

International economic law

Section A: Evolution and principles of international economic law

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Chapter 3: Fundamental principles of international economic law

Introduction

This chapter will examine the definition of international economic law, the fundamental principles of this body of law and developments in other areas of international law that have influenced the development of international economic law.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- explain the fundamental principles of international economic law
- explain the importance of the economic sovereignty of states and the PSNR.

Essential reading

- Lowenfeld, Chapters 1, 2, 11 and 22.
- UN Declaration on the Permanent Sovereignty of States over their Natural Resources 1962.
- UN Charter of Economic Rights and Duties of States 1974.
- Rio Declaration on Environment and Development 1992.

3.1 The definition of international economic law

International economic law regulates the international economic order or economic relations among nations. However, the term ‘international economic law’ encompasses a large number of areas.

It is often defined broadly to include a vast array of topics ranging from public international law of trade to private international law of trade to certain aspects of international commercial law and the law of international finance and investment.

The International Economic Law Interests Group of the American Society of International Law includes the following non-exhaustive list of topics within the term ‘international economic law’:

- (1) International Trade Law, including both the international law of the World Trade Organization and GATT and domestic trade laws;
- (2) International Economic Integration Law, including the law of the European Union, NAFTA and Mercosur;

- (3) Private International Law, including international choice of law, choice of forum, enforcement of judgments and the law of international commerce;
- (4) International Business Regulation, including antitrust or competition law, environmental regulation and product safety regulation;
- (5) International Financial Law, including private transactional law, regulatory law, the law of foreign direct investment and international monetary law, including the law of the International Monetary Fund and World Bank;
- (6) The role of law in development;
- (7) International tax law; and
- (8) International intellectual property law.

3.2 The basis of international economic law

International economic law is based on the traditional principles of international law such as:

- *pacta sunt servanda*
- freedom
- sovereign equality
- reciprocity
- economic sovereignty.

It is also based on modern and evolving principles such as:

- the duty to co-operate
- permanent sovereignty over natural resources
- preferential treatment for developing countries in general and the least-developed countries in particular.

The sources of international economic law are the same as those sources of international law generally outlined in Article 38 of the Statute of the International Court of Justice:

Article 38

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

3.3 Economic sovereignty

When states began to function as politically independent and sovereign entities, they realised that one of the most important attributes of state sovereignty was economic sovereignty. Without this, political sovereignty was not complete. Asserting economic

sovereignty meant having control over the economic activities of both juridical and natural persons conducting business within the country, whether nationals of that country or foreigners.

Owing to a number of historical reasons, many states inherited on independence a situation in which foreign individuals or companies enjoyed certain concessions or privileges or control over the economic activities of the country concerned. In many states the natural resources and mining rights were controlled by foreign companies or individuals under a concession agreement entered into with the previous administration, whether colonial or otherwise.

When the country concerned wished to embark on a policy of economic development, one of the first initiatives it had to take was to consider harnessing its natural resources in accordance with its economic policies. It therefore became necessary for these states to assert sovereignty over the natural resources of the country and require that foreign individuals and companies comply with the new policy adopted by the state.

In many countries it was difficult to assert economic sovereignty without doing away with the rights, concessions and privileges enjoyed by foreign individuals and companies over the country's natural resources.

However, developed countries whose nationals had gone overseas to invest and do business resisted attempts to impose national law on foreigners. They argued that existing concessions and contracts had to be honoured under international law. It was at this juncture that the concept of permanent sovereignty over natural resources was introduced in international law.

3.4 Permanent sovereignty over natural resources (PSNR)

When the number of newly independent developing countries grew, these states sought to assert their complete economic sovereignty by proclaiming that they had complete and permanent sovereignty over their natural resources – regardless of any arrangements made by their previous colonial administrations.

Consequently, a resolution was introduced in the UN General Assembly to this effect and was passed by an overwhelming majority of states. Paragraphs 1 and 2 of the famous 1962 UN General Assembly Resolution on the Permanent Sovereignty over Natural Resources (PSNR) state:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned;
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorisation, restriction or prohibition of such activities.

