

International Economic Law

In economics, as in physics,
changes are generally continuous.

ALFRED MARSHALL¹



1 Introduction

International economic law is the branch of public international law that governs international economic relations.² Although the regulation of international economic relations has always been a central aspect of international law, it has become a distinct field of the international legal system since the end of WWII. In its aftermath, states representatives met at Bretton Woods, New Hampshire, United States, motivated by the belief that a closer economic integration among states could prevent economic warfare, enhance international peace, and promote global welfare. The creation of international institutions dealing with international trade, foreign direct investment (FDI), and foreign exchange was seen as a means to avoid protectionism and foster peaceful and prosperous relations among nations.³

During the negotiations, three international institutions were imagined to form the pillars of the international economic order: the International Trade

1 Alfred Marshall, *Principles of Economics* [1890], 8th edition (London: Macmillan 1920) 409, footnote 1.

2 Georg Schwarzenberger, 'The Principles and Standards of International Economic Law' (1966) 117 *Recueil des Cours* 1 and 7; Pieter VerLoren van Themaat, *The Changing Structure of International Economic Law* (Leiden: Brill 1981) 9–11.

3 The policy of protecting domestic industries against foreign competition by means of tariffs, subsidies, quotas, and other restrictions placed on foreign goods had characterized the 1930s, undermining international cooperation, fostering nationalism, and ultimately contributing to the Second World War. Leon Trotsky, 'Nationalism and Economic Life' (1934) 12 *Foreign Affairs* 395, at 395 (noting that 'everywhere policy is being directed toward as hermetic a segregation as possible of national life away from world economy'); Rafael Lima Sakr, 'Beyond History and Boundaries: Rethinking the Past in the Present of International Economic Law' (2019) 22 *JIEL* 57–91, 66.

Organization (ITO), the International Bank for Reconstruction and Development (World Bank), and the International Monetary Fund (IMF). The ITO was to govern both trade and investment; the IMF was to provide short-term finance to countries in balance of payment difficulties; and the World Bank was meant to provide long-term capital to support development. Of the three institutions, only the IMF and the World Bank were established. The ITO never saw the light of the day: its founding instrument was adopted in Havana in 1948 but it failed to enter into force since the United States Congress did not approve it, and other states could not establish an international trade system without the largest economy in the world.⁴

Instead, the parties signed the much less ambitious, but perhaps more pragmatic General Agreement on Tariffs and Trade (GATT 1947).⁵ The GATT was not an international organization nor did it have an international personality. Rather, it was a multilateral treaty with an agile structure. Although the GATT was meant to have a provisional application, over time, it became extremely successful, probably because of its practical and diplomatic nature. It gradually developed some institutional and dispute settlement features, and after almost five decades, an agreement was reached to establish the World Trade Organization (WTO).⁶

Nowadays, international economic law is a well-developed area of law that includes international monetary law, international investment law, and international trade law, as well as elements of international financial law and international development law. This chapter provides some sense of the various debates and trends in international economic law focusing on two of its subfields, namely international trade law and international investment law.⁷ Although each subfield could be treated in its own right, this book attempts to

4 Gerhard Loibl, 'International Economic Law', in Malcom Evans (ed.), *International Law* (Oxford: OUP 2010) 722–751, 732.

5 General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194.

6 Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement or WTO Agreement), 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994).

7 As the interplay between international financial law and the protection of cultural heritage has been already investigated by a number of contributions, it will be mentioned by way of reference. See Antonia Zervaki, 'The Cultural Heritage of Mankind Beyond UNESCO: The Case for International Financial Institutions', in Photini Pazartzis and Maria Gavouneli (eds), *Reconceptualizing the Rule of Law in Global Governance—Resources, Investment, and Trade* (Oxford: Hart 2016) 169–184 (examining the practice of the World Bank and the European Investment Bank in relation to the financing of projects that have an impact on the cultural heritage of humankind). See also Willem Van Genugten, *The World Bank Group, the IMF, and Human Rights: A Contextualized Way Forward* (Intersentia 2015); Juan Pablo Bohoslavsky and Jernej Letnar Čerňič (eds), *Making Sovereign Financing and Human Rights Work* (Oxford:

examine the converging divergences between the two fields in relation to their interplay with cultural heritage protection. The in-depth and holistic scrutiny of these two subfields of international economic law enables the detection of the possible emergence of general principles of international law mandating the protection of cultural heritage in peacetime. Such a holistic approach also enables a better understanding of the international economic order and its various parts. Finally, it allows the defragmentation of international law.⁸

The chapter shows that international economic law cannot be isolated from general international law. On the one hand, international economic law can influence the development of general international law. The jurisprudence of international economic courts can be informally considered by other international courts and tribunals. Moreover, state practice and *opinio juris* developed under the aegis of international economic law can contribute to the coalescence of customary law or general principles of international law. On the other hand, as mentioned, international economic law is rooted in general international law. Its sources are treaties, customs, and general principles of law—the same sources of general international law. Moreover, international economic law is gradually becoming permeable to the influence of other subfields of international law, such as international cultural heritage law, albeit to a varying extent. Therefore, general international law and its subfields should not be read in clinical isolation from each other.

The chapter provides a brief overview of the features, aims, and objectives of international economic law and dispute settlement mechanisms, thus setting the stage for illuminating the linkage between cultural heritage protection and international economic law in theory and practice. While international economic law can be approached from a variety of different perspectives,⁹ the chapter primarily adopts an international law perspective. Additional perspectives such as economics, political science, and history come into play when necessary, to understand this complex field of study.

The chapter proceeds as follows. Section 1 briefly examines the content, aims, and objectives of international economic law. Section 2 analyzes its

Hart 2014); Galit Sarfaty, *Values in Translation—Human Rights and the Culture of the World Bank* (Stanford, CA: Stanford University Press 2012).

