



Frontiers of International Economic Law

*Legal Tools to Confront
Interdisciplinary Challenges*

Edited by
Freya Baetens & José Caiado

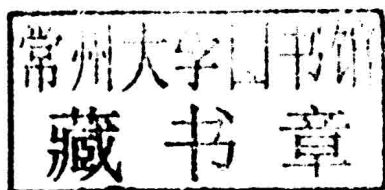
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Acknowledgments

This book is the result of two years' work by several people. Its chapters draw on the scholarship of promising junior researchers presented at the 1st Conference of the Postgraduate and Early Professionals and Academics (PEPA) network of the Society of International Economic Law (SIEL).

At this Conference, all papers were commented upon by senior scholars including Jean d'Aspremont, Freya Baetens, Alexandra Diehl, Markus Gehring, Holger Hestermeyer, Alexander Lorz, Bruce Malashevich, Gabrielle Marceau, Simon Schropp, Yulia Selivanova, Christian Tietje, Anne Trebilcock, Isabelle Van Damme and Stefan Voigt. Their initial comments were crucial to the selection and further development of the papers that would eventually compose this edited volume.

In a later stage, we were fortunate to receive the additional input of reviewers such as Tomer Broude, Andrew Lang, Junji Nakagawa and Tania Voon. Many other members of the SIEL Executive Council have supported us during this project. By thanking the SIEL Executive Vice-Presidents, Meredith Kolsky Lewis and Colin Picker, we hope that they will all feel represented.

As the 1st SIEL/PEPA Conference was generously hosted by the University of Hamburg, we pay our respect to the 2011 Conference Committee consisting of Babette Ancery, Thomas Berghaus, José Caiado, Luis Montilla, Jessica Giovanelli, Beatriz Huarte and Daragh McGreal. Galina Zukova and Federico Ortino have spent a significant amount of time helping to rationalize the Conference budget.

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Freya Baetens and José Caiado

Preface

Confronted with today's global interdisciplinary challenges, international economic law offers a myriad of legal tools to provide both procedural and substantive solutions. The contributions to this book pose clearly defined and provocative questions: why have States not disputed currency devaluation at the World Trade Organization (WTO)? Should an international investor who has violated human rights obligations nevertheless be compensated in case of an illegal expropriation? How could States use preferential trade agreements to promote climate change mitigation?

The book congregates various perspectives on international economic law: some chapters examine age-old continuing points of discussion within international law, while others explicitly address problems which have only recently emerged and are currently fiercely debated in the media as well as in legal practice and academic circles.

While this work mainly presents the results of legal research, a number of social scientists and economists conducting related projects were invited to share their views in a manner accessible to legal scholars. The focus lies on concrete problems and legal solutions that are international by definition. In those cases where a chapter zooms in on a domestic problem, it concerns a problem with an international appeal. The challenges analysed and the policy conclusions reached are intended to form the foundation of future research on similar and correlated topics.

This volume is based on the papers presented at the 1st Conference of the Postgraduate and Early Academics and Professionals (PEPA) of the Society of International Economic Law (SIEL) in Hamburg on 27 and 28 January 2012. Contributions were chosen based on reviews of senior SIEL members, so as to reflect the eclectic and multifaceted reality of international economic law, especially in its interface with current social, economic and political concerns. The authors are junior practitioners and academics from leading institutions in their respective fields, providing critical assessments on the most challenging topics facing the international community today. The selected papers called the attention of SIEL's experts because of the strength of their theoretical underpinnings and their particular capacity to operationalise this theory in order to offer pragmatic and coherent responses to legal and policy problems in the international and domestic arena.

This volume will appeal to those interested in the general theory of international economic law, but also readers looking for innovative solutions to practical challenges will be pleased to find a broad array of topics covered by the contributions. The book is structured along four frontier themes: first, facing economic crises and uncertainties; second, confronting environmental challenges; third, considering human rights and development objectives; and fourth, regulating energy transit and new technologies.

Part One—Facing Economic Crises and Uncertainties

Part One questions the legal and economic reasoning underlying rules aimed at regulating the behaviour of States and private agents in the area of monetary and financial law. The first chapter, by *An Hertogen*, discusses the relationship between monetary policy and trade commitments by looking at General Agreement on Tariffs and Trade (GATT) Articles XV:4 and XII:3(a), both of which deal with monetary issues but have not yet been applied in any disputes. The author explains why these Articles have received little attention in practice and examines how scholars could overcome empirical and legal uncertainty about the specific conditions under which they apply.

