International Economic Law

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Content type: Encyclopedia entries
Article last updated: June 2014

Product: Max Planck Encyclopedia of Public International Law [MPEPIL]

Subject(s):
International investment law — International monetary law — International trade — Non-discrimination — Most-favoured-nation treatment (MFN) — National treatment — Developing countries — Full protection and security — Proportionality and immediacy — Customary international law — EC Law, relationship with international law

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. Notion and Scope

1. Definition

The term international economic law stands for a complex regulatory framework flowing from different sources of law governing international economic relations and transboundary economic conduct by States, international organizations, and private actors (→ Non-State Actors). In the interest of tangible contours, this notion is confined to the regulation of cross-border transactions in goods (→ Goods, Free Circulation of, services (→ Services, Trade in) and capital (→ Capital, Free Flow of, Investments, International Protection), monetary relations (→ Monetary Law, International), and the international protection of intellectual property (→ Intellectual Property, International Protection). A narrow concept of international economic law only refers to the segment of public international law directly governing—rather than merely affecting—economic relations between States or international organizations. A broader understanding more adequately reflects the role of private actors or hybrid entities administering public goods of major relevance to the → international community, like the Internet Corporation for Assigned Numbers and Names (′ICANN′; → Internet). It includes norms of public international law addressing transboundary activities of private undertakings by international agreements as well as issues of → jurisdiction of States and conflicting interests of States concerning the regulation of economic activities in an international context.

2. Areas of International Economic Law

International economic law encompasses international trade law, regional economic integration (→ Regional Trade Agreements), international investment law and international monetary law. It also comprises areas related to trade and investment such as international commercial arbitration (→ Commercial Arbitration, International), double taxation agreements, and international intellectual or industrial property law (→ Industrial Property, International Protection), as well as international competition law (→ Antitrust or Competition Law, International). Advanced integration of economies will require a regime for movement of persons, including free establishment, and finally, common antitrust rules.

(a) International Trade Law

The international regulation of the exchange of goods and services across borders is a major sector of international economic law. It is predominantly based on the reciprocal character of the respective rights and obligations of all parties and considered to achieve mutual benefits for all of them (→ Reciprocity). The → World Trade Organization (WTO) provides the institutional basis for global trade relations and is built on pre-existing structures. Its principal objectives are to reduce existing trade barriers and expand international trade, raise the standard of living, realize → sustainable development, and secure an adequate share in the growth of international trade for → developing countries (Marrakesh Agreement Establishing the World Trade Organization [WTO Agreement] preamble). The institutional system of the WTO administers a number of trade agreements. The → General Agreement on Tariffs and Trade (1947 and 1994) (′GATT′) constitutes an elaborate legal instrument to substantially reduce tariffs and other barriers to trade and to eliminate discriminatory treatment. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (′SPS Agreement′; → Sanitary and Phytosanitary Standards) and the Agreement on Technical Barriers to Trade (→ Technical Barriers to Trade) complement the trade rules under GATT. General exceptions allow for restrictive measures in the interest of enumerated public interests such as health or the protection of public morals. Specific exceptions, inter alia, relate to the protection of domestic producers against unforeseen serious harm arising from imports and trade concessions (→ Safeguards). Other WTO agreements have established a special regime for the agricultural sector (WTO Agreement on Agricultural Trade, signed 15 April 1994; entered in force 1 January 1995, 1987 UNTS 410) or address subsidies (→ Subsidies, International Restrictions), → anti-dumping, trade-related investment measures, and government procurement (Government Procurement, International Restrictions). The → General Agreement on Trade in Services (1994) (′GATS′) extends the multilateral trading system to the field of services. The → Agreement on Trade-Related Aspects of Intellectual Property Rights (1984) (′TRIPS Agreement′) aims at the protection of
4 WTO law allows for preferential trade agreements (establishing → customs unions or → free trade areas), if covering ‘substantially all the trade’ (see Art. XXIV (4) and (8) GATT 1947). In a regional context, the system of the European Union has reached a unique level of economic and political integration (→ Economic Integration, Comparative Analysis). The → North American Free Trade Agreement (1992) (NAFTA’; 1993) 32 ILM 288 created a trading block with Canada, the United States, and Mexico. Other examples of regional economic agreements are the → Association of Southeast Asian Nations (ASEAN), the ASEAN-China Free Trade Agreement (AECFTA), the → Asian-Pacific Economic Cooperation (APEC), the → Andean Community of Nations (CAN), the → Mercosur, and the → Arab Free Trade Area Agreement (1997), as well as a number of regional trade arrangements in Central America (→ Central American Integration System [CACI]), the Caribbean (→ Caribbean Community [CARICOM]), and Africa (→ Economic Community of West African States [ECOWAS], → Common Market for Eastern and Southern Africa [COMESA], → Southern African Development Community [SADC]).