8 Asif Qureishi and Andreas Ziegler, *International Economic Law*, 11 ed. (London: Sweet & Maxwell 2009) 6.

9 John Haskell and Akbar Rasulov (eds), *New Voices and New Perspectives in International Economic Law* (Heidelberg: Springer 2020). On the hegemony of economic analysis in international economic law, see Oisín Suttle, 'Poverty and Justice: Competing Lenses on International Economic Law' (2014) 15 *JWIT* 1071–1086 (noting that 'the hegemony of economic analysis, and in particular the power of comparative advantage in trade scholarship, left little space for alternative theoretical approaches.').

sources. Section 3 discusses the interplay between state sovereignty and international economic law. Section 4 investigates the settlement of international economic disputes. Finally, Section 5 analyses and critically assesses the current legitimacy crisis of international economic law. Final remarks sum up the key findings of the chapter.

2 Content, Aims and Objectives of International Economic Law

International economic law governs economic phenomena, including but not limited to trade, investment, services, currency, and finance when such activities cross national borders.¹⁰ Due to economic globalization, international economic law has expanded in breadth and width – governing a growing number of fields and to an extent unknown before. While most fields of international law have an economic dimension, such economic tools of governance formally remain outside the normative ambit of international economic law.¹¹

Rather, it is possible to identify ‘the core and the penumbra’ of international economic law.¹² The core of international economic law includes international trade, foreign investment, and international monetary relations. Because of their centrality to the field, these areas have been under the spotlight for decades and have become worthy of investigation in their own right. Within the matrix of international economic law, international investment law and international trade law are often examined together as the twin pillars of the system.¹³ They share the general objectives of providing security and predictability to economic actors and increasing world prosperity by reducing barriers to international flows of goods, services, and investments. Foreign investments and international trade often interact in a globalized economy, and there is some partial overlapping in their respective legal frameworks, as some aspects of

¹⁰ John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations* (St. Paul, MN: West Group 2002) 193–194.

¹¹ For instance, Article 15 of the 1972 World Heritage Convention established a Fund for the Protection of the World Cultural and Natural Heritage. The operation of such fund remains outside the formal borders of international economic law, despite having an economic character.

¹² Qureishi and Ziegler, *International Economic Law*, 14.

¹³ Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: CUP 2016); Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: CUP 2016); Jürgen Kurtz, ‘Charting the Future of the Twin Pillars of International Economic Law’ (2014) 9 *Jerusalem Review of Legal Studies* 36–51; Mary E. Footer, ‘International Investment Law and Trade: The Relationship that Never Went Away’, in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (Cambridge: CUP 2013) chapter 12.

foreign direct investments are governed by relevant WTO agreements. Negotiations on an Investment Facilitation for Development Agreement have been underway in the WTO since September 2020; they are meant to conclude by the end of 2022. The negotiations are far advanced and focus on a wide range of measures that governments can put in place to facilitate the flow of FDI. In turn, some trade elements surface in relevant investment arbitrations.¹⁴ Both regimes prohibit unjustifiable discrimination.¹⁵

Because of the expansive character of international economic law, this field has increasingly interacted with other regimes of international law. International economic law has thus become increasingly porous to noneconomic values including, but not limited to, human rights, public health, environmental protection, and cultural concerns.¹⁶ This interaction—the so-called linkage issue—has attracted growing attention, but remains in a twilight zone, thus deserving further scrutiny.¹⁷

International economic law aims to promote peaceful and prosperous relations among nations, thus enhancing global welfare. The participants to the Bretton Woods conference endorsed the idea that by promoting a closer economic integration among nations, a mutual and better understanding would follow. Accordingly, an economically close-knit international community would develop a sense of interdependence, unity, and common destiny among its members.

Because of its three-fold aim—namely, growth, welfare, and peace—international economic law has multi-layered objectives, including both economic and noneconomic goals. Economic objectives include ‘raising the standards of living, ensuring full employment, ... the facilitation of growth in real income.’¹⁸ The most important undertakings that a country makes pursuant to international economic law are the so-called mostfavored nation (MFN) treatment

14 See e.g. Anastasios Gourgourinis, ‘Reviewing the Administration of Domestic Regulation in WTO and Investment Law’, in Freya Baetens (ed.), *Investment Law within International Law Integrationist Perspectives* (Cambridge: CUP 2013) chapter 13.

15 See e.g. Nicholas DiMascio and Joost Pauwelyn, ‘Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’, (2008) 102 *AJIL* 48–89, 88.

16 Daniel Drache and Lesley A. Jacobs, *Grey Zones in International Economic Law and Global Governance* (Vancouver: University of British Columbia 2019).

17 Isabella D. Bunn, ‘Linkages between Ethics and International Economic Law’ (1998) 19 *University of Pennsylvania JIEL* 319–327; Frank J. Garcia, ‘Trade and Justice: Linking the Trade Linkage Debates’ (1998) 19 *University of Pennsylvania JIEL* 391–434; James Harrison, ‘The Case for Investigative Legal Pluralism in International Economic Law Linkage Debates’ (2014) 2 *London Review of International Law* 115–145.

18 Marrakesh Agreement Establishing the World Trade Organization, preamble.

and national treatment.¹⁹ MFN treatment requires generally that ‘any advantage, favor, privilege or immunity granted by any contracting party’ to any foreign investor, investment, or product ‘shall be accorded immediately and unconditionally’ to the like investor, investment or ‘product originating in or destined for the territories of all other contracting parties.’²⁰ In other words, the best treatment extended to any has to be extended to all. National treatment requires equal treatment of foreigners and locals.

