arbitration over such matters and instead subscribed to the Calvo Clause according to which foreign investors were subject to domestic jurisdiction just like local investors. While the Calvo Clause fell into disrepute, a renewed questioning of the legitimacy of arbitral decision-making has led Bolivia and Ecuador to disown the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (ICSID Convention). And perhaps, Bolivia and Ecuador are not alone in this re-awakening considering the movements that are developing in response to these kinds of mechanisms in most of Latin America.

Third World Approaches to international economic governance focus on both types of transparency concerns – procedural and substantive. While the first may be remedied by wide acceptance of public disclosure of information related to arbitral proceedings, the second may not be as easily disposed of through transparency reforms that only focus on increasing available information during investor-state arbitrations. There still continues to be a need to interrogate the prerogative of keeping some kinds of information confidential in arbitral proceedings even when there has been progress made in opening up arbitral proceedings in a variety of venues. On the substantive aspect, which may be cast as a legitimacy issue, the need to explore alternative modes of dispute settlement continues. For example, it may be apposite to establish formal international court mechanisms to address cases that implicate matters that are constitutional in nature and extend beyond purely commercial issues. Often, the balancing of the commercial interests of parties to disputes and the clearly relevant interests of millions of people sometimes involved in water and sewerage cases, massive economic collapse facing states, wide ranging environmental and health considerations, and so on, seem to extend beyond the ready grasp of *ad hoc* arbitral tribunals. As such, Third World Approaches to international economic governance should not only question the suitability of arbitration to deal with these kinds of cases given the limitations that attend it as a dispute settlement mechanism but also seek alternative international mechanisms and assess emerging norms in order to respond to challenges facing the system.

Given the importance of these issues and related issues in international economic law, there is a need to revisit them especially at this time of widespread change in the international legal order. This brief volume touches on some of these issues. *James Gathii's* contribution, "War's Legacy in International Investment Law," traces war's legacy in international commercial law and touches on many of these issues. For its part, *Jalia Kangave's* contribution, "The Dominant Voices in Double Taxation Agreements: A Critical Analysis of the 'Dividend' Article in the Agreement between Uganda and the Netherlands," highlights the

imbalances and inequities produced in tax treaties between economically powerful states and Third World countries. Kangave's paper demonstrates the importance of scholarly contributions from a third world perspective in technical forums such as the Organization for Economic Cooperation and Development (OECD) that have long remained crucial forums for discussing and coordinating international tax issues. For example while the OECD Model Double Tax Treaty lays down rules and guidelines for the avoidance of double taxation that are used between developed countries, in practice, these rules often make their way into negotiations between Third World countries like Uganda and developed countries like the Netherlands. As Kangave further shows, a similar UN-Model Double Tax Treaty also has potentially worrying consequences for Third World countries. We would anticipate that a UN-Model Treaty may be better for Third World countries where Third World countries are represented than in the OECD where they are not, but as Kangave shows this is not the case. The paper shows quite vividly how the Uganda/Netherlands Double Tax Treaty shifts significant tax revenues away from Uganda – which arguably needs to keep as much revenue as a least developed country relative to the Netherlands. Perhaps foregoing this revenue will increase foreign direct investment in Uganda given such incentives are argued to encourage investors. However, as Kangave shows, there is hardly any reliable evidence that incentives result in increased investments. As such, revenue losses arising from extending such incentives may well dwarf their benefits. This is particularly so in the Uganda/Netherlands Tax Agreement whose dividend provision essentially reduces the tax rate for Dutch investors in Uganda to nil.

In his paper, "Third World Resistance to International Economic and Structural Constraints: Assessing the Utility of the Right to Health in the Context of the TRIPS Agreement," *Daniel Muriu* shows through an analysis of power, resistance and agency, how the right to health has been compromised by leading economic actors. He argues that it is not enough to merely examine the normative content, justiciability and enforceability of the right to health without concurrently paying attention to what we may refer to as the structural power of multinational actors.³ In fact, Third World Approaches to International Law (TWAAIL) scholarship has precisely relied on such a combination of both mainstream and critical analysis to expose the manner in which rights such as the right to health are limited by the very real power exercised by actors with opposing

³ Susan Strange defines structural power as having to do with the ability to set "the rules of the game." See Conversation With Susan Strange, available at http://www.geocities.com/jt_revino41/STRANGE.DOC (last visited June 4, 2003). Note, she gives the following example of the exercise of structural power: "An individual like the Pope has structural power because he manages the Catholic Church, and the Catholic Church, for example, prevents some Catholics from contraception or abortion in their range of options; so he is exercising structural power." *Id.* Susan Strange further argues that it is "only by looking at the structural power exercised – often unconsciously – over other states, markets, private individuals, and firms by the agencies of the United States can the extent of the asymmetries of state power be appreciated." Susan Strange, 'The Defective State', 124 *Daedulus* 55, 64 (1995).

interests. Indeed as Muriu concludes, the struggle for the right to health is a political one that includes not only mobilizing the best legal arguments possible, but includes the organization and mobilization of concerned individuals and groups domestically and internationally and not only on the streets but in court rooms and in a variety of other locations. Such mobilization and organization would directly engage with the powerful actors who have stood in the way of the realization of the right to health. Such mobilization and organization of not only legal arguments but of political action, Wanjau shows, has paid off dividends in South Africa following the withdrawal of a suit against South African legislation by the powerful global pharmaceutical industry that makes it easier for South Africa to have essential medicines affordable and accessible to South Africans that need them. In short, this issue provides a variety of insights into some of the most important challenges facing international economic law as it affects the Third World today. We hope it inspires even more such work in future to reflect on the multiple similar challenges confronting the Third World.