→ East African Community [EAC]. In addition to these multilateral treaties, some WTO members, especially the US and the EU, pursue an ambitious agenda of bilateral trade agreements. The EU and the US have entered into negotiations on a Transatlantic Trade and Investment Partnership (TTIP).

(b) International Antitrust or Competition Law

5 International antitrust or competition law governs the interplay of domestic competition (antitrust) rules concerning the issue of undertakings. WTO law contains rudimentary rules sanctioning the abuse of regulatory powers and practices restraining competition (see Mexico—Measures Affecting Telecommunication Services—Report of the Panel). In the absence of a truly international regime for competition, the establishment and application of competition rules lie with the competent domestic bodies. International agreements provide for mutual assistance and cooperation among competition authorities (see eg Agreement between the Government of the United States of America and the Commission of the European Communities regarding the Application of Their Competition Laws [done and entered into force 23 September 1991] (1991) 30 ILM 1481; Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws [done and entered into force 4 June 1998] (1998) 37 ILM 1071). International law governs the legitimate reach of national competition laws as to their extraterritorial effects. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices elaborated by the United Nations Conference for Trade and Development addresses the exercise of antitrust mechanisms. The OECD Guidelines for Multinational Enterprises (Chapter X) aim at restricting anticompetitive behaviour.

(c) International Investment Law

6 International investment law covers the promotion of foreign investments and their protection against interferences by the host State. Attracting foreign investments by establishing a favourable investment climate is now recognized as a cornerstone of economic development. The main sources of international investment law are bilateral and multilateral investment treaties (→ Investments, Bilateral Treaties) and, rising in number, preferential trade agreements or treaties for specific sectors with an investment protection regime like the Energy Charter Treaty [signed 17 December 1994, entered into force 16 April 1998] CJILB/02/24. By establishing standards for legal stability, predictability of State action, and due process, particularly in the context of → fair and equitable treatment, international investment law has intensive repercussions on the legal system of the host State, enhancing the → rule of law. Under some agreements, customary rules still provide the standard of reference for fair and equitable treatment. On the other hand, treaty standards shape the → minimum standards for the treatment of foreign investors in general. Recent treaty practice tends to avoid undue limitations on political choices, leaving considerably more room for standards concerning national environment, health, or labour. Nowadays, respect for the integrity of the law of the host State is also perceived as ‘a critical part of development and a concern of international investment law’ (Fraport v Philippines para 402).

The withdrawal of some emerging economy countries from investment treaties and the call for prior exhaustion of local remedies have placed the current system of investment protection under pressure.

(d) International Monetary Law

7 An important sector of international economic law deals with monetary relations. The Articles of Agreement of the International Monetary Fund (‘IMF Agreement’ [signed and entered into force 27 December 1945] 2 UNTS 39; → International Monetary Fund [IMF]) provides the rules for surveillance of currency arrangements (→ Currency Control) and assistance to Member States in case of balance of payment deficits (Art. IV (1) (iii) IMF Agreement). A major weakness of the actual monetary system lies in the lack of a truly effective control of exchange rate manipulations. Besides the European Monetary Union (→ Monetary Law, European) with its European System of Central Banks, other → monetary unions and monetary zones exist with a far lesser degree of monetary and fiscal integration.