Noneconomic objectives relate to the respect of community values such as the optimal utilization of world’s resources ‘in line with the objectives of sustainable development and the preservation of the environment.’²¹ While the preamble of the WTO Agreement expressly refers to sustainable development, preambles of investment treaties vary.²² Such noneconomic objectives also include the respect of cultural diversity or public morals (*ordre public*)²³ and national and international security.²⁴ While expressed in the form of specific or general exceptions, noneconomic concerns should not be considered to be antithetical to international economic law, but as a necessary component of the same. They constitute necessary limits to economic freedoms, enabling a vital connection between international economic law and general international law.

3 The Sources of International Economic Law

This section briefly maps the sources of international economic law and discusses their past and contemporary relevance. The sources of international

19 General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 ILM 1153 (1994), Articles I and III.

20 See GATT Article I and analogous provisions in IIA s.

21 Qureshi and Ziegler, *International Economic Law*, 17.

22 The Canadian Model BIT expressly lists sustainable development among the objectives of the respective treaties.

23 Article XIV(a) of the General Agreement on Trade in Services (GATS) authorizes countries, under certain conditions, to maintain trade-restrictive measures ‘necessary to protect public morals.’ General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994). Other WTO Agreements contain parallel public morals clauses. See General Agreement on Tariffs and Trade as amended and incorporated into Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, 15 April 1994, 33 ILM 1125 (1994), Article XX(a).

24 GATT Article XXI.

law are set forth in Article 38 of the Statute of the ICJ.²⁵ Such sources are international conventions, customary international law, and general principles of law.²⁶ The decisions of international economic courts and the teachings of the most highly qualified jurists constitute subsidiary means for the determination of international law.²⁷ As is known, the provision specifically empowers the ICJ to apply these sources when deciding disputes in accordance with international law. Nonetheless, such provision is generally interpreted as listing the sources of international law that international courts and tribunals can use to detect, interpret, and apply international law. Therefore, this provision is generally considered to constitute a roadmap of the sources of international law in general and of its subfields in particular.

International economic law is mainly governed by a number of bilateral, regional, and multilateral agreements and is composed of detailed rules. Examples of bilateral treaties are BITs. As there is no single comprehensive multilateral investment agreement, more than 3,000 international investment agreements (IIAs) define investors' rights. The first BIT was concluded between West Germany and Pakistan in 1959; the number of BITs has grown steadily since then. Such IIAs generally require states to grant foreign investors fair and equitable treatment, full protection and security, and non-discrimination, in addition to prohibiting unlawful expropriation and other forms of state misconduct. Regional agreements include FTAs and agreements establishing customs unions.

Multilateral agreements include the Marrakesh Agreement establishing the WTO and its covered agreements.²⁸ Contrary to the GATT 1947, which granted states some latitude in signing up to the different agreements, creating a complex mosaic of commitments (*GATT-à-la-carte*), the WTO obliges its members to accept a core package of multilateral agreements. This includes GATT 1994, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Dispute Settlement Understanding (DSU).²⁹

25 United Nations, Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993.

26 Article 38 Statute of the ICJ. The Statute of the International Court of Justice is annexed to the Charter of the United Nations. Charter of the United Nations, 26 June 1945, in force 24 October 1946, 1 UNTS XVI.

27 ICJ Statute, Article 38(1)(d).

28 Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994).

29 General Agreement on Tariffs and Trade as amended and incorporated into Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, 15 April 1994, 33 ILM 1125 (1994); General Agreement on Trade in Services (GATS), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994, Marrakesh Agreement Establishing the World Trade

To date, the idea of governing both trade and foreign investments at a multi-lateral level has been unsuccessful.³⁰ While the Havana Charter contained provisions on the treatment of foreign investment,³¹ it was never ratified, and only its provisions on trade were incorporated into the GATT 1947.³² Later attempts to govern FDI at the WTO also proved unsuccessful. For example, the 1996 Singapore Ministerial Conference decided to establish a new working group on trade and investment, and the subject was originally included on the Doha Development Agenda (DDA).³³ According to the mandate, the negotiations would start after the 2003 Cancún Ministerial Conference, on the basis of a decision to be taken, by explicit consensus, at that session.³⁴ However, there was no consensus, and the item was therefore dropped from the DDA in 2004. The United States and developing countries converged in their desire to eliminate investment from the DDA, albeit for different reasons. Developing countries opposed the insertion of investment governance on the negotiation table, fearing a race to the top of investment protection standards and the consequent dilution of their regulatory autonomy. Meanwhile, the US and other industrialized countries expected to achieve a greater degree of liberalization for investment via bilateral and regional deals. Nowadays, negotiations are under way to develop a Multilateral Agreement on Investment Facilitation for Development. However, such agreement does not cover market access, investment protection, and investor-state dispute settlement.

Most international economic instruments include internal mechanisms of interpretation and dispute settlement that tend to reach pragmatic rather than strictly judicial settlement. Given the abundance of international economic legal instruments, conflicts can arise, and have arisen, between such instruments.³⁵ While some multilateral instruments explicitly include an

Organization, Annex 1C, 1869 UNTS 299; Understanding on the Rules and Procedures Governing the Settlement of Disputes, Dispute Settlement Understanding (DSU), Annex 2 to the Marrakesh Agreement, 1869 UNTS 401, 33 ILM 1226 (1994).

30 See generally Pierre Sauvé, 'Multilateral Rules on Investment: Is Forward Movement Possible?' (2006) 9 JIEL 325–355.

31 Havana Charter for an International Trade Organization, adopted 24 March 1948, United Nations Conference on Trade and Employment, Final Act and Related Documents, UN Doc E/CONF.2/78, Article 12.

