

TOPIC DESCRIPTION

Netherlands Yearbook of International Law, vol 48 (2017)

Shifting Forms and Levels of Cooperation in International Economic Law: Structural Developments in Trade, Investment and Financial Regulation

International economic law – understood here as covering trade, investment and financial regulation – is confronted with a number of changes. Many of these changes are more general in the development of the international legal system and are not limited to international economic law. They include a proliferation of involved actors (including non-state actors in particular), a proliferation of instruments (from international agreements to more informal law-making and non-legal commitments), a stronger influence of regulation (as a result of the need to agree on more standardization), a tension between global needs and regional or bilateral pragmatism (resulting in what has been termed ‘fragmentation’), but also an increasing awareness of the impact of international rules and agreements on individuals and on developing and least developed countries (leading to new views on democracy and legitimacy in international law).

The changes thus relate to both the level and the forms of cooperation. As far as the level is concerned, we witness a move from multilateral negotiations in which it is ever harder to reach consensus, to agreements among smaller groups of countries, both within the framework of the multilateral system (plurilateral agreements) and outside of it (regional or bilateral trade agreements). International trade negotiations may serve as an example. At the same time, examples of the opposite development can still be found and show a scaling-up of cooperation in terms of the number of participating states (the Paris climate change negotiations) or the acceptance of stronger enforcement mechanisms (financial regulation in the EU). As far as the form of cooperation is concerned, we note a shift in actors and policy instruments. With regard to the former, in institutional terms this may amount to a shift in the relevant international (informal) fora or bodies that actually instigate international cooperation (such as the reinforced role of the G20 in the context of the global economic and financial crisis). In terms of policy instruments this may indicate a shift in the (preferred) regulatory approach, such as deregulation, reregulation, integration, harmonization, public or private enforcement.

As one of the original fields of international cooperation, international economic law is certainly one of the most developed areas in international law. It not only covers a wide-range of areas, but it is also characterised by a complex set of inter-related norms that find their basis in many different multilateral, plurilateral, regional and bilateral arrangements. While a focus on international economic law may certainly not tell the whole story in relation to shifts in levels and forms of international cooperation, it does allow for a very detailed analysis of some of the important trends we currently witness.

The example of trade law is well known. Arguably the main outcome of the World Trade Organization's Doha Round negotiations was the plurilateral Trade Facilitation Agreement adopted in 2015, and most trade negotiations now occur on a regional or bilateral level (e.g. TPP, CETA and TTIP). These shifts in levels of cooperation may be traced back to characteristics specific to the policy area at issue. The sophisticated enforcement regime and 'single undertaking' approach of the World Trade Organization, may be among the reasons why, after 15 years of negotiations, arguably very little has been agreed at the multilateral level. These days, trade liberalisation objectives are increasingly pursued at plurilateral, regional or bilateral levels. At the same time, international economic law is

characterised by an ongoing further sophistication. This is particularly evidenced by the many new regimes that are active in the area of financial regulation. Similar developments can be seen in (bilateral or regional) standardisation processes as a result of a wish to facilitate trade and investment. Furthermore, it now becomes clear to see that international economic law is no longer solely in the hands of the states. The influence of non-state actors, both in the creation of (ever more technical) norms (by a large number of international standard-setting bodies) and in the supervision and enforcement of norms (e.g. in relation to investor-state disputes) have changed the nature of international economic law. And it is these processes in particular that made the general public aware of the impact of international economic law, which arguably resulted in calls for more transparency and legitimacy.

This volume aims to explore which emerging trends can be observed in selected fields of international economic law, with a focus on trade, investment and financial regulation. It will do so by looking both at a shift in the levels of cooperation (from global/multilateral to plurilateral, regional or bilateral – or vice versa) and at shifts in the forms of cooperation (examining changing actors and instruments for cooperation). It will examine these questions both from a conceptual and a practical perspective.

Conceptually, the volume aims to apply contributions on integration theories, such as neo-functionalism and new institutionalism, to explain the drivers for the trends observed in selected policy areas. Inter alia, the progression in the underpinnings for regionalism, and the role of policy makers and stakeholders as drivers of changes in the level of cooperation pursued by States may be addressed. In addition, conceptual questions will relate to the historical development of international economic law, its future in the context of other structural developments in international law and the impact on individuals. This theoretical discussion of the rationale behind the level of cooperation observed in each selected policy field will form the backdrop for the practical discussion.

Practically, this volume aims to assess the implications of the different levels and forms of cooperation observable in the chosen policy fields and of shifts in both. Thus, the level (or levels) at which cooperation occurs as well as the chosen form may affect: (1) the process of law-making (i.e. the dynamics of negotiations); (2) the outcome of law-making (i.e. what can be achieved); (2) sources of law (the way in which overlapping obligations from agreements reached at different levels of cooperation are addressed); and (3) enforcement (the interaction between adjudicatory fora at different levels within the same policy field). In addition, the question whether international rules are developed and enforced at the multilateral level or at a plurilateral, regional or bilateral level and the forms that they take can have important consequences for the interests of individuals and of developing and least developed countries.