B. Historical Evolution

8 In classical public international law few principles, such as the minimum standard of treatment, governed international economic relations. The → Calvo Doctrine/Calvo Clause advocates national treatment (→ National Treatment, Principle), as opposed to a universal minimum standard, as the relevant parameter for foreigners. After losing influence in the Latin American countries, the doctrine has, however, in recent years experienced a form of revival. The arguments of Adam Smith (An Inquiry into the Nature and Causes of the Wealth of Nations [1776]) and the theory of ‘comparative advantage’ (John Stuart Mill, David Ricardo) laid the conceptual basis for a liberalization of international trade. The Cobden–Chevalier Treaty between France and the United Kingdom [signed 23 January 1860, entered into force 4 February 1860] 121 CTS 243 became a model for other free trade agreements, which often provided for most-favoured-nation (‘MFN’) treatment (→ Most-Favoured-Nation Clause). During long periods of the 19th century, the UK, more than any other economic power, stood for free trade, whilst the US adhered to protectionism. In the last quarter of the 19th century and afterwards, the broad liberalization of international trade in Europe with low tariffs gave way to protectionist tendencies. International agreements had rather little impact on the relatively high integration of capital markets in the late 19th century (on the basis of the gold standard) as well as on the free movement of persons. Between the World Wars and after World War II, the rise of State economies and → nationalization in communist countries challenged established rules on the protection of foreign property (→ Property, Right to, International Protection). At the London Economic Conference in 1933, multilateral endeavours to revive the world economy through currency stabilization by setting intergovernmental → debts and reducing tariffs failed.

9 The contours of modern international economic law emerged at the end of World War II with the → Bretton Woods Conference (1944), leading to the establishment of the IMF and the → World Bank Group. The → Havana Charter (1948) (UN Doc ECONF/278, 3), aiming at the
establishment of an international trade organization, did not materialize owing to criticism in the US. A core element of the Havana Charter came into force in 1948—the GATT 1947. The bilateral to treaties of friendship, commerce and navigation operated as precursor to subsequent preferential trade agreements and investment treaties. In the 1960s and 1970s, many developing countries, supported by communist and certain non-aligned States, called for a New International Economic Order (NEO) focusing on national sovereignty over natural resources and lowering the standard for compensation of expropriated foreign companies ("appropriate" rather than "adequate" compensation). This movement found its most notable expression in the Charter of Economic Rights and Duties of States (1974) with industrialized States of the West either voting against or abstaining. On the other hand, recognition of private foreign investment as a vital factor for economic and social development—as formulated in the Monterrey Consensus of the International Conference on Financing for Development—as well as the collapse of most communist systems catalyzed the conclusion of bilateral investment treaties providing for full compensation in case of expropriation. The Uruguay reform of the world trade system (1994; "Uruguay Round") led to the establishment of the WTO, the GATT 1947, and several other agreements. In a broader sense, the WTO regime may be considered the constitutional framework for world trade. However, the WTO system does not lend itself to be conceptualized in terms of fundamental individual rights and values that underlie or even supersede explicit rules. Rather than generating complex balancing processes and a large margin of interpretation, the WTO system operates as a finely-tuned interplay of principles and exceptions. A wide range of bilateral and multilateral regional agreements on trade and economic integration supplement and—to some extent—erode the WTO rules ("spaghetti bowl").

C. Sources of International Economic Law

1. Public International Law

Under customary international law States are free to opt for or against economic relations with other countries. As the international Court of Justice (ICJ) put it in the Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States (1986) ICJ Rep 14): "A State is not bound to continue particular trade relations longer than it sees fit to do, in the absence of a treaty commitment or other specific legal obligation" (at para. 276). Therefore, bilateral and multilateral treaties are the primary sources of international law governing transboundary movement of persons in the context of economic activities, the flow of capital, and trade in goods and services, as well as monetary relations.

(a) Custom

Still, customary rules continue to be relevant for the status of aliens, especially concerning a minimum standard of treatment, conditions for expropriation of foreign property, and rules for diplomatic protection. Customary law also determines the validity of stabilization clauses included in agreements between States and foreign investors (Treaties, Validity). These clauses aim to prevent changes in domestic law interfering with established legal positions of the investor, thus creating limited international legal personality. Customary law limits the extraterritorial application of economic law and the exercise of jurisdiction over foreign individuals and corporations (Extraterritorially). Additionally, it determines the possible reliance of States on necessity as an exonerating circumstance in times of financial or economic crisis.

(b) Multilateral and Bilateral Treaties

Modern international economic law is, first and foremost, based on treaties. This holds particularly true for international—universal and regional—trade law and international monetary law. Integration within the EU rests on an autonomous legal order, which can no longer be conceptualized in terms of traditional international treaty law (European Community and Union Law and International Law). The protection of foreign investment is nowadays governed by an ever closer net of treaties.


