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Fabian Amtenbrink · Denise Prévost  
Ramses A. Wessel  
Volume Editors

# Netherlands Yearbook of International Law 2017

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



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The Netherlands Yearbook of International Law (NYIL) was first published in 1970. As a double-blind peer-reviewed publication, the NYIL offers a forum for the publication of scholarly articles of a conceptual nature in a varying thematic area of public international law. In addition, each Yearbook includes a section *Dutch Practice in International Law*. The NYIL is published under the auspices of the T.M.C. Asser Instituut.

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# Preface

## Shifts in International Economic Law: Mapping Trends and Developments

International economic law—understood here as covering trade, investment and financial regulation—is confronted with a number of changes.<sup>1</sup> Many of these changes concern more generally 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),<sup>2</sup> an increase of instruments (from international agreements to more informal lawmaking and non-legal commitments),<sup>3</sup> but at the same time also a stronger influence of regulation (as a result of the need to agree on more standardisation),<sup>4</sup> as well as a tension between global needs and regional or bilateral pragmatism (resulting in what has been termed ‘fragmentation’ or ‘pluralism’).<sup>5</sup> There is also a growing 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).<sup>6</sup>

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<sup>1</sup> International economic law is generally seen as regulating the international economic order or the economic relations between nations. 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. See the contributions to the *Journal of International Economic Law* (OUP) as well as Cottier and Nadakavukaren Schefer 2017; Lowenfeld 2008; Picker et al. 2008; Davey and Jackson 2008.

<sup>2</sup> Noortmann et al. 2015.

<sup>3</sup> Pauwelyn et al. 2012 as well as Berman et al. 2012.

<sup>4</sup> Delimatsis 2015.

<sup>5</sup> Krisch 2010.

<sup>6</sup> Wolfrum and Roeben 2008; Wheatley 2010; Kumm 2004.



The changes thus relate to both the levels and the forms of cooperation. As far as the level of cooperation 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 agreements). International trade negotiations may serve as an example.<sup>7</sup> At the same time, examples of the opposite development can also be observed and show a scaling-up of cooperation in terms of the number of participating states (e.g. the Paris climate change negotiations) or the acceptance of stronger enforcement mechanisms (e.g. financial market regulation in the European Union). As far as the form of cooperation is concerned, we note a shift in both 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 (e.g. the reinforced role of the G20 in the context of the global economic and financial crisis).<sup>8</sup> In terms of policy instruments, this may indicate a shift in the (preferred) regulatory approach, such as deregulation, reregulation, integration, harmonisation, and 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 also is 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 more detailed analysis of some of the important trends we currently witness.

The example of international trade law is very familiar. Arguably, the main multilateral outcome of the World Trade Organization's Doha Round negotiations was the Trade Facilitation Agreement adopted in 2015, which showcases a new approach to variable obligations in response to capacity constraints of developing country Members.<sup>9</sup> Other important achievements of this Round, such as the extension of the plurilateral agreements on Information Technology and on Government Procurement, are binding only on those Members that are parties to

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<sup>7</sup> Examples of successful plurilateral trade negotiations within the context of the multilateral system of the World Trade Organization are the extensions of the Agreement on Government Procurement (GPA/113) and the Information Technology Agreement (WT/MIN(15)/25), which came into force on 6 April 2014 and 16 December 2015, respectively. Examples of successful bilateral trade negotiations outside the WTO framework are the Comprehensive Economic and Trade Agreement between the European Union and Canada, which entered into force provisionally on 21 September 2017. Other trade agreements currently being negotiated outside the WTO framework are the Trade in Services Agreement (TiSA) involving 23 countries that account for 70% of trade in services and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

<sup>8</sup> Martha 2009; Amténbrink et al. 2015.

<sup>9</sup> Finger 2014; Hoekman 2014.

those agreements.<sup>10</sup> Most trade negotiations now occur on a regional or bilateral level.<sup>11</sup> These shifts in levels of cooperation may be traced back to characteristics specific to the policy area at issue. The sophisticated enforcement regime, and the initial ‘single undertaking’ approach to negotiations in the World Trade Organization, may be among the reasons why, after 15 years of negotiations, arguably very little was agreed at the multilateral level.<sup>12</sup> These days, trade liberalisation objectives are increasingly pursued at plurilateral, regional or bilateral levels.<sup>13</sup>

At the same time, international economic law is characterised by a continuous further sophistication. This is particularly evidenced by the many new regimes that are active in the area of financial market regulation.<sup>14</sup> Similar developments can be seen in (bilateral or regional) standardisation and regulation processes as a result of a desire to facilitate trade and investment.<sup>15</sup> What is more, it becomes clear that international economic law is no longer solely in the hands of states.<sup>16</sup> 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), has transformed the nature of international economic law. And it is these processes in particular that have made the general public aware of the impact and thus the relevance of international economic law, which arguably resulted in calls for more legitimacy and transparency.<sup>17</sup>

The present Yearbook aims to explore emerging trends in international economic law. Its contributions examine shifts in the levels of cooperation (from multilateral to plurilateral, regional or bilateral—or vice versa) and shifts in the forms of cooperation (changing actors and instruments for cooperation). These trends are analysed hereafter from both a conceptual and a practical perspective. Conceptually, this Yearbook aims to explain the drivers for the trends observed. Inter alia, it addresses the progression in the underpinnings for regionalism and the role of policymakers and stakeholders as drivers of changes in the level of cooperation pursued by states. In addition, conceptual questions 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. From a practical perspective, this Yearbook explores the shifts in levels and forms of

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<sup>10</sup> Nakatomi 2013. See, at an earlier date, Mavroidis and Hoekman 1999.

<sup>11</sup> Leal-Arcas 2011.

<sup>12</sup> For an alternative view of the causes of the failure of the Doha Round negotiations, see Wolfe 2013.

<sup>13</sup> Gantz 2013. See also, earlier, De Lombaerde 2006.

<sup>14</sup> Donnelly and Wessel 2018.

<sup>15</sup> Rigod 2013; Menkes 2017.

<sup>16</sup> Cafaggi 2015. See also Dilling 2012.

<sup>17</sup> See also Tietje and Lang 2016.

cooperation that can be identified in a number of specific policy fields. In sum, the main purpose of this Yearbook is to map some of the key developments we witness in international economic law and to provide a conceptual backdrop for discussions in various fields of international economic law and beyond.

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