

The Impact of International Law on International Cooperation

Theoretical Perspectives

Edited by
Eyal Benvenisti
and **Moshe Hirsch**

CAMBRIDGE

THE IMPACT OF
INTERNATIONAL LAW ON
INTERNATIONAL
COOPERATION

Theoretical Perspectives

edited by

EYAL BENVENISTI

MOSHE HIRSCH



CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge, CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© Cambridge University Press 2004

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2004

Printed in the United Kingdom at the University Press, Cambridge

Typeface Adobe Minion 10.75/12.75 pt. *System* L^AT_EX 2_ε [TB]

A catalogue record for this book is available from the British Library

ISBN 0 521 83554 2 hardback

THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION

Theoretical Perspectives

The point of departure of this book is that the disciplines of international law and international relations are inexorably inter-linked. Neither can be understood properly in isolation. Like every legal system that operates in a specific societal system, international law functions in the international system. International law grows out of the international society: it reflects the particular character of this society, and it also affects the relationships among the actors in this system. At the same time, international law produces norms that influence, if not shape, the behavior of international actors.

This book aims at advancing our understanding of the influences international norms and international institutions have over the incentives of states to cooperate on issues such as environment and trade. The different contributions to this book adopt two different approaches in examining this question. One approach focuses on the constitutive elements of the international legal order, including customary international law, soft law and framework conventions, and on the types of incentives states have, such as domestic incentives and reputation. The other approach examines closely specific issues in the areas of international environment protection and international trade. The combined outcome of these two approaches is a more refined understanding of the forces that pull states toward closer cooperation or prevents them from doing so, and the impact of different types of international norms and diverse institutions on the motivation of states. The insights gained suggest ways for enhancing states' incentives to cooperate through the design of norms and institutions.

EYAL BENVENISTI is Director, Cegla Center for Interdisciplinary Research of the Law, Tel Aviv University, Israel.

MOSHE HIRSCH is Vice Dean of the Faculty of Law and Senior Lecturer in the Faculty of Law and Department of International Relations, Hebrew University of Jerusalem, Israel.

CONTRIBUTORS

Kenneth W. Abbott is the Elizabeth Froehling Horner Professor of Law and Commerce at Northwestern University School of Law, and Director of the Northwestern Center for International and Comparative Studies. Professor Abbott teaches courses on international organizations and governance, international trade and business, and international public health and environmental protection. He was the first American legal scholar to apply modern international relations theory to legal problems, and his research brings an interdisciplinary perspective to a range of international issues. He has lectured and taught in numerous countries around the world.

Eyal Benvenisti is Professor of Law at Tel Aviv University Faculty of Law and Director of the Cegla Center for Interdisciplinary Research of the Law. Previously Hersch Lauterpacht Professor of International Law at the Hebrew University of Jerusalem, Faculty of Law, and Director of the Minerva Center for Human Rights at the Hebrew University. Studied law at the Hebrew University of Jerusalem, (LLB), and Yale Law School (LLM, 1988; JSD, 1990). Taught at Harvard Law School, Columbia Law School, University of Michigan School of Law and New York University School of Law. Founding co-editor, and current Editor-in-Chief, *Theoretical Inquiries in Law*. Areas of teaching and research include constitutional law, international law, human rights and administrative law.

Edith Brown Weiss is the Francis Cabell Brown Professor of International Law at Georgetown University Law Center. She is the author or editor of ten books and numerous scholarly articles. Her book received the Certificate of Merit from the American Society of International Law (ASIL) for the most outstanding contribution to the development of international law. Edith Brown Weiss is the recipient of many other awards. She served as the Associate General Counsel for International at the US Environmental Protection Agency, where she established a new division

for international and comparative environmental law. She was President of the American Society of International Law, and has been a member of the highest bodies of the US National Research Council, including the Commission on Geosciences, Environment and Resources and the Water Science and Technology Board.

George W. Downs is Dean of Social Science and Professor, Department of Politics, New York University. Areas of specialization are international institutions and international cooperation. Current research projects include books on the effectiveness of multilateral environmental agreements and on the role of reputation in promoting compliance with international regulatory agreements. He has authored or co-authored four books including *Tacit Bargaining, Arms Races and Arms Control*, and *Optimal Imperfection? Domestic Uncertainty and Institutions in International Relations*, edited a book on collective security after the Cold War and written articles in various political science, statistics and law journals. He is a member of the editorial boards of *World Politics* and *International Organization*.