(c) General Principles of Law

In international economic relations, general principles of law ("recognized by civilized nations" (Art. 38 (1) (c) ICJ Statute) play a role in filling "gaps" between international treaty law and rules of customary international law. A general principle of international law precludes investors' claims based on corruption from being recognized (World Duty Free Company Ltd v Kenya). General principles of law also determine the liability of members of international organizations vis-à-vis States and private creditors.

2. Transnational Law and Lex Mercatoria

Normative standards for international economic relations are also shaped by private actors engaged in transboundary transactions as well as by common features of national contract and commercial law. Well-established international trade practice may now be considered part of a transnational lex mercatoria which also includes the authoritative interpretation of trade terms ("INCOTERMS"). Agreements of private parties on general principles of contract law as a standard of reference for international arbitration tribunals have been accepted by national courts. It remains a matter of controversy whether widely recognized elements of lex mercatoria, in conjunction with general principles of national law, are sufficiently comprehensive and consistently linked together to form a transnational law in terms of a legal system.

In a broader sense, the autonomous regulation of cyberspace—the Domain Name System by the ICANN with its international management structure—may be considered a transnational legal regime. However, the incorporation of ICANN under the law of California and the involvement of the US government (which shall be phased out from 2015) demonstrate that even this form of internationalized self-regulation is somehow anchored in domestic law.
3. National Law and its Extraterritorial Application

17 Within the confines established by customary international law or treaties on national jurisdiction, States may regulate economic activities on their own and even on foreign territory. Without a sufficient nexus legitimizing such exercise of jurisdiction—such as a personal or territorial link—the extraterritorial application of national laws violates the principle of non-intervention (→ Intervention, Prohibition of). As a basis for jurisdiction, States often rely on the effects upon their own territory caused by economic activities carried out abroad, eg in antitrust law. The precise limitations on the extraterritorial exercise of jurisdiction are a matter of controversy. Particularly far-reaching extraterritorial legislation, such as the US sanctions regime against → Cuba or Iran and Libya, has drawn serious criticism. The recent case-law of the US Supreme Court follows the presumption that Congress does not intend to legislate with extraterritorial effects.

18 States and their courts are free to give legal effect to foreign legislation that has extraterritorial reach. National courts usually will apply or otherwise give due consideration to foreign legislation which pursues aims and interests recognized as legitimate under domestic law or under international treaties ratified by the State concerned. This applies in particular with respect to → arms control, → cultural heritage, or endangered species. Some treaties provide for extraterritorial effect that is given to certain national measures in such a way that they are recognized by other States (see on exchange control regulations Art. VIII (2) (b) IMF Agreement).

19 Extraterritorial application of national laws fulfils an important function in international economic law to the extent that internationally recognized interests (global or national) are not sufficiently protected by international instruments. Thus, the extraterritorial reach of legislation against the violation of international law serves the protection of → human rights in the context of economic activities carried out abroad (see also → Trade and Human Rights). Under the → United States Alien Tort Claims Act (1789) (ATCA), 28 United States Code § 1350) federal courts had assumed corporate liability for aiding and abetting human rights violations committed by foreign States. However, in the ḥehe case the US Supreme Court rejected the extraterritorial application of the ATCA.

D. Actors

1. States

20 The world economic order is still a rather decentralized system. Thus, individual States continue to be the main actors in international economic law. Their predominance is the result of several factors. States exercise regulatory power over economic activities, not only in terms of national legislation and administrative supervision, but also through the creation of new international rules and their membership in international organizations and other forums of intergovernmental cooperation. States, either directly or through governmental agencies such as central banks and State enterprises, participate in economic transactions. The definition of strategic sectors allows them to control industrial and other economic activities considered as particularly sensitive. States administer natural resources such as commodities (→ Commodities, International Regulation of Production and Trade) or genetic resources within their sovereign rights. They control the supply of energy via transport infrastructure. Sovereign wealth funds rank among the most potent investors and allow States to implement what they consider an ethical investment policy.

21 In principle, each State may choose its own economic system. International law protects this freedom through the principle of non-intervention. However, multilateral agreements like GATS or other regional and bilateral agreements on free trade guarantee or pre-suppose a market economy and provide for access to private undertakings for the trade of goods or services and limit State monopolies.