32 General Agreement on Tariffs and Trade, adopted 30 October 1947, in force 1 January 1948, 55 UNTS 194.

33 Singapore WTO Ministerial Declaration, adopted 13 December 1996, in force 18 December 1996, WT/Min(96)/DEC, para 20.

34 Doha WTO Ministerial Declaration, adopted on 14 November 2001, in force 20 November 2001, WT/MIN(01)/DEC/1, para 20.

35 *Argentina—Certain Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items*, WT/DS56/R, WTO Panel Report, 25 November 1997 (detailing Argentina's obligations under the IMF and under GATT 1994).

exception enabling states to achieve closer forms of economic integration,³⁶ other instruments do not specifically govern such interaction, and in some instances, parallel litigations have taken place before different *fora*.³⁷

Customary international law has developed in the area of international economic law. Historically, customary law principles of the freedom of communication (*jus communicationis*) and freedom of the sea (*mare liberum*) played a significant role in promoting freedom of commerce in the past centuries.³⁸ Despite its historic importance, customary law now plays a residual and limited role in international economic relations because of the abundance of treaties and their detailed provisions. Nonetheless, customary law remains the bedrock of international economic law, and the norms of the former still constitute fundamental threads of the fabric of the latter. Important rules of customary law pertain to treaty interpretation, the treatment of aliens, diplomatic protection, and the principle that agreements must be kept (*pacta sunt servanda*).³⁹ Despite the existence of many international treaties, recourse to customary law enables the system to be flexible, and to adapt to changing circumstances and the evolving needs of states. Nonetheless, customary law presents distinct challenges due to the possible lack of consensus among states as to the customary law nature and extent of given norms.

General principles of law also play an important role in international economic relations.⁴⁰ As is known, these can have a domestic or international origin. Because international law has promoted standardization in domestic law, in turn such harmonization can foster the emergence of general principles of law.⁴¹ As for customary law, the identification of general principles of

36 GATT 1994, Article XXIV.

37 Michelle Zang, 'Judicial Interaction of International Trade Courts and Tribunals' in Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, and Michelle Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge: CUP 2018) 432–453; William Davey and André Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements' (2009) 8 *World Trade Review* 5–23; Daowei Zhang, *The Softwood Lumber War: Politics, Economics, and the Long U.S.-Canadian Trade Dispute* (Abington: Routledge 2007); Marcos Orellana, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 *Nordic JIL* 55–81.

38 Valentina Vadi, *War and Peace, Alberico Gentili and the Early Modern Law of Nations* (Leiden: Brill 2020).

39 Qureshi and Ziegler, *International Economic Law*, 27.

40 Georges Abi-Saab, 'General Principles of Law in International Economic Law', in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Encyclopedia of International Economic Law* (Cheltenham: Elgar 2017) 42–43.

41 Qureshi and Ziegler, *International Economic Law*, 28.

international law can be challenging. While universal consensus is not needed, a careful scrutiny of various legal systems is required.

The decisions of international economic courts and the teachings of the most highly qualified jurists constitute subsidiary means for the determination of international economic law.⁴² Although there is no binding precedent in international law,⁴³ the decisions of international courts and tribunals have played an important role in clarifying, interpreting, and even developing international economic law.⁴⁴ The teachings of jurists also significantly appear in the jurisprudence of international economic courts. While this can contribute to the development of international economic law, commentators have called for more diversity within the field in order to enable different perspectives to emerge and contribute to the evolution of international economic law.⁴⁵

The incidence of each type of source inevitably varies in each subfield of international economic law, depending on the development of the same. For instance, in international monetary law, soft law in the form of nonbinding instruments still prevails. Instead, both international trade law and international investment law are characterized by a significant number of treaties, expressing a clear preference for a rule-based system.⁴⁶ More importantly, 'the manner in which these sources are elucidated, for example with or without a positivist or natural orientation, serves the goals of certain interest groups better than others.'⁴⁷

4 State Sovereignty and International Economic Law

Sovereignty is an elusive concept that has different meanings depending on context.⁴⁸ A flexible notion, it mainly refers to 'the power of a state freely and autonomously to organize itself and to exercise a monopoly of legitimate

42 ICJ Statute, Article 38(1)(d).

43 ICJ Statute, Article 59.

44 Joanna Jemielniak, Laura Nielsen, and Henrik Olsen (eds), *Establishing Judicial Authority in International Economic Law* (Cambridge: CUP 2016) 139–212; Giorgio Sacerdoti, 'Precedent In The Settlement Of International Economic Disputes: The WTO And Investment Arbitration Models', in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Leiden: Brill 2010) 225–246.

45 Qureshi and Ziegler, *International Economic Law*, 31.

46 Id. 36.

47 Id.

48 Daniel Sarooshi, *International Economic Organizations and their Exercise of Sovereign Powers* (Oxford: OUP 2005) 1; John Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: CUP 2006) 58.

power within its territory.⁴⁹ It also forms the basis for the state's external relations.⁵⁰ In discussing sovereignty, scholars generally distinguish between internal sovereignty, that is, 'governing authority within the state', and external sovereignty, that is, 'sovereignty as between states.'⁵¹

Internal sovereignty refers to the capacity of the country to govern itself regardless of its form, and to pursue the achievement of its own destiny. It indicates a geopolitical entity with its own rules, its own administration, and the monopoly of force within the state. Internal sovereignty also includes a state's permanent control over its natural and cultural resources,⁵² self-determination,⁵³ and general jurisdiction over activities within its own territory.

External sovereignty⁵⁴ refers to the capacity of states to operate externally as the main actors of international law. It indicates that states owe authority to no other ruler (*rex superiorem non recognoscens*); rather, they are considered to be perfect communities, complete in and of themselves (*communitates perfectae*).⁵⁵ As states are independent and equal, they have the duty not to interfere in the domestic affairs of other states under international law.⁵⁶

The two types of sovereignty are in fact closely connected, as polities 'act in international relations by virtue of [their] authority in internal relations.'⁵⁷ The concept of sovereignty is thus at the heart of international law, and how sovereignty is theorized is relevant to the theory and practice of international law.⁵⁸ Only sovereign states are independent subjects of international law.