The second chapter in this section analyses the intent and effect of regulatory responses to economic crises. *Kuan-Chun Chang* focuses on Credit Rating Agencies to criticize regulatory measures put forward during the recent financial crisis. Chang investigates the US and the EU regulation reforms, arguing that due to the rating industry's issuer-pay business model and the regulators' lack of expertise, the proposed rules may negatively impact both the investors' and the issuers' reliance on Credit Rating Agencies' ratings. In his opinion, a combination of economic and legal theory could help us to understand the rationale followed by different participants on the international credit markets and provide the basis for the creation of an optimal regulatory system policy.

Part Two—Confronting Environmental Challenges

Part Two connects environmental concerns to the international economic law research agenda. *Matthäus Fink* opens this Part by discussing the establishment of Protected Areas as a tool to guard the environment. Taking up the debate about the fragmentation of international law, he addresses whether and how the law and policy of Protected Areas may conflict with investment law. General conflict rules aimed at a harmonized interpretation and application of legal norms, such as *lex specialis* and *lex posterior*, have had limited success in resolving conflicts between environmental and investment law. The author proposes that environmental impact assessments would be more suitable for the prevention of conflicts. Moreover, the concept of 'financial recourse', as applied by international investment tribunals, could play a relevant role in settling or at least tempering conflicts of norms.

Subsequently, *Daniela Gómez Altamirano* analyses the EU's emission-trading scheme to combat climate change. More in particular, she examines the Directive prescribing that all airlines, including those from third countries, have to acquire and surrender emissions allowances for their flights departing from and arriving at airports

located in the EU. The author elaborates on the concept of extra-territoriality under international law and argues that the EU Directive is to be considered extraterritorial in its scope. This leads to a discussion whether extraterritorial unilateral trade measures are a legitimate means to combat environmental problems, and, if these measures are legitimate, under which conditions they should be applied in order to avoid a breach of WTO obligations.

The final chapter in this section deals with the complex relation between regional and multilateral rules on environmental protection. *Rafael Leal-Arcas* puts forward that Preferential Trade Agreements (PTAs) with strong climate change chapters could contribute to reducing greenhouse gas emissions. He defends the introduction of a regional model for promoting climate change mitigation as an alternative to the present structure of the United Nations Framework Convention on Climate Change and its Kyoto Protocol.

Part Three—Considering Human Rights and Development Objectives

Part Three discusses the relationship between human rights and development objectives in international investment law and related domestic rules. By means of a case study, *Lars Schönwald* examines whether and to what extent States can guarantee human rights through public-private partnerships. He shows how certain provisions of the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights promote the possibility of guaranteeing the right to housing through such partnerships. *Filip Balcerzak* then seeks to answer whether States' obligation to respect, protect and fulfill human rights may reduce the compensation due for a breach of investment treaty obligations. He investigates different rationales for States to invoke human rights clauses in international disputes and concludes that, regarding compensation for breaches of the fair and equitable treatment standard, Article 39 of the International Law Commission's Articles on State Responsibility (dealing with contribution to injury) provides a sound legal basis for claiming that such compensation may be reduced.

The section finishes with the work of *Jan-Christoph Kuntze* and *Tom Moerenhout*, who explain how WTO law applies to renewable energy feed-in tariffs (FITs) with local content requirements (LCRs) to promote domestic development. They argue that FITs with LCRs are inconsistent with specific GATT provisions, the Agreement on Trade-Related Investment Measures (TRIMS) and the Agreement on Subsidies and Countervailing Measures (SCM). Those agreements thus prohibit the use of such schemes, in the absence of any applicable WTO exemptions. The final part of the chapter analyses the negotiations regarding an energy agreement within the WTO, as well

as the role of important and underexplored flexibilities within the WTO system, *i.e.*, the ‘infant industries’ exception to protect developing sectors and the inclusion of new subsidy exceptions in the SCM Agreement.