2. International Organizations and Other Forms of Intergovernmental Cooperation

22 Ever since the end of World War II the complexity of transboundary economic relations and the limited influence of the single State, as well as the activities of transnational corporations (“TNCs”; → Corporations in International Law), have stimulated the establishment of international economic organizations and other forms of intergovernmental cooperation (→ Economic Organizations and Groups, International). International organizations play a vital regulatory role in international economic law. They also provide a forum for intergovernmental cooperation, → consultation, and support. Organizations like the → Organization of the Petroleum Exporting Countries (OPEC) coordinate the marketing of commodities, operating as a form of cartel. After the collapse of the → International Tin Council (ITC), the direct engagement of international organizations in the market of commodities—eg by purchasing and selling commodities in order to stabilize prices—has given way to softer mechanisms of influencing trade.

23 Major universal economic organizations are the → International Monetary Fund (IMF), the → International Bank for Reconstruction and Development (IBRD) and related institutions (→ International Development Association [IDA], → International Finance Corporation [IFC]), the WTO, or the → World Intellectual Property Organization (WIPO). The UN General Assembly established the → United Nations Conference on Trade and Development (UNCTAD) and the → United Nations Commission on International Trade Law (UNCITRAL). Within the WTO, members have formed various groups of States united by common interests (G21, G33, Cairns Group). This new informal framework has dramatically changed the balance of negotiating power in the WTO in favour of certain emerging and developing countries.

24 Besides these international universal economic organizations, a variety of regional organizations have been created. Some agreements on economic integration and free trade form the basis of supra-national systems like the EU or international organizations such as MERCOSUR, whilst other regional regimes, for example NAFTA, content themselves with a looser institutional framework without legal personality. The → Organization for Economic Co-operation and Development (OECD) unites the most important industrialized States of the Western world. The → Regional Development Banks include the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the Asian Development Bank.

25 There is an increasing number and a growing importance of non-formal forums of cooperation in economic relations such as the Group of Seven (G7), uniting the seven most important industrialized Western States and the EU, and the → Group of Eight (G8). The Group of 20 integrates important emerging economies into international economic governance. Nowadays, the G7 and the “BRIC” (Brazil, Russia, India, and the Peoples’ Republic of China), controlling institutions like the IMF, are the major political actors in shaping the framework for global economic relations.

26 Inter-agency cooperation has increasingly gained particular significance in respect of banking supervision. The Basel Committee for Banking Supervision, hosted by the → Bank for International Settlements (BIS), provides a forum for cooperation on banking supervisory matters and is composed of heads of central banks and of supervisory agencies. It elaborates guidelines and supervisory standards to be

3. Non-Governmental Organizations

27 A great number of → non-governmental organizations (‘NGOs’) operate in various areas of international economic law. These include established economic NGOs such as the → International Chamber of Commerce (ICC), the → International Air Transport Association (IATA), the International Federation of Consulting Engineers, and international trade unions and employers associations. Other NGOs address economic issues in the context of environmental protection (Trade and Environment), human rights, and the fight against corruption (eg Greenpeace; → Amnesty International (AI); Transparency International). NGOs are involved as observers in intergovernmental conferences or participate in international proceedings and human rights litigation, often related to economic activities. National and international courts or dispute settlement bodies, in varying degrees, consider the opinions of NGOs.

4. Transnational Corporations

28 TNCs, which operate in two or more countries, play a vital role in international trade and investment. They account for a large share of the most capital-rich business entities worldwide, with revenues often topping the GDP of many States. Their network of operative bases and their economic impact make it easier for TNCs to resist the regulatory reach of national authorities. This also opens up the possibility of influencing domestic politics more easily than other private business entities. In particular, developing countries often take a critical view of TNC activities on their territories. On the other hand, TNC investments make an important contribution to the economic and technological development of developing countries, providing employment and improving the balance of payments. Several international organizations have formulated → codes of conduct in order to ensure respect for human rights, labour standards, and sustainable development, as well as transparency and restraints from political interference in the host State. → Compliance with the OECD Guidelines for Multinational Enterprises is supervised by national contact points established by home governments in order to monitor the activities of companies abroad (see Global Witness v Afrimex Ltd). The Extractive Industries Transparency Initiative has laid down standards for the exploitation of natural resources.