49 Qureshi and Ziegler, *International Economic Law*, 31.

50 See PCIJ, *The Case of the S.S. Lotus (France v Turkey)*, Judgment, 7 September 1927, 1927 PCIJ (ser. A) No. 9, at 18 (stating that '[i]nternational law governs relations between ... states.').

51 James Crawford, 'Sovereignty as a Legal Value', in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: CUP 2012) 117–133, 120.

52 General Assembly Resolution 1803 (XVII) 14 December 1962 on Permanent Sovereignty over Natural Resources.

53 International Covenant on Economic, Social, and Cultural Rights (ICESCR), 16 December 1966, 6 ILM 360, 993 UNTS 3, Article 1.

54 Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: CUP 2010) 5.

55 Crawford, 'Sovereignty as a Legal Value', 123.

56 United Nations, Charter of the United Nations, signed on 26 June 1945, published on 24 October 1945, 1 UNTS XVI, Article 2(7).

57 Crawford, 'Sovereignty as a Legal Value', 128.

58 Nehal Bhuta, 'State Theory, State Order, State System—*Jus Gentium* and the Constitution of Public Power', in Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford: OUP 2017) 398–417, 398.

The reason of state—in the form of cultural, security, public health, and public morals exceptions—qualifies a number of international law provisions. In turn, international law also deeply interacts with, and seeks to limit, the reason of state.⁵⁹ In fact, the main role of international law is to restrain the scope of state action. Therefore, ‘the apparently clear distinction between internal and international tends to break down ... depending on the development of international relations.’⁶⁰

Much ink has been spilled on the vexed question as to whether global economic governance threatens state sovereignty.⁶¹ International economic law traditionally imposed only narrow limits on national autonomy, by restricting measures at the border such as tariffs and quotas and prohibiting export subsidies.⁶² It ‘did not traditionally address regulation with more prudential purposes ... except to require that it be applied to imported and domestic goods on a non-discriminatory basis.’⁶³ Since the inception of the WTO in 1995, however, as tariffs and other forms of protection were sensibly reduced, other forms of protection arose and domestic regulation came to be seen as ‘the next frontier of protection.’⁶⁴ Nowadays, the WTO administers a number of agreements that contain detailed rules regulating economic activity that reach behind the border and affect the regulatory autonomy of states. In parallel, international investment law has pervasive effect on domestic policies, thus raising the question as to whether policymakers truly retain regulatory autonomy after signing IIAs.⁶⁵

Although international economic governance supposedly requires economic and technical changes, such changes ‘shape the policy choices available to governments, alter existing constitutional and political arrangements, ... thus affecting functions that go at the heart of political and constitutional authority.’ In other words, ‘the shifting of decision-making authority from

59 Martti Koskeniemi, ‘International Law and *Raison d’État*: Rethinking the Prehistory of International Law’, in Benedict Kingsbury and Benjamin Straumann (eds), *The Roman Foundations of the Law of Nations* (Oxford: OUP 2010) 298.

60 Crawford, ‘Sovereignty as a Legal Value’, 121–122.

61 Julian Ku and John Yoo, ‘Globalization and Sovereignty’ (2013) 31 *Berkeley JIL* 210–234; John H. Jackson, ‘Sovereignty-Modern, A New Approach to an Outdated Concept’ (2003) 97 *AJIL* 782.

62 Joel Trachtman, ‘Regulatory Jurisdiction and the WTO’, in William Davey and John Jackson (eds), *The Future of the WTO* (Oxford: OUP 2008) 193–213, 194.

63 Id.

64 Id. 195.

65 Brigitte Stern, ‘Investment Arbitration and State Sovereignty’ (2020) 35 *ICSID Review—Foreign Investment Law Journal* 443–458.

governments to international economic institutions affects ... sovereignty.⁶⁶ Critics have cautioned that economic globalization can even lead to a race to the bottom, that is, a leveling down of human rights, labour, environmental, and cultural standards, and that 'transnational corporations often overpower national ... regulators with self-interested interpretations of international economic law.'⁶⁷

Nonetheless, global economic governance 'depends in part on the willingness of sovereign states to constrain themselves.'⁶⁸ By entering into treaty obligations, states necessarily exercise, if not cede, some sovereignty.⁶⁹ States voluntarily join international economic organizations because of growing interdependence in international relations.⁷⁰ Membership of such organizations does not affect state sovereignty because states can generally withdraw from international economic agreements.⁷¹ Rather, international economic law constitutes a tool for safeguarding if not strengthening sovereignty and helping states to maintain their clout in unstable, uneven, and perennially changing international relations.

Because of the pervasiveness of international economic law, the national economic system is then subjected to international legal scrutiny and the purview of international economic courts. Nonetheless, states generally comply with international economic law because of reputation, reciprocity, and self-interest—only by participating in the system can they contribute to shaping global economic governance and achieve common aims and objectives such as growth and sustainable development. Only by maintaining their commitments can they attract growing investment flows and participate in global trade. By participating in international economic agreements, especially those

66 Anne Orford, 'Locating the International: Military and Monetary Interventions After the Cold War' (1997) 38 *Harvard International Law Journal* 443, 464–67, 470.

67 Tim Dorlach and Paul Mertenskötter, 'Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label' (2020) 54 *Law & Society Review* 571–606, 572.

68 Steven Croley and John Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 *AJIL* 193, 193–95, 211–12.

69 *Japan—Taxes on Alcoholic Beverages*, WT/DSS/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, 11 November 1996, p. 16 ('in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.')

70 Kal Raustiala, 'Rethinking the Sovereignty Debate in International Economic Law' (2003) 6 *JIEL* 841–878, 860.

71 *Id.* 846.

of a multilateral character, countries may minimize the risk of power-based relations and maximize the benefits of a rule-based system.

