Foreword

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The title of this Research Agenda is catchy—and it says it all in a few words. This book focuses on global power shifts and international economic law (IEL), two strongly interrelated items.

Let's begin with IEL, a relatively young discipline in continuous evolution, particularly also as a reaction to global (economic, political, and technological) power shifts.

When one of the first treatises of IEL was published, Georg Erler's *Grundprobleme des internationalen Wirtschaftsrechts* in 1956 (in German), the approach adopted by this author was a truly comprehensive one: both elements of public international law and elements of the national legal orders (both private and public) were considered, as long as their purpose should be "the regulation of the international economy."[1]

This all-encompassing approach was summarized by Georg Erler (1905–81) in the following way: "International Economic Law is not the international law of the economy but rather the law of the international economy." Today, this vision seems remarkably modern, but in the second half of the twentieth century, many writers seemed to follow prevailingly a different path, thereby adhering to the vision of Georg Schwarzenberger (1908–91), for whom IEL was a special field of international law.[2] This era was characterized by a neat East–West divide and states acting as main protagonists in the international economy. It was therefore small wonder that traditional international public lawyers could claim IEL with some justification as "theirs."[3]

The crumbling of the Iron Curtain provoked a major shift in power relations: as the East–West divide disappeared, at least in its most pronounced form, also the state, as the ultimate stronghold of national sovereignty in economic relations, was

1 See, for this and the following, P. Hilpold, Book review: Matthias Herdegen, Principles of International Economic Law 2nd ed. 2016, in: 20 JIEL 2017, pp. 436–48.

2 See, in this regard, inter alia., I. Seidl-Hohenveldern, International Economic Law, Kluwer Law International, 1989.

3 This is, however, not to deny that treatises written by lawyers of private law were also published. See, inter alia, H. Kronke/W. Melis/H. Kuhn, Handbuch Internationales Wirtschaftsrecht, Schulthess: Zurich 2nd ed. 2016.

undermined in its relevance. Economic deregulation fostered transnational transactions and promoted the creation of an ever-growing number of non-state economic actors. A further and even heavier assault on the walls of the state came from technological shifts that permitted the creation of truly universal marketplaces where widely harmonized technological systems and transaction rules applied and state control over these transactions began to fade. One of the most glaring expressions of these developments was the creation of the World Trade Organization (WTO), which seemed to form a bedrock for IEL regulation that would overcome traditional boundaries of (public international law-oriented) IEL, especially as a consequence of the integration of the rules on the protection of intellectual property in the Agreement on Trade-Related Aspects of Intellectual Property Rights. Another common trait seemed to be the broad judicialization of both international law and international economic law.[4] In the meantime, however, opposing trends have come to bear, and the certainties and prospects of the 1990s have blurred or are vanishing.

In the meantime, however, much has changed again. We are assisting a so-called "dejudicialization" process, whereby international judicial institutions are restricted in their jurisdiction or are rendered altogether dysfunctional. The best example of this is the WTO dispute settlement system: the US blocking of new nominations for the Appellate Body since 2017 provoked a progressive decline of this institution and eventually, in 2019, its demise.[5]

Another area which has undergone profound changes is that of development. Since the 1960s, the development issue has become a centerpiece of any IEL discussion. Since Part IV was added to the General Agreement on Tariffs and Trade (GATT) in the period 1964–66, the question of how IEL institutions should address the development challenge has always been at the top of the agenda of international trade negotiations.[6] This process culminated in the qualification of the ninth WTO negotiating Round, the "Doha Round" starting in 2001, as the "development round." The de facto failure of this round is often seen as a bad omen for the perspective of the development task as such. In reality, however, the transformation of the development concept must also be taken into account. The understanding of the meaning of development, and what it was aimed at, was surely different in the 1970s than, let's say, in the 1980s and similar considerations can be made for the following decades. These changing perspectives had immediate consequences for the understanding of the nature of IEL. The failure of the attempt to create a New International Economic Order had profound repercus-

4 For an overview of these developments, see G. I. Hernández, The Judicialization of International Law: Reflections on the Empirical Turn (Review Essay), in: 25 EJIL 2014, pp. 919–33; and A. Follesdal/G. Ulfstein (eds.), The Judicialization of International Law – A Mixed Blessing? OUP: Oxford 2016.