29 International laws do not directly extend human rights obligations to private businesses. Attempts within the United Nations to formulate binding obligations for TNCs with regard to human rights have failed so far. However, there are tendencies to hold corporations accountable for violations of elementary human rights. Self-commitment to respect human rights and environmental standards reflect an increased sensitivity of TNCs (see Joint Statement on the Baku-Tbilisi-Ceyhan Pipeline Project [16 March 2003] and BTC Human Rights Undertaking [22 September 2003]). In 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights presented by the UN Secretary-General’s Special Representative on business and human rights, John Ruggie. These principles refer to the corporate responsibility of TNCs as well as to the control of TNC activities by home States.

E. International Economic Order

1. Liberalization of Trade

30 Today’s international economic order aims at the liberalization of cross-border trade by reducing or eliminating tariffs and non-tariff barriers to trade (see → World Trade, Principles). Among regional regimes, the EU stands for the exemplary realization of an internal market (Art. 28 (2) Treaty on the Functioning of the European Union [signed 13 December 2007, entered into force 1 December 2008] [2008] OJ C115/47), in particular on the basis of market freedoms (free movement of products, persons, services, capital and payments), harmonizing legislation and supranational supervision of competition and subsidies, coupled with an economic and monetary union.

2. Non-Discrimination: Most-Favoured-Nation Treatment and National Treatment

31 The principle of non-discrimination is one of the guiding principles in trade and investment treaties. This principle includes MFN treatment, ie the extension of bilateral concessions to all other parties, and national treatment, ie treatment of foreign persons or economic goods (nationals of or originating from other parties) on the same footing as their domestic counterparts. Both expressions of non-discrimination are a central feature of WTO law (see Arts I.1, II GATT). A recent issue is non-discriminatory access to natural resources in terms of even-handedness (China—Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum). Under GATT and GATS important exceptions to MFN treatment relate to free trade areas or customs unions and to developing countries. The great number of preferential trade agreements substantially devalue the MFN principle within the WTO system, making further steps towards general trade liberalization all the more important.

3. Development

32 Besides trade liberalization, modern international economic law reflects the interests of developing countries and their aspiration to secure a greater share in the growth of international trade (see Preambule to the WTO Agreement). However, WTO law still leaves considerable room for the EU, the US, and other industrialized States to inflict heavy damage on developing countries by granting subsidies to domestic producers in the agricultural sector. The Charter of Economic Rights and Duties of States emphasizes equitable development, → technology transfer, and the relevance of human rights to economic development. The call for a new economic order has been closely linked to the demand for a right to development which encompasses the commitment of economically strong States to support developing countries. Fair restructuring of debts is a recurring challenge to the international financial system. In 1996, the IMF and the World Bank Group started an initiative of debt relief for heavily indebted poor countries (see also → Debt Crisis).

(a) Preferences for Developing Countries

33 In international trade law, a formally equal treatment of all States would but perpetuate inequality of competitiveness between industrialized and developing countries. Under GATT, the generalized system of preferences allows privileges for developing countries. Least-developed members of the WTO are required to undertake trade concessions only in conformity with their individual development needs and capabilities (Art. XI (2) WTO Agreement; see also Arts 65 and 96 TRIPS Agreement).
4. Rationality, Proportionality, and Scientific Standards

35 Many regional regimes foster rationality and empirical scrutiny by requiring legitimate restrictions of trade to be necessary for the pursuit of a recognized public interest. WTO law, for example, under special exceptions for health, safety, or the environment (eg, case Law and Practice of International Law [1971] ICJ Rep 207 [1965] ICJ Rep 314; Transnational Corporation [United States v. The United Kingdom] (1945) 140 IT 267 [1932] ICJ Rep 122). However, the required proportionality of any restrictive measures severely limits discretion. Under the required proportionality of any restrictive measures severely limits discretion. On the one hand, the rule of law, with a reliable legal framework including an effective and independent judicial system, and the effective protection of property rights and individual freedoms, form the basis for pluralism, sustainable economic growth, a stable investment climate, and, finally, poverty reduction. From this perspective, international economic law makes a vital contribution to various elements of good governance.

36 Modern standards of investment protection—especially fair and equitable treatment—require the host State to act in a consistent and transparent manner as well as to respect legitimate expectations, thus calling for a stable legal business environment (see Técnicas Medioambientales Tecmed S.A v United Mexican States). They also call for due process in administrative and judicial proceedings. In the long run these standards will be beneficial not only to foreign investors, but in terms of a spill-over also to nationals of the host State, thus promoting the rule of law in general.