Accordingly, the resolution goes on to outline the rights of states with regard also to the expropriation and nationalisation of the assets of foreign companies:

4. Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

The concluding paragraph of the resolution seeks to assure investor countries and foreign investors that the provisions of bilateral investment agreements will be respected:

8. Foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith; states and international organisations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

The provisions of the PSNR Resolution (Resolution 1803 of 1962) have been held widely as representing customary international law because of:

- the unanimous support it received at the UN
- its declaratory nature of the rules of customary international law on the subject matter.

3.5 Fundamental principles of international economic law

As an attempt to implement the objectives of the NIEO and to establish the norms of international economic relations, the UN General Assembly adopted as part of its resolutions on the NIEO the Charter of Economic Rights and Duties of States (CERDS) of 1974. The full text of this Charter is appended to this Study Guide.

Chapter 1 of the Charter outlines the fundamentals of international relations in the following words:

Economic as well as political and other relations among states shall be governed, *inter alia*, by the following principles:

- (a) Sovereignty, territorial integrity and political independence of States;
- (b) Sovereign equality of all States;
- (c) Non-aggression;
- (d) Non-intervention;

- (e) Mutual and equitable benefit;
- (f) Peaceful coexistence;
- (g) Equal rights and self-determination of peoples;
- (h) Peaceful settlement of disputes;
- (i) Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development;
- (j) Fulfillment in good faith of international obligations;
- (k) Respect for human rights and international obligations;
- (l) No attempt to seek hegemony and spheres of influence;
- (m) Promotion of international social justice;
- (n) International co-operation for development;
- (o) Free access to and from the sea by land-locked countries within the framework of the above principles.

These are principles of a general nature which include both economic and political principles and reflect the trend of the early 1970s.

Articles 1, 2, 4 and 5 outline the economic rights and duties of states in a more concrete manner:

Article 1

Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each state has the right:
 - (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
 - (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;
 - (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such

measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Article 4

Every State has the right to engage in international trade and other forms of economic cooperation irrespective of any differences in political, economic and social systems. No State shall be subjected to discrimination of any kind based solely on such differences. In the pursuit of international trade and other forms of economic cooperation, every State is free to choose the forms of organisation of its foreign economic relations and to enter into bilateral and multilateral arrangements consistent with its international obligations and with the needs of international economic cooperation.

Article 5

All States have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy. In particular accelerating the development of developing countries. Correspondingly, all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.

Although the charter was not a 'hard law' instrument having binding legal effect, many of the principles embodied in it have been regarded as representing the basis for the development of international economic law. Indeed, the charter reiterates some of the principles that were already widely accepted as representing customary rules of international law, such as the permanent sovereignty of states over their natural resources.

3.5.1 The right to economic development

One of the central elements of the NIEO and CERDS was the economic development of states. This element was reinforced and strengthened through a 1986 resolution of the UN General Assembly on the right to economic development of states. The main operative provisions of this declaration read as follows:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

2. The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Although the right to development is a difficult right to define in concrete terms and does not have much legal significance, the articulation of this right in 1986 has enabled the international community to rely on it to support and develop:

- other principles of international trade and development
- special and preferential treatment for developing countries
- the need to address the problem of the international debt.

It can also be argued that the right to development was a contributor to the adoption of the Millennium Development Goals by the international community in 2000, at the dawn of the new millennium.

3.5.2 The law on natural resources

The Stockholm Declaration 1972

The Stockholm Declaration of the United Nations Conference on the Human Environment of 1972¹ was perhaps the first major international environmental law instrument that introduced the idea of conserving natural resources onto the agenda of international economic law.

¹ 11 *ILM* 1416 (1972), adopted on 16 June 1972.

Principles 2, 3 and 5 of the Stockholm Declaration speak of the need to conserve natural resources:

Principle 2

The natural resources of the earth including, the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 3

The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable restored or improved.

Principle 5

The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

The Stockholm Declaration sought for the first time to limit the right of states to exploit their natural resources (especially those which are non-renewable).

As stated earlier, until this point international economic law had sought to define and strengthen the rights of sovereign states to exploit their natural resources (whether renewable or non-renewable) through various instruments, such as the concept of permanent sovereignty over natural resources.