Moshe Hirsch, Arnold Brecht Chair in European Law, is Vice Dean of the Faculty of Law and Senior Lecturer in the Faculty of Law and the Department of International Relations at the Hebrew University of Jerusalem. He is a member of the Think-Tank on the Future Status of Jerusalem, the Jerusalem Institute for Israel Studies. He is the author of *The Responsibility of International Organizations Toward Third Parties* (1995) and *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes* (1993). A significant part of his publications on various issues of international law and international economic law involves interdisciplinary research that employs, inter alia, game theory, sociological theories, political economy and political science.

Robert Howse is a Professor of Law at the University of Michigan Law School. Previously he taught at the Faculty of Law at the University of Toronto. He received his BA in Philosophy and Political Science with high distinction, as well as an LLB, with honours, from the University of Toronto. He also holds an LLM from the Harvard Law School and has traveled and studied Russian in the former Soviet Union. He has been a visiting professor at Harvard Law School and taught in the Academy of European Law, European University Institute, Florence. Professor Howse is a frequent consultant or adviser to government agencies and international organizations such as the OECD, and has undertaken studies for, among

others, the Ontario Law Reform Commission and the Law Commission of Canada. His research has concerned a wide range of issues in international law and legal and political philosophy, but his emphasis has been on international trade and related regulatory issues.

Michael A. Jones is an Associate Professor in the Department of Mathematical Sciences at Montclair State University, New Jersey, and a Visiting Scholar in the Department of Politics at New York University. He specializes in the mathematics of the social sciences, including political science, economics and psychology. He has written many articles in political science, game theory and law journals.

Arie M. Kacowicz is a Senior Lecturer in International Relations at the Hebrew University of Jerusalem. He is the 2002–2003 Visiting Goldman Israeli Professor at the Department of Government at Georgetown University. He is the author of *Peaceful Territorial Change* (1994), *Zones of Peace in the Third World: South America and West Africa in Comparative Perspective* (1998), and co-editor of *Stable Peace among Nations* (2000). He has recently completed a book manuscript on “The Impact of Norms in International Society: The Latin American Experience, 1881–2001.”

Edward D. Mansfield is Hum Rosen Professor of Political Science and Director of the Christopher H. Browne Center for International Politics at the University of Pennsylvania. His research focuses on international security and international political economy. He is the author of *Power, Trade, and War* (Princeton University Press, 1994) and the co-author (with Jack Snyder) of *Democratization and War* (MIT Press, forthcoming).

Petros C. Mavroidis is Professor of Law at Columbia Law School and the University of Neuchâtel, Switzerland. He was previously Chair for Competition Law at EUI, Florence and member of the Legal Affairs Division of the GATT. He is currently serving as Chief Co-reporter for the American Law Institute (ALI) project “Principles of WTO Law”.

Helen V. Milner is James T. Shotwell Professor of International Relations, Columbia University. She holds a BA from Stanford University, 1980; MA, Harvard University, 1982; PhD, 1986. She was a Research Fellow, Brookings Institution, 1983–1984; Advanced Research Fellow in Foreign Policy Studies, Social Science Research Council, 1989–1991; and Fellow, American Academy of Arts and Sciences, 2000 to the present. She also held a position with the Center for Advanced Study in the Behavioral

Sciences, 2001–2002 and has been Assistant Professor to Professor, Columbia University, 1986 to the present. She was the Editor, *Review of International Political Economy*, from 1996–1999; and a Member, Council of the American Political Science Association, from 1994–1996. She has been a member of the editorial boards of *International Organization* from 1998 to the present and of *International Studies Quarterly*, from 1995 to the present.

Peter Rosendorff is Associate Professor of International Relations and Economics at the University of Southern California. He has published widely on the political economy of trade policy, and much of his work concerns the linkages between domestic politics and institutions and international economic policy. He is currently serving as co-editor of the Blackwell journal, *Economics and Politics*, and is a member of the editorial board of *International Organization*. He has held visiting positions at the University of California, Los Angeles and Georgetown University. His latest research concerns the links between democracy, accountability and transparency, and what these mean for the design of domestic and international institutions such as the judiciary, central banks and preferential trade agreements.