More substantively, the meaning of international economic law and consequently the policy space left to national governments are strongly shaped by interpretation.⁷² While investors tend to advance interpretations of international economic law that challenge unfavorable regulation, states have the capacity to uphold their own interpretations, defending the legality of their cultural policies.⁷³ Finally, much of the interpretation and construction of international economic law will occur before international economic courts.

5 The Settlement of International Economic Disputes

International economic law is characterized by sophisticated dispute settlement mechanisms. While the WTO Dispute Settlement Mechanism (DSM) was—until recently—defined as the ‘jewel in the crown’ of this organization,⁷⁴ investor-state arbitration has become the most successful mechanism for settling investment-related disputes.⁷⁵

While the original GATT 1947 provided for informal, pragmatic, and flexible dispute settlement tools, during the Uruguay Round negotiations leading to the establishment of the WTO, ‘the United States agreed to refrain from unilateral actions in exchange for making the newly negotiated rules more credible through a stronger dispute settlement system.’⁷⁶ As a result, the WTO dispute settlement system has become highly legalized. The rule-based architecture of the DSM was designed to strengthen the multilateral trade system.⁷⁷ While under the GATT 1947 only two provisions dealt with dispute settlement, under the WTO, an entire treaty, the DSU, governs the matter.

In parallel, investment treaties provide investors with direct access to an international arbitral tribunal. The use of the arbitration model is aimed at

72 Dorlach and Mertenskötter, ‘Interpreters of International Economic Law’, 599.

73 Id. 576 and 580.

74 Amrita Narlikar, *The WTO: A Very Short Introduction* (Oxford: OUP 2005).

75 Susan Franck ‘Development and Outcomes of Investor–State Arbitration’ (2009) 9 *Harvard Journal of International Law* 435–489.

76 Manfred Elsig, Rodrigo Polanco, and Peter Van den Bossche, ‘Introduction—International Economic Dispute Settlement: Demise or Transformation?’ in Manfred Elsig, Rodrigo Polanco, and Peter Van den Bossche (eds), *International Economic Dispute Settlement—Demise or Transformation?* (Cambridge: CUP 2021) 1–10, 2.

77 Croley and Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’, 193.

depoliticizing disputes, avoiding potential national court bias, and ensuring the advantages of confidentiality and effectiveness.⁷⁸ By allowing foreign investors to directly sue governments, states intended to credibly commit themselves and, as a consequence, encourage FDI. Whether the inclusion of investor–state dispute settlement in IIAs and the ratification of BITs more generally has contributed to attract FDI remains contested.⁷⁹

Certainly, negotiators of the relevant agreements could not foresee the increasingly common use of the WTO DSM and investment arbitration. They likely assumed that the establishment of such dispute settlement mechanisms would lead states to follow agreed international rules. However, as international economic courts have been used beyond initial expectations, attention has moved to the consequences of legal proceedings.⁸⁰

Due to the ever-expanding nature of international economic law and international law more generally, conflicts between economic values and other values have increasingly arisen. Given the structural imbalance between the vague and nonbinding dispute-settlement mechanisms provided by international cultural heritage law on the one hand, and the effective, sophisticated, and binding dispute-settlement mechanisms available under international economic law on the other hand, cultural disputes involving investors' or traders' rights have often been brought before international economic courts.⁸¹ This raises both theoretical and practical concerns.

Questions arise concerning the fragmentation of international law. Are international cultural heritage law and international economic law self-contained regimes? One persistent problem both fields confront is the recognition, interpretation, and application of other international law. Can international economic courts interpret and apply other international law? To what extent

78 Ibrahim Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA' (1986) 1 *ICSID Review* 1–25, 5.

79 Jason Webb Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 *Law & Society Review* 805–832.

80 Elsig, Polanco, and Van den Bossche, 'Introduction'.

81 Clearly, this does not mean that these are the only available fora, let alone the superior fora for this kind of dispute. Other fora are available such as national courts, human rights courts, regional economic courts and the traditional state-to-state fora such as the International Court of Justice or even inter-state arbitration. Some of these dispute-settlement mechanisms may be more suitable than investor–state arbitration or the WTO DSM to address cultural concerns.

can international economic courts review domestic policies that are allegedly inconsistent with international economic law?

Conversely, one may wonder whether the fact that cultural heritage-related disputes tend to be adjudicated before international economic courts determines a sort of institutional bias. Treaty provisions can be vague, and their language encompasses a potentially wide variety of state regulation that may interfere with economic interests. Therefore, a potential tension exists when a state adopts measures interfering with foreign investments or free trade. The aggrieved investors may consider such measures to violate substantive standards of treatment under investment treaties. They may thus require compensation before arbitral tribunals. In parallel, affected traders may spur the home state to file a claim before the WTO organs.

More specifically, with regard to the WTO Dispute Settlement Body (DSB), 'it is quite uncontroversial that an adjudicatory system engaged in interpreting trade-liberalizing standards would tend to favor free trade.'⁸² According to some empirical studies, there is a consistently high rate of complainant success in WTO dispute resolution.⁸³ For some scholars, 'the WTO panels and the WTO Appellate Body have interpreted the WTO agreements in a manner that consistently promotes the goal of expanding trade, often to the detriment of respondents' negotiated and reserved regulatory competencies.'⁸⁴ In particular, given the fact that about 80 percent of the cases have been settled in favor of the claimant, scholars have highlighted the fact that 'the DSB has evolved WTO norms in a manner that consistently favors litigants whose interests are generally aligned with the unfettered expansion of trade.'⁸⁵

In the parallel domain of investor–state arbitration, some scholars contend that such a mechanism is biased in favor of corporate and economic interests, and neglects vital noneconomic concerns.⁸⁶ Certainly, given the architecture of the arbitral process, significant concerns arise in the context of disputes involving cultural elements. While arbitration structurally constitutes a private

82 Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International LJ* 333–377.