5 See P. Hilpold/R. Senti, WTO – System und Funktionsweise der Welthandelsordnung, 2024, p. 157.

6 Ibid., pp. 239 ff. See also P. Hilpold, EU Development Cooperation: A Stock-Taking and a Vision for the Future, in: Austrian Review of International and European Law, vol. 20, 2015 (2019), pp. 189–260.

sions on the understanding of IEL.[7] WTO law did not develop as expected. The global power shift is mirrored in the WTO: the growing rivalry between the great trading blocs and powers also had disruptive effects on the functionability of this institution. With the weakening of the WTO institution, regional integration became a forceful alternative to multilateral trade on the basis of the most-favored nation principle.[8] Many recent publications on IEL are aware of the need to widen the perspective and to focus on a "New IEL" that considers both the most important technological changes in the international economic system and the partial disintegration of the "traditional" IEL system with a few monolithic international institutions, like the WTO, standing at its center.[9]

The present collective writing, edited by Joel Slawotsky, carries these attempts forward and brings them to a new height.

Joel Slawotsky starts out with a detailed analysis of "national security" in a contribution entitled "Conceptualizing National Security in an Era of Transformative Technologies and Strategic Conflict." The author characterizes this task as "among the most enigmatic legal issues in today's IEL." He evidences that the security exception, until recently, was relatively rarely invoked or litigated. As the practical experience with Art. XXI GATT has shown, barriers were extremely high for the activation of this exception.[10] In the meantime, however, several great trading nations and blocs have considerably expanded the notion of national security, so that it should eventually refer even to attempts to defend positions of economic or technological advantage or domination. Thereby, in the era of larger power shifts, often engendered by new developments in IT, justifications for the recourse to unilateral measures—to the detriment of the stability of the International Economic Order (IEO)—have been greatly expanded. Very fittingly, Joel Slawotsky has identified in this development a worrying challenge for the future of the IEO.

Strictly connected with this topic is the issue of sanctions. Of particular concern are unilateral sanctions, to which ever more states are taking recourse in an ever-broader

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7 See extensively Th. Wälde, A Requiem for the "New International Economic Order": The Rise and Fall of Paradigms in International Economic Law and a Post-Mortem with Timeless Significance, in: G. Hafner et al. (eds.), Liber Amicorum for Professor Ignaz Seidl-Hohenveldern – in honour of his 80th birthday, 1998, pp. 771–804.

8 See J. N. Bhagwati, Termites in the Trading System: How Preferential Agreements Undermine Free Trade, OUP: Oxford 2008; and P. Hilpold, Die EU im GATT/WTO-System, Nomos: Baden-Baden, 4th ed. 2018.

9 See, for example, J. D. Haskell/A. Rasulov (eds.), New Voices and New Perspectives in International Economic Law, EYIEL 2020; L. Choukroune/J. J. Nedumpara, International Economic Law, CUP: Cambridge 2021; D. Yokomizo et al. (eds.), Changing Orders in International Economic Law – A Japanese Perspective, Routledge 2023; and L. Han, International Economic Law in Contemporary World, Springer: Cham 2024.

10 See P. Hilpold/R. Senti, WTO, 2024, above n. 5, p. 368 ff.

fashion. The question arises in this context whether this policy is reconcilable with international law. Sienho Yee demonstrates, in a contribution entitled "Unilateral Sanctions: Kind and Degree; Long-Arm and Strong-Arm Jurisdiction; Real Intent and 'Could-be' Intent," the many gray areas and definitional problems in this field. On the whole, this contribution can be seen as a plea to act with more restraint in this context, in order to maintain an open, fair, and competitive international economic system.