Anne-Marie Slaughter is Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University. She is also President of the American Society of International Law. Prior to becoming Dean, she was the J. Sinclair Armstrong Professor of International, Foreign and Comparative Law and Director of Graduate and International Legal Studies at Harvard Law School. She is a Fellow of the American Academy of Arts and Sciences and a member of the Council on Foreign Relations. She has written over fifty articles and edited or written four books, on subjects such as the effectiveness of international courts and tribunals, the legal dimensions of the war on terrorism, building global democracy, international law and international relations theory, and compliance with international rules.

Duncan Snidal is Associate Professor of Political Science and Public Policy at the University of Chicago and Director of the Program on International Politics, Economics, and Security (PIPES). His past research has focused on theoretical issues of international cooperation. He is currently working on issues of international legalization and international institutional design.

ACKNOWLEDGMENTS

This book is the outcome of a conference that took place at the Hebrew University of Jerusalem Faculty of Law in June 2001. This is an opportunity for us to thank the many people whose assistance, cooperation and support made the conference and this book possible. Israel Gilead, then the Dean of the Faculty of Law, supported the project since its inception, and raised the necessary funds for it. Maly Lichtenstadt and Yael Wyant helped with the organization of the conference; Dahlia Shaham assisted with the editing process leading up to publication. Felice Kahan-Siskin was responsible for the sensitive and accurate editing work.

We thank the participants at the conference whose comments contributed to the final versions of the chapters presented in this book, among them Emmanuel Adler, Ruth Lapidot, Oren Perez, Arie Reich and Joseph H.H. Weiler.

We are grateful to the Hebrew University of Jerusalem Faculty of Law, the Dr. Emilio von Hofmansthal fund, the Hersch Lauterpacht fund, the Louis Marshall fund and the Harry and Michael Sacher Institute for Legislative Research and Comparative Law for their generous support of this project.

ABBREVIATIONS

ABM	Anti-Ballistic Missile
AD	anti-dumping
ADACS	Assistance with the Development and Consolidation of Democratic Stability (Council of Europe)
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BOP	balance of payments
CACJ	Central American Court of Justice
CITES	Convention on International Trade in Endangered Species
CTB	Comprehensive Test Ban Treaty
CVD	countervailing duty
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO)
EPU	European Payments Union
ERM	Exchange Rate Mechanism
FAO	Food and Agriculture Organization (UN)
FC	framework convention
FDI	foreign direct investment
GATT	General Agreement on Tariffs and Trade
GEF	Global Environmental Facility
GSP	Generalized System of Preferences
ICJ	International Court of Justice
IL	international law
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund
INF	Intermediate Nuclear Forces

IR	international relations
ITC	International Trade Commission
ITTA	International Tropical Timber Agreement
ITTO	International Tropical Timber Organization
LDC	least developed country
LRTAP	European Long-Range Transboundary Air Pollution Regime
MFN	Most Favored Nation
NMD	National Missile Defence
NPT	Nuclear Non-Proliferation Treaty
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
PD	Prisoner's Dilemma
PIC	prior informed consent
SALT	Strategic Arms Limitation Talks
SEATO	South East Asian Treaty Organization
SPS	Agreement on Sanitary and Phyto-Sanitary Measures
TBT	Agreement on Technical Barriers to Trade
TPRM	Trade Policy Review Mechanism
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
VER	voluntary export restraint
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

CONTENTS

<i>List of contributors</i>	page vii
<i>Acknowledgments</i>	xi
<i>List of abbreviations</i>	xii

- 1 Introduction 1
EYAL BENVENISTI AND MOSHE HIRSCH
- 2 International law and international relations theory:
a prospectus 16
ANNE-MARIE SLAUGHTER
- 3 Pathways to international cooperation 50
KENNETH W. ABBOTT AND DUNCAN SNIDAL
- 4 Customary international law as a judicial tool for
promoting efficiency 85
EYAL BENVENISTI
- 5 Reputation, compliance and development 117
GEORGE W. DOWNS AND MICHAEL A. JONES
- 6 Rethinking compliance with international law 134
EDITH BROWN WEISS
- 7 Compliance with international norms in the age of
globalization: two theoretical perspectives 166
MOSHE HIRSCH
- 8 Compliance and non-compliance with international
norms in territorial disputes: the Latin American record
of arbitrations 194
ARIE M. KACOWICZ