83 John Maton and Carolyn Maton, 'Independence under Fire: Extra Legal Pressures and Coalition Building in WTO Dispute Settlement' (2007) 10 *JIEL* 317–334.

84 Juscelino F Colares, 'A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development' (2009) 42 *Vanderbilt Journal of Transnational Law* 383–439, at 388.

85 *Id.* at 387.

86 Robin Broad, 'Corporate Bias in the World Bank Group's International Centre for Settlement of Investment Disputes—A Case Study of a Global Mining Corporation Suing El Salvador' (2015) 36 *University of Pennsylvania JIL* 851–874, at 854.

model of adjudication, investment disputes present public law aspects.⁸⁷ Arbitral awards ultimately shape the relationship between the state on the one hand and private individuals on the other.⁸⁸ Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.⁸⁹

Despite, or perhaps because of, these apparent successes, both dispute settlement mechanisms have recently come to the forefront of legal debates. Many diplomats and scholars have expressed ‘concern regarding the magnitude of decision power’ allocated to international economic courts.⁹⁰ Such tribunals are asked to determine matters such as the interplay between cultural policies and international economic governance.

Because investor–state arbitration is characterized by the absence of an appeal mechanism and has produced a range of inconsistent awards on cases arising out of the same or similar factual issues, countries and commentators have proposed a range of alternatives moving toward some judicialization of the system.⁹¹ Ongoing discussions focus on the establishment of a multilateral investment court. In turn, and perhaps paradoxically, WTO courts have been under siege for their alleged overreach, judicialization, and judicial activism.⁹² After briefly delineating some fundamental features of investor-state arbitration and the WTO Dispute Settlement Mechanism in the next two subsections, the chapter discusses the current legitimacy crisis of international economic law.

5.1 *The Main Features of Investor–State Arbitration*

Once deemed to be an ‘exotic and highly specialised’ domain,⁹³ international investment law is now becoming mainstream.⁹⁴ Due to economic globalization

87 Gus Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims against the State’ (2007) 56 ICLQ 371–393, at 372.

88 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: OUP 2007) 70.

89 M Sornarajah, ‘The Clash of Globalizations and the International Law on Foreign Investment’ (2003) 10 *Canadian Foreign Policy* 1–20.

90 Trachtman, ‘The Domain of WTO Dispute Resolution’, 333.

91 Anthea Roberts, ‘Incremental, Systemic, and Paradigmatic Reform of Investor–State Arbitration’ (2018) 112 AJIL 410–32.

92 Gregory Shaffer, ‘A Tragedy in the Making?: The Decline of Law and the Return of Power in International Trade Relations’ (2018) 44 *Yale Journal of International Law* 37–53.

93 ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group (Marti Koskeniemi) UN Doc. A/CN.4/L.682, 13 April 2006, para. 8.

94 Stephan W. Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’ (2011) 22 EJIL 875–908.

and the rise of foreign direct investments, the regulation of the field has become a key area of international economic law and a well-developed field of study in its own right. As there is no single comprehensive global investment treaty, investors' rights are defined by an array of international investment agreements (IIAs), customary international law, and general principles of law as well as subsidiary means for the determination of rules of law, namely, awards of arbitral tribunals and the teachings of the most highly qualified jurists.⁹⁵

At the substantive level, international investment law provides extensive protection to investors' rights in order to encourage FDI and to foster economic development. Since the inception of Bilateral Investment Treaties (BITs) in the late 1950s, countries have signed on to BITs with the distinct aims of protecting their investors overseas, attracting FDI, and fostering economic development.⁹⁶ Under IIAs, states parties agree to provide a certain degree of protection to investors who are nationals of contracting states, or their investments. Such protection generally includes compensation in case of expropriation, fair and equitable treatment, non-discrimination, full protection and security, and repatriation of profits among others.

At the procedural level, international investment law is characterized by sophisticated dispute settlement mechanisms. Most investment treaties contain two dispute resolution clauses: one permitting investor–state arbitration for investment disputes, and the other permitting state-to-state arbitration for disputes concerning the treaty's interpretation and/or application. While state-to-state arbitration has become rare,⁹⁷ investor–state arbitration has become the most successful mechanism for settling investment-related disputes.⁹⁸

Arbitral tribunals are typically composed of an uneven number of members, most frequently three: one arbitrator selected by the claimant, another selected by the respondent, and a third appointed by a method that attempts to ensure neutrality.⁹⁹ All arbitrators are required to be independent and

95 M. Somarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge: CUP 2010) 79, 87.

96 Genevieve Fox, 'A Future for International Investment? Modifying BITs to Drive Economic Development' (2014) 46 *Georgetown JIL* 229–260, 229.

97 Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 *Harvard International Law Journal* 1–70, 1; Michele Potestà, 'Towards a Greater Role for State-to-State Arbitration in the Architecture of Investment Treaties?', in Shaheez Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor–State Arbitration* (Leiden: Brill 2015) 249–273, 250.

98 Susan Franck, 'Development and Outcomes of Investor–State Arbitration' (2009) 9 *Harvard International Law Journal* 435–489, 435.

99 Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 *EJIL* 387–424, 397.

impartial.¹⁰⁰ Once proceedings are initiated by an investor, arbitral tribunals review state acts in light of the relevant investment treaty provisions.