As mentioned above, the "global shifts" in the IEO as well as in IEL concern, in a very pronounced manner, the question of development. The profound changes that the IEO has undergone in recent decades had immediate effects also on the understanding of the concept of "development." The notion of "development" has surely become more sophisticated and more articulated; but in this context, even more important were the global power shifts at the center of this edited book. Countries that were in the past touted with the epithet "developing," like China or India, belong now to the worldwide leading economic nations. If they are still to be considered as "developing countries," the meaning attributed to this characterization has to be a widely different one than it has been in the past.

The contribution by Ru Ding and Yupeng Cheng, entitled "The New Development Philosophy: Inspirations for the WTO Reform on Industrial Subsidy Rules," delivers a refreshing panoply of these issues. They show that traditional WTO developmentalism has increasingly become inadequate to cater to the most pivotal modern-day development challenges such as climate change, global pandemics, economic disparities, and geopolitical tensions. The authors effectively analyze the development initiatives by the foremost trading blocs and countries: the "European Union's Green Deal" of 2019, the United States' Inflation Reduction Act of 2022, and the Chinese Belt and Road Initiative of 2017. All these initiatives build on subsidies to overcome market failures and to boost economic development. Drawing heavily on China's new development philosophy, they propose a new vision of subsidies as a development instrument and in this context they advocate the incorporation of climate change subsidies and development-supporting subsidies as new categories of non-actionable subsidies within WTO law.

In their contribution on "[t]he Ever-Expanding Action of the EU Against Subsidies, Except its Own", Juhi Dion Sud and Edwin Vermulst, take a somewhat different stance when they blame the EU subsidy policy of incoherence as the EU forcefully counters subsidies of some (not all) trading partner while taking avail of this instrument for "green" objectives.

Coherence is, in fact, an important objective of any legal system and of the international economic order in particular. Especially these days it becomes clear what dangers may lie in unilateral, arbitrary action.

This book identifies "digitalization" as one major driving force for a comprehensive transformation of IEL as it has been understood in the past. Several contributions in

this collective writing are dedicated to specific issues of the international digitalization process and how it affects IEL and the IEO.

The chapter by Locknie Hsu on "Digitalization and its Role in International Economic Law" opens the discussion by evidencing that rapidly evolving digital technology should provoke an assessment of whether the existing laws and regulations in this field are "fit for purpose," both in view of present technological and economic needs and in regard to the most recent geopolitical developments, which have engendered aspirations and needs for control and security. The author invites policymakers to devote more attention to these developments in order to be prepared for the challenges, potential, and risks arising from these technologies.

In a contribution entitled "Is DEPA a New Choice for China in Participating in Global Digital Trade Governance?" Wei Shen (Jiaotong) emphasizes that for the moment, there is no encompassing legal framework for the international governance of digital trade. As a consequence, the European Union and the United States are pursuing a unilateral approach whereby their own standards should be fostered. It is foreseeable that such an approach may lead to trade conflicts and in any case, it is counterproductive to any attempt to maximize worldwide welfare gains from digitalization. In this context, the author draws the reader's attention to the Digital Economy Partnership Agreement of 2020, the world's first international agreement specifically dedicated to digital trade. While at the time of writing (April 2025) it had only four members (Chile, New Zealand, Singapore, and South Korea), China is also on the way to joining this agreement. The author specifies the advantages that China can draw from this agreement due to the specific characteristics of the Chinese economy in the digital field, where huge potential lies, as the author demonstrates.

The interplay between cross-border data flows and digital foreign direct investment (FDI) is examined in the chapter contributed by Julien Chaisse. This chapter explores regulatory gaps and inherent challenges within the digital FDI regime and speaks out for the facilitation of cross-border data flows, while at the same time ensuring that national security concerns are guaranteed and data privacy concerns are adequately addressed. Also, this contribution makes clear that while the existing regulatory framework—especially the one based on WTO law—may offer a useful basis to this end, as a whole it is not sufficient to address effectively the present challenges in this area, and even less so those lying ahead.