Part Four—Regulating Energy Transit and New Technologies

The fourth and last section of this volume examines the regulation of trade in energy and intellectual property issues in connection with the digital environment. *Beatriz Huarte Melgar* offers a broad picture of the legal challenges raised by the energy transit between States. She advocates that achieving energy security and energy independence became a central issue after the rescission of the provisional application of the Energy Charter Treaty by Russia in 2010, combined with the EU’s intention to reset the negotiations on the Energy Charter Treaty Protocol on Transit. The chapter highlights the necessity for policymakers to strive in negotiations for legal alternatives to the regulation of energy transit.

Mikella Hurley then addresses the often discordant relationship between multi-lateral and preferential rules on the transit of energy. More precisely, she questions whether GATT Article XXIV authorises Members to offer more favourable terms to their PTA partners in this area. She concludes that this Article may offer a limited basis upon which PTA parties can choose to offer such treatment, provided that such action does not directly increase the restrictions imposed on the transit of energy goods for non-PTA Members.

In the final contribution to this volume, *Anna Giulia Micara* presents the rules on internet service providers’ liability for trademark counterfeiting in the US and the EU. The chapter analyses recent case law concerning trademarks counterfeiting on the internet auction site eBay and in specific new business models, such as keyword advertising. The author concludes that legal certainty and the underlying balance between intermediaries and brand owners’ interests urgently need to be further developed in this field.

This book is intended for a global audience, including established academics and practitioners as well as those at the start of their career, in the fields of public as well as private international law. We hope that the chapters presented here will help to push forward, through promoting and developing the rule of law, the—at times contentious—frontiers of international economic law.

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List of Abbreviations

ACHPR	African Charter of Human and Peoples' Rights
AG	Advocate General
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CBD	Convention on Biological Diversity
CDO	Collateralized Debt Obligation
CER	Certified Emissions Reduction
CJEU	Court of Justice of the European Union
COP	Conference of the Parties of the CBD
CPC	Central Product Classification
CRA	Credit Rating Agency
CSR	Corporate Social Responsibility
CU	Customs Union
DMCA	Digital Millennium Copyright Act
ECD	E-commerce Directive
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECTP	Energy Charter Treaty Protocol on Transit
EIA	Environmental Impact Assessment
ERU	Emissions Reductions Unit
ESC	European Social Charter
ETS	Emission Trading Scheme
FET	Fair and Equitable Treatment
FITS	Feed-in Tariffs
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse Gas
HIPC	Heavily Indebted Poor Countries
HRC	Human Rights Council
IATA	International Air Transport Association
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
IIA	International Investment Agreement
IIL	International Investment Law

ILC	International Law Commission
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISP	Internet Service Providers
ITO	International Trade Organization
IUCN	International Union for Conservation of Nature
JNNSM	Indian Jawaharlal Nehru National Solar Mission
LCR	Local Content Requirement
LDCS	Least-Developed Countries
MEA	Multilateral Environmental Agreement
MEF	Major Economies Forum on Energy and Climate
MFN	Most-Favoured Nation
NRSRO	Nationally Recognized Statistical Rating Organization
NTD	Notice and Take-Down
OECD	Organization for Economic Co-Operation and Development
OHRLLS	UN Office of the High Representative for Least Developed Countries, Landlocked Developing Countries and Small Island Developing States
ORC	Other Regulations of Commerce
ORRC	Other Restrictive Regulations of Commerce
PA	Protected Area
PEPA	Postgraduate and Early Professionals and Academics network
PPP	Public-Private Partnership
PTA	Preferential Trade Agreement
PV	photovoltaic
REIO	Regional Economic Integration Organization
RMBS	Residential Mortgage-Backed Securities
SCM	Agreement on Subsidies and Countervailing Measures
SEC	US Securities and Exchange Commission
SIEL	Society of International Economic Law
SRSG	UN Special Representative of the Secretary General on the issues of Human Rights and Transnational Corporations and other Business Enterprises
TFA	Trade Facilitation Agreement
TPP	Trans-Pacific Partnership
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights Agreement
TTIP	Trans-Atlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UNCLOS	UN Convention on the Law of the Sea
UNFCCC	UN Framework Convention on Climate Change

UN HABITAT	UN Human Settlements Programme
VCLT	Vienna Convention on the Law of Treaties
WGTF	Working Group on Trade, Debt and Finance
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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