- 9 International trade and domestic politics: the domestic sources of international trade agreements and institutions 216
HELEN V. MILNER, B. PETER ROSENDORFF AND EDWARD D. MANSFIELD
- 10 Human rights, developing countries and the WTO constraint: the very thing that makes you rich makes me poor? 244
PETROS C. MAVROIDIS
- 11 Back to court after *Shrimp–Turtle*: India’s challenge to labor and environmental linkages in the EC generalized system of preferences 261
ROBERT HOWSE
- Index* 299

Introduction

EYAL BENVENISTI AND MOSHE HIRSCH

This book aims at advancing our understanding of the influences international norms and international institutions have over the incentives of states to cooperate on issues such as environment and trade. The different contributions to this book adopt two different approaches in examining this question. One approach focuses on the constitutive elements of the international legal order, including customary international law, soft law and framework conventions, and on the types of incentives states have, such as domestic incentives and reputation. The other approach examines closely specific issues in the areas of international environment protection and international trade. The combined outcome of these two approaches is a more refined understanding of the forces that pull states toward closer cooperation or prevents them from doing so, and the impact of different types of international norms and diverse institutions on the motivation of states. The insights gained suggest ways for enhancing states' incentives to cooperate through the design of norms and institutions.

This introduction begins with an overview of contemporary international law (IL) – international relations (IR) scholarship, to be followed by a short description of the contributions to this book.

IL–IR scholarship

The point of departure of this book is that the disciplines of IL and IR are inexorably interlinked. Neither can be understood properly in isolation. Like every legal system that operates in a specific societal system, international law functions in the international system. International law grows out of the international society: it reflects the particular character of this society, and it also affects the relationships among the actors in this system. At the same time, international law produces norms that influence, if not shape, the behavior of international actors.

Yet IL–IR interdisciplinary scholarship is quite a new phenomenon. Kenneth Abbott's well-known article in 1989 on IR theories and IL¹ is widely considered the harbinger of a wave of cooperation between IL and IR scholars. Anne-Marie Slaughter followed and significantly extended this direction in her 1993 article discussing the historical evolution of the IL–IR relationship since World War II.² Her article recommends to IL and IR scholars potential pathways of interdisciplinary research in this field. Indeed, many IL scholars (including most of the IL contributors to this volume) have adopted these recommendations, and a growing number of articles and books that draw on the common ground of these disciplines have been published in recent years.³ On the IR side, the "move to law" in world politics was particularly manifest in the special issue of *International Organization* in the summer of 2000 that was devoted to the subject "Legalization and World Politics."⁴

Employing IR theoretical tools is of particular importance for IL scholars. Analysis of specific features of the international system is valuable for a proper understanding of the content and role of IL in a given period. Likewise, ascertaining the nature of developments in the international system at large are of great importance for understanding changes in IL and international legal institutions.

Different IR theories offer several sets of factors that motivate the behaviors of states and other actors in the international community. These factors explain the evolution of IL and its specific norms. Consequently, studying IR theories may enable IL scholars to explore why a particular legal concept or rule emerged in a given period (and not earlier, or later) and why alternative legal concepts or rules were discarded. Such theories also explain legal pluralism among different regional legal systems.

IR research may also assist practitioners and judges of IL who apply this body of law to particular factual situations. Application of international rules often requires interpretation which, in turn, frequently necessitates reference to the aim of a particular rule, as well as the historical context

¹ Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 *Yale J. Int'l L.* 335.

² Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *Am. J. Int'l L.* 205.

³ See the many books and articles referred to in Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 *Am. J. Int'l L.* 367.

⁴ (2000) 54 *International Organization* (No. 3, Summer).

of its enactment.⁵ IR studies may aid agencies of interpretation in ascertaining the factual and theoretical background of particular legal rules or comprehensive legal regimes.