37 The elimination of all forms of corruption is a crucial, though recent element of international investment law, in terms of committing host governments as well as foreign investors and their home State. Bribery is a major obstacle to sustainable economic development and a good investment climate. The lack of legal clarity and unrestrictive discretion fosters abuses of authority for personal gain.

6. The Balance between International Standards and Regulatory Freedom

39 Securing a fair balance between international standards on the one hand and regulatory freedom of States and democratic choices on the other is a lasting challenge for international economic law and its evolution, in particular with respect to trade and investment protection. Unlike EU law, most international trade regimes leave ample room for internal restrictions to trade as long as they are applied in terms of non-discrimination. This opens a large corridor for legal measures deferring to political choices or societal preferences. General exceptions under WTO law permit even discriminatory treatment of domestic and imported goods or services on the grounds of public morals as defined within a broad margin of national discretion. Public Morals may also justify measures in favour of animal welfare (EC—Measures Prohibiting the Importation and Marketing of Seal Products). However, the required proportionality of any restrictive measures severely limits discretion. Under the required proportionality of any restrictive measures severely limits discretion. On the one hand, the rule of law, with a reliable legal framework including an effective and independent judicial system, and the effective protection of property rights and individual freedoms, form the basis for pluralism, sustainable economic growth, a stable investment climate, and, finally, poverty reduction. From this perspective, international economic law makes a vital contribution to various elements of good governance.

40 The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) recognizes a broad freedom of States to engage in a form of cultural protectionism in favour of domestic goods and services which might invite trade conflicts under WTO law. Modern treaty practice in investment law enhances the freedom of host States to interfere with foreign investments for reasons of health, environmental protection, or other recognized public interests without crossing the threshold of expropriation and without contracting liability to compensation.

F. Dispute Settlement

41 The various branches of international economic law have established a broad variety of dispute settlement mechanisms. States only brought a very limited number of economic disputes before the IJC, eg with respect to the protection of investors (see Barcelona Traction Case [1966] ICJ Rep 6; [1968] ICJ Rep 3, Elettronica Sicula Case, Iran-United States Claims Tribunal). Under the Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) 1892 UNTS 401 the WTO has established a dispute settlement body with quasi-judicial features (independent panels and appellate body) and sanctions for non-compliance. Preferential trade regimes have established specific mechanisms for dispute settlement. The dispute settlement mechanisms of the WTO, the EU, and the other regional trade regimes occasionally compete with other forums like the International Tribunal for the Law of the Sea.
G. The Interplay of International Economic Law with Other Legal Regimes

42 Various sectors of international economic law, in particular international trade law and investment law, stand in close interaction with other legal regimes (→ Fragmentation of International Law). An important mechanism to reach overall constancy lies in systematic interpretation in terms of Art. 31 (3) (c) → Vienna Convention on the Law of Treaties (1969) (1155 UNTS 331). Thus, WTO rules cannot be read in clinical isolation from public international law and must be interpreted in the light of customary international law (United States—Standards for Reformulated and Conventional Gasoline 17).

1. Human Rights

43 Human rights, in particular the guarantee of property, the right to work (→ Work, Right to, International Protection), and freedoms of communication (including press and broadcasting; → Information and Communication, Freedom of, International Protection) enshrined in treaties, have a massive impact on the economic order. Recent conflicts over the exploitation of natural resources have led to the → Inter-American Court of Human Rights (IACHR) to expand the protection of property rights, and rights of → indigenous peoples affected in their habitat and in their traditional way of life (see eg → Mayagna [Sumo] Awas Tingki Community v Nicaragua Case [IACHR Series C No 79 (31 August 2001)]). The IACHR’s jurisprudence requires the participation of these communities in the decision-making process, a social and → environmental impact assessment before granting concessions, as well as securing an adequate share for indigenous communities in the economic benefits from exploitation (see Saramaka People v Suriname). This case-law has inspired the → African Commission on Human and Peoples’ Rights (ACommHPR) (see Centre for Minority Rights Development v Kenya). Human rights bodies repeatedly held that negligent or even willful interference with life and health or family life, in the context of the exploitation of natural resources, constitutes human rights violations. Under investment treaties, human rights obligations should be generally considered as part of the legal order of the host State which foreign investors are obliged to respect. The World Bank, in order to fund training for World Bank staff in human rights, pilot projects linked to poverty reduction strategy papers, and development indicators for efficient human rights and justice programmes, established the Nordic Trust Fund in 2006. Under GATT the security exceptions for emergencies in international relations (Art. XXI (b) (iii) GATT 1947) seem to cover restrictive measures in response to serious violations of human rights constituting → erga omnes obligations. Without being strictly required by human rights standards, the → Declaration on the TRIPS Agreement and Public Health and its implementation, facilitating the compulsory licences in public health crises, may be understood as a tribute to the right to health under Art. 12 → International Covenant on Economic, Social and Cultural Rights (1966) (990 UNTS 3).