Leon Trakman and Robert Walters point out in their contribution on "International Commercial Arbitration in the Digital Economy" that digitalization presents both great opportunities and considerable risks for international commercial arbitration. While new digital technologies like blockchain may contribute to rendering these procedures speedier and more cost-efficient, they also present also challenges regarding their potential misuse and, in particular, the protection of confidentiality. The dysfunctional working of such technologies will also be the object of challenges by disputants, and, according to the authors, arbitration institutions and decision-makers should prepare for this event.

In a contribution inspired by legal philosophy, Larry Catá Backer, writing on "Overcoming the Human, Rights, and the State in Human Rights," considers the need to develop a new approach to human rights protection beyond the one still inspired by the Universal Declaration on Human Rights of 1948, in order to take account of the global power shifts associated with the introduction of new digital technologies as described above. Of course, thereby "traditional" human rights protection will not lose relevance. There is still the need to adapt the IEO and IEL more forcefully to the commands of international human rights protection as they are derived, in their very essence, from the Universal Declaration of Human Rights.[11] Nonetheless, the ongoing technological revolution requires the adoption of a broader perspective.

Two important contributions, focusing on the dejudicialization of IEL we are currently witnessing, conclude this collective writing.

Ming Du explores "The Dejudicialization of Global Economic Governance: A Paradigm Shift in International Economic Law?" The backlash against the judicialization of IEL—once considered the most important trait of modern IEO, providing guidance for its further development—is a matter of fact. The author points, in this context, first of all, to the paralysis of the WTO Appellate Body and the severe legitimacy crisis of investor-state dispute settlement (ISDS). As the main culprits for this development, the author identifies global power shifts and the intent to reassert national sovereignty in the face of ISDS jurisprudence often felt to be too intrusive by national governments. The author, however, also correctly remarks that judicialization can ebb and flow and the long-term trajectory of the present developments in this field is by no means sure or predictable.

In the final analysis written by Paul B. Stephan on the "Revolt Against International Tribunals," appropriately set at the end of the book, an astute examination of this paradigm shift in IEL is undertaken. Stephan describes the demise of the WTO Appellate Body system and the severe disruption of ISDS as facts that may be bemoaned by lawyers, but eventually the present situation has to be accepted as it is. Nonetheless, according to the author, this situation should not necessarily be viewed over-critically or lead to a pessimistic outlook for the IEO. Even international dispute resolution rendered less "judicial" and more "diplomatic" can offer important contributions for solving international conflicts and rendering international economic transactions smoother. He sees more flexibility in the newly adapted dispute resolution instruments so that power shifts can be better accommodated and compromise can be easier to find. In the end, the transformation of IEL that we are currently witnessing reflects nothing other than the enormous adaptability of international law as a whole, which must also mirror the power situation, the "facts on the ground" as they present themselves in reality. At the same time, the IEO has, of course, to defend the principles

[11] See E.-U. Petersmann, International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods, Hart: London 2012; and P. Hilpold, WTO Law and Human Rights: Bringing Together Two Autopoietic Orders, in 10 Chinese Journal of International Law 2011, pp. 323–372.

that have proven to be essential for the survival and prosperity of mankind in a world order based on respect for human dignity. In this sense, IEL has to demonstrate resilience in the face of new developments.

This leads us to a general assessment of this collective writing in a broader perspective: without doubt, this is an important book that analyzes and in part anticipates developments that more traditional analysts and textbooks have not yet fully taken into account. This is also an important challenge for "teaching international law."[12] All too often, the content of this teaching reflects a considerable backlog regarding the most recent developments in this field, thereby making it in part redundant, if not even harmful, as future lawyers are thereby instructed on the basis of a legal system no longer in place. Teachers are often in the same situation as the lawyers described by Stephan who want to preserve an IEO that is no longer in force: they have to adapt to a new reality that takes shape at a breathtaking pace. The paradigm shifts underway offer new opportunities for those capable of identifying them and adapting accordingly. This book offers an excellent opportunity to become acquainted with these transformation processes, which international lawyers and practitioners will ignore in the future at their own peril.

[12] See P. Hilpold/G. Nesi (eds.), Teaching International Law, Brill/Martinus Nijhoff: Leiden/Boston 2024.