IR theories may also assist IL scholars in anticipating what kind of legal rules are likely to prevail under various circumstances in the future (e.g., if inequality between states increases, or if a bilateral setting is transformed into a multilateral one). IR theories do not predict precisely which rules will be adopted in a given situation but they may well give scholars significant indications of the expected trends and patterns of legal concepts that are likely to emerge in particular settings. Empirical studies are used to study the validity of such IR hypotheses, which have considerable significance for IL scholars.

As noted above, existing international legal concepts reflect to a significant measure the current traits of the international system. This observation should not lead us to under-estimate the dynamic dimension of IL. International legal regimes generally do not aim to reflect accurately and to perpetuate the existing situation in a given community.⁶ On the contrary, a basic function of IL is to generate change in the conduct of its subjects and also, occasionally, to modify the relationships among them.⁷ IL is often used as an instrument to alter conduct in the international system that is undesirable (either immoral or inefficient). This is the case, for instance, with international treaties that aim to prohibit racial or gender discrimination, or treaties that require signatory states to eliminate various barriers to international trade.

IR theoretical tools may help IL scholars and policy-makers employ IL as a purposive instrument. IR theories often aim to identify the critical factors that explain a particular international conduct (whether desirable or undesirable). Identification of the factors that motivate states to adopt a particular course of action in the normative sphere may indicate to IL scholars what kinds of legal mechanisms are needed to affect states' behavior in a given area. Desirable legal mechanisms, in accordance with IR theories, may include either existing or innovative legal concepts. For instance, certain legal rules may enhance the prospects of international

⁵ See Articles 31–32 of the 1969 Vienna Convention on the Law of Treaties, 8 *International Legal Materials* 679.

⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finish Lawyers' Publishing Company, Helsinki, 1989), pp. 2–5.

⁷ On the function of law as an instrument of social change, see Roger Cotterrell, *Sociology of Law* (2nd ed., Butterworths, London, 1992), pp. 44–70.

cooperation in the sphere of environmental protection, and particularly in settings that are susceptible to collective action failure.⁸

The capacity of IL to reshape conduct and relationships in the international system should not be over-estimated. IL, like any other societal institution, has its own limitations. Still, IR theoretical tools may be helpful here in pointing out where new legal rules or institutions are unlikely to generate the desired change.

Interdisciplinary IL–IR scholarship is also valuable for IR scholars.⁹ IR scholars investigate the role of IL in international politics. With the rapid increase in international treaties, institutions and tribunals in recent decades, IR scholars attempt to analyze rigorously the impact of these developments on states' behavior, as well as the structural changes resulting from this trend for the international system at large. IR scholars have devoted particular research efforts to exploring the puzzle of compliance with IL.

The distinction between rational choice and sociological analyses constitutes one of the major dividing lines in social sciences scholarship.¹⁰ These paradigms posit different assumptions regarding the motivation for social behavior at large, as well as with regard to the central factors that affect the decision-making processes. Naturally, this theoretical cleavage resurfaces also in IR theoretical literature. As Slaughter shows in the opening chapter, the major theoretical approaches in IR (realism, institutionalism and liberalism) are based on both constructivist and rationalist causal mechanisms. Still, numerous realist, institutionalist and liberal analyses incline to emphasize the rational aspects of these approaches. This trend is also mirrored in most chapters of this book that widely employ the rational theoretical tools. Notwithstanding this, some contributors discuss and highlight the sociological (or “constructivist”) approaches in IR theory. This is the case with the chapters written by Anne-Marie Slaughter, Moshe Hirsch, Edith Brown Weiss and Arie Kacowicz.

⁸ See, e.g., Eyal Benvenisti, “Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resource Law” (1996) 90 *Am. J. Int'l L.* 384; Moshe Hirsch, “Game Theory, International Law, and Environmental Cooperation in the Middle East” (1999) 27 *Denver J. Int'l L. and Policy* 75.

⁹ See, e.g., Robert Keohane, “International Relations and International Law: Two Optics” (1997) 38 *Harvard Int'l L. J.* 487.

¹⁰ See, e.g., Shaun Hargreaves Heap *et al.*, *The Theory of Choice: A Critical Guide* (Blackwell, Oxford, 1992), pp. 62–72.