2. Environmental Protection

44 In many ways the international rules on the protection of the environment interact with international economic law. The CBD tries to strike a balance between the economic use of genetic and other resources on the one hand and the preservation of biological diversity and ecologic equilibrium on the other. At the biodiversity summit 2010, the parties to the CBD adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization (29 October 2010) UN Doc UNEP/CBD/COP/10/L.43/Rev.1). Many trade agreements pay tribute to the principle of sustainable development (see preamble to the WTO Agreement) which, in turn, influences the interpretation of these agreements (see on Art. XX (g) GATT 1947 United States—Import Prohibition of Certain Shrimp and Shrimp Products and allow for precautionary measures. Art. 26 Cartagena Protocol on Biosafety to the Convention on Biological Diversity (done 29 January 2000, entered into force 11 September 2003) 228 UNTS 209, → Biological Safety) enhances the regulatory freedom of States in the light of socio-economic considerations with respect to imported living → genetically modified organisms, thus creating potential conflicts with the scientific risk assessment required under WTO law. The Agreement on Subsidies and Countervailing Measures allows WTO members considerable regulatory freedom in establishing competitive markets for renewable energy in context with a determined energy supply-mix (Canada—Certain Measures Affecting the Renewable Energy Generation Sector).

3. International Security

45 International trade law allows unilateral measures to respond to threats to national or international security. Thus, Art. XXI GATT 1947 provides for security exceptions in the national interest (paras (a) and (b)) as well as for the maintenance of international peace and security under the Charter of the United Nations (para. (c)). Under Chapter VII UN Charter, the Security Council may resort to trade embargoes and other economic measures (Art. 41 UN Charter).

H. Evaluation

46 The growing integration of regional and global markets calls for common or concerted rules for trade in goods and services, for a level playing field among competing industries, for international standards for foreign investments and for regulating monetary relations. International economic law plays a paramount role in the opening of markets, enhancing freedoms for corporations and individuals as well as ensuring a stable legal environment, thus massively curtailng the political options of States. However, there are other vital aspects of international economic law: solidarity in an international community characterized by massive economic asymmetries as well as the responsibility of TNCs and their home States. Thus, international economic law increasingly integrates the necessities and legitimate expectations of developing countries and responds to the standards of sustainable development. International trade and investment law touch the very nerve of the freedom of economic, political, and social choices. All the more important is the sustained endevour to adequately balance the protection of universal or regional interests and individual freedoms with the regulatory autonomy of sovereign States.
Select Documents

Convention Providing a Uniform Law for Cheques (signed 19 March 1931, entered into force 1 January 1934) 143 UNTS 355.
Convention on the Law Applicable to the Contractual Obligations of International Carriers of Goods by Road
Convention on the Law Applicable to the Contractual Obligations of International Carriers of Goods by Rail
Convention on the Law Applicable to the Contractual Obligations of International Carriers of Goods by Air
Convention on the Law Applicable to the Contractual Obligations of International Carriers of Goods by Sea

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procedural reasons on 23 December 2010.


Statute of the International Court of Justice (28 June 1945) 3 Bevans 1179; 59 Stat 1055; TS No 993, entered into force 24 October 1945.

Técnicas Medioambientales Tecmed SA v United Mexican States (Award of 29 May 2003) ICSID Case No ARB(AF)/00/2 (2004) 19 ICSID Rev/RefJ 158.


World Duty Free Company Ltd v Kenya (Award of 4 October 2006) ICSID Case No ARB/00/7.


WTOS Agreement on Technical Barriers to Trade (signed 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120.