However, while endorsing this right of states, Principle 21 of the Stockholm Declaration sought to reconcile it with the need for environmental protection:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The Charter of Economic Rights and Duties of States 1974

Article 30 of the Charter of Economic Rights and Duties of States of 1974 included the following provision furthering the spirit of the Stockholm Declaration:

The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should cooperate in evolving international norms and regulations in the field of the environment.

Thus, the momentum was maintained within international environmental law to limit the right to exploit natural resources in favour of the preservation of the environment. Consequently, the need to conserve natural resources and to exploit them in a sustainable manner figured prominently in the 1982 World Charter for Nature.²

² UNGA Res. 37/17; 22 *ILM* 455 (1983), adopted on 28 October 1982.

World Charter for Nature 1982

The preamble to this Charter declares that ‘man can alter nature and exhaust natural resources by his action or its consequences and, therefore, must fully recognise the urgency of maintaining the stability and quality of nature and of conserving natural resources’.

The Charter then goes on to state that:

The degradation of natural systems owing to excessive consumption and misuse of natural resources, as well as to failure to establish an appropriate economic order among peoples and among states, leads to the breakdown of the economic, social and political framework of civilisation.

UN Convention on the Law of the Sea 1982

The need to pay attention to the preservation of the environment while exploiting natural resources was also reflected in the Law of the Sea Convention adopted in the same year.

Article 193 of this Convention provides that:

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Thus, from the 1980s onwards the idea developed that the right of states to freely dispose of their wealth and natural resources was subject to the concepts of:

- the preservation of the environment
- conservation of natural resources
- the sustainable use and development of such resources.

These concepts were also gradually finding their way into the body of international economic law.

These principles of international environmental law had started to influence the international economic law principles relating to the exploitation of natural resources. Other environmental treaties (whether global or regional) relating to specific regions (e.g. Africa or Southeast Asia) or the protection of specific geographical areas (e.g. wetlands) or specific natural resources (e.g. wildlife, flora and fauna) had started lending their support to the idea that the international economic law-based right of a state to exploit their natural resources was subject to certain principles of international environmental law.

Examples are:

- the 1968 African Convention on the Conservation of Nature and Natural Resources
- the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources
- the Ramsar Convention on Wetlands of 1971
- the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora
- the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals

- the 1991 Protocol on Environmental Protection to the Antarctic Treaty.

The Brundtland Commission

The 1985 report of the World Commission on Environment and Development (WCED) (popularly known as the 'Brundtland Commission') popularised the phrase 'sustainable development', embodying both states' right to economic development and their obligation to pay particular attention to any degradation of the environment resulting from development activities.

In other words, it was a phrase coined to express the balance that had to be reached between the right of states to use or exploit their natural resources in accordance with their developmental policies and the duty inherent upon them to preserve the environment in carrying out such developmental activities.

The Commission defined the term 'sustainable development' as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.³

In the opinion of the Commission, economic development that undermined the environment or led to the excessive exploitation of natural resources to the detriment of future generations was not sustainable development. Hence, it was felt that the need to preserve and make rational use of the natural resources of a country in the interests of the environment and future generations was inherent in the concept of sustainable development.

³ *Our common future: World Commission on Environment and Development* (Oxford: Oxford University Press, 1987), p.43.

The Rio Conference 1992

Following the groundwork done by the Brundtland Commission on broad concepts such as sustainable development that embraced not only the environment, but also all other economic activities regulated by international economic law, the UN decided to convene a special Conference on Environment and Development in Rio in 1992.

Unlike the Stockholm Conference (which was on the human environment) the Rio Conference was going to consider both the environment and development, displaying the importance attached to the elements embodied in both words. Principle 1 of the resulting Rio Declaration on Environment and Development declared that human beings were at the centre of concerns for sustainable development.

The Rio Declaration was adopted unanimously by the Rio Conference – the largest conference ever convened in the history of international relations. It seeks to recognise:

- the right of states under international economic law to exploit their own resources pursuant to their own environmental policies
- the duty of states international environmental law to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Principle 2 of the Declaration reads:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign

right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The language used here draws heavily on the provisions of:

- Principle 21 of the Stockholm Declaration
- Article 30 of the 1974 Charter of Economic Rights and Duties of States
- the 1962 UN Declaration on Permanent Sovereignty of States over their Natural Resources (PSNR).

The tension between the right of states to exploit their natural resources and the need to conserve natural resources has been a tension between international economic law and international environmental law. The law of sustainable development has brought these two together, adding a sustainable development dimension to various principles of international economic law such as:

- equity
- the right to economic development
- the right of permanent sovereignty of states over their natural resources.

Although the Rio Declaration widened the scope of the principle of sustainable development to include not only conservation of natural resources, but also a host of other elements, it gave this principle a credible international standing.

What is more, Principle 12 of the Rio Declaration injects the sustainable development dimension into international economic law issues and highlights the importance of international economic law principles for the effective operation of the rules of international environmental law.

Principle 12

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on an international consensus.

The UN Convention on Biological Diversity 1992

The Rio Declaration was not the only outcome of the Rio Conference. The 1992 UN Convention on Biological Diversity was opened for signature at the Rio Conference and was signed by 157 states and the European Union.

The preambular paragraphs of the Convention reaffirm the sovereign rights of states over their own biological resources.

However, the Convention stresses at the same time that states are responsible for:

- conserving their biological diversity
- using their biological resources in a sustainable manner.

Article 6 of the Convention states:

Each Contracting Party shall, in accordance with its particular conditions and capabilities:

- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and
- (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Thus, although there are still not any specific international treaties regulating the exploitation of certain natural resources (e.g. oil, gas, minerals and land), the discussion in the preceding paragraphs demonstrates that these natural resources must be exploited:

- in a sustainable manner
- with due respect for the environment.

Activity 3.1

To what extent has international environmental law influenced the development of international economic law?

Feedback: page 33.

Summary and conclusions

Traditionally speaking, international economic law did not pay much attention to environmental concerns. International economic and commercial activities continued to expand until recently with little concern for the harm done to the environment by these activities.

The main international economic agenda in the post-Second World War period involved promoting the free movement of goods and capital across borders and enabling states to exploit their natural resources to the maximum extent possible for their economic development.

International economic law tried to catch up with this expansion of international economic and commercial activities and regulate wherever and whichever aspect possible, but without paying much serious attention to environmental aspects of economic development.

However, more recently, developments taking place within international environmental law have influenced the development of international economic law. The international environmental law principle of sustainable development, a relatively new principle, has had a profound impact on international economic law.⁴

Within the UN's economic development agenda, a significant shift in emphasis in the theory of economic development began in 1987 with the introduction of the concept of sustainable development, which sought to impose some restraints on economic development in favour of the need to protect the environment.

This new idea also sought to unite both the developing and developed countries in pursuit of a common agenda.

Implicit in the idea of sustainable development was that the developing countries would receive financial assistance from the developed countries to carry out developmental projects which:

- do not harm the environment
- take into account concepts such as intergenerational equity.

The development agenda of the world was no longer supposed to be a struggle between the developed and developing countries. Rather, both groups of states were supposed to work jointly to achieve sustainable economic development.

All states had a duty to contribute to the process, but the level of contribution would be guided by the concept of common but differentiated responsibility. This idea was endorsed by the Rio Declaration of 1992 and other instruments adopted by the Rio Conference.

⁴ For a recent leading work in this area, see Weiss, F., et al. (eds), *International economic law with a human face* (The Hague: Kluwer Law International, 1998).

Self-assessment questions

What are the main principles of international economic law?

How have those principles evolved over time?

Useful further reading

- Fox, H. 'The definition and sources of international economic law', in Fox, H. *International economic law and developing states: an introduction* (1992), *BIICL*, London, pp.1–23.
- Malanczuk, P. 'Globalisation and the future role of sovereign states', in Weiss, F., et al. (eds), *International economic law with a human face* (Kluwer Law International, The Hague, 1998), pp.45–65.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- explain the fundamental principles of international economic law
- explain the importance of the economic sovereignty of states and the PSNR.

Feedback to activities: Chapter 3

Activity 3.1 *Developments within international environmental law have had a profound impact on international economic law. The principle of sustainable development itself is a major contribution to the evolution of international economic law, and the law of natural resources is partly international economic law and partly international environmental law. The obligation to exploit the natural resources of a state in a sustainable manner was another major influence of international environmental law on international economic law.*