The internationalization of investment disputes has been conceived as an important valve for guaranteeing a neutral forum and depoliticizing investment disputes. Investor–state arbitration shields investment disputes from power politics and insulates them from the diplomatic relations between states.¹⁰¹ The depoliticization of investment disputes benefits: (1) foreign investors, (2) the host state, and (3) the home state.¹⁰² First, foreign investors no longer have to rely on the vagaries of diplomatic protection; rather, they can bring direct claims and make strategic choices in the conduct of the arbitral proceedings.¹⁰³ In this regard, investor–state arbitration can facilitate access to justice for foreign investors¹⁰⁴ and provide a neutral forum for the settlement of investment disputes.¹⁰⁵ Such access is perceived to be necessary to render meaningful the substantive investment treaty provisions. Second, the depoliticization of investment disputes protects the host state by reducing the home country's interference in its domestic affairs.¹⁰⁶ It prevents or 'limit[s] unwelcome diplomatic, economic, and perhaps military pressure from strong states whose nationals believe they have been injured.'¹⁰⁷ Third, the depoliticisation of investment disputes also protects the home state in that it no longer has to become involved in investor–state disputes.¹⁰⁸

Arbitral tribunals have reviewed host-state conduct in key sectors, including cultural heritage. Consequently, many of the recent arbitral awards have determined the boundary between two conflicting values: the legitimate need for state regulation in the pursuit of the public interest on the one hand and the protection of private interests from state interference on the other.

100 Antonio Parra, 'The Initiation of Proceedings and Constitution of Tribunals in Investment Treaty Arbitrations', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford: OUP 2010) 105, 116.

101 Sergio Puig, 'No Right without a Remedy: Foundations of Investor–State Arbitration' (2013–2014) 35 *University of Pennsylvania JIL* 829–861, 848–53.

102 Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 *Harvard International Law Journal* 353–417, 390.

103 Puig, 'No Right without a Remedy', 844.

104 Francesco Francioni, 'Access to Justice, Denial of Justice, and International Investment Law' (2009) 20 *EJIL* 729–747.

105 Puig, 'No Right without a Remedy', 846.

106 Roberts, 'Triangular Treaties', 389–390.

107 Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System' (2014) 29 *ICSID Review* 372–418, 404.

108 Roberts, 'Triangular Treaties', 390.

5.2 *The Main Features of the WTO Dispute Settlement Mechanism*

International trade law is characterized by a sophisticated dispute-settlement mechanism. The creation of the WTO DSM determined a major shift from the political consensus-based dispute settlement system of the GATT 1947 to a rule-based architecture designed to strengthen the multilateral trade system.¹⁰⁹

Under the original GATT 1947, only two provisions were dedicated to dispute settlement. Articles XXII and XXIII of GATT 1947 provided for bilateral consultations between disputing parties; if no settlement could be reached, states could resort to good offices, mediation, or conciliation, before requesting a GATT panel of experts. The Council of Contracting Parties would then adopt the panel's report by consensus, that is, if any Contracting Party did not oppose it. Although quite successful, this informal, flexible, and pragmatic dispute settlement mechanism had several shortcomings.¹¹⁰ The losing party could delay or even block the adoption of panel report by the Contracting Parties. This led some parties to adopt unilateral measures. The *ad hoc* nature of the panels meant that reports could be inconsistent. Furthermore, there was no time frame for the decision-making process. The dispute settlement experience of the GATT 1947 gave way to a more formalized dispute settlement mechanism since the inception of the WTO.

The WTO DSM is compulsory, exclusive, and, at least until recently, highly effective.¹¹¹ Only WTO member states have *locus standi* in the DSM, that is, individuals cannot file claims before panels and the Appellate Body (AB).¹¹² When trade disputes emerge, Article 23.1 of the DSU obliges members to subject the dispute exclusively to WTO bodies.¹¹³ In *US—Section 301 Trade Act*, the Panel held that members 'have to have recourse to the DSU DSM to the exclusion of any other system.'¹¹⁴ In *Mexico—Soft Drinks*, the AB clarified that the provision even implies that 'that Member is entitled to a ruling by a WTO panel.'¹¹⁵

109 Croley and Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', 193.

110 Loibl, 'International Economic Law', 737.

111 Peter Van Den Bossche, *The Law and Policy of the World Trade Organization*, 4th edition (Cambridge: CUP 2017).

112 Henrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 JIEL 383–405, at 391.

113 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994), Article 23.1.

114 WTO Panel Report, *United States—Section 301–310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.43.

115 WTO Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para. 52.

Pursuant to WTO settled jurisprudence and Article XXIII:1 of the GATT 1994, each WTO Member which considers any of its benefits to be prejudiced under the covered agreements can bring a case before a panel.

If consultations among the disputing parties are unsuccessful, the complaining state may request the establishment of a panel of experts to hear the matter. The Dispute Settlement Body (DSB) (consisting of representatives of all WTO Members) must then establish a panel. It is now impossible for any of the parties to a dispute to block the formation of a dispute settlement panel or the adoption of a ruling by the adjudicators. After objectively assessing the matter, the panel renders a report that may be appealed to the AB. Panels and the AB interpret and apply the WTO treaties, preserving the rights and obligations of the WTO members under the covered agreements 'in accordance with customary rules of treaty interpretation.'¹¹⁶

The WTO's DSB automatically adopts the panel's report—or, if the latter is appealed, the AB's report—unless there is a consensus not to adopt a report. Adopted reports are binding on the parties, and the DSU provides remedies for breach of WTO law. The DSB can authorize countermeasures including the suspension of concessions if the report is not implemented. While the system is rule-based, it is designed to reduce the use of unilateralism in international economic relations and ensure mutually satisfactory solutions.

For the sake of clarity, the book adopts the term 'international economic courts' to refer to arbitral tribunals, panels, and the Appellate Body because they all present elements of growing judicialization. Nonetheless, the term *courts* is not used in the WTO agreements. Panels and the AB are usually referred to in literature as 'quasi-judicial bodies' since adjudication in the WTO contains both diplomatic and judicial elements: bilateral consultations must precede the referral of a dispute to a panel. Once a dispute has been referred to a panel, however, the procedure is quintessentially judicial.¹¹⁷

Until recently, the WTO DSM was a great success; with no real executive and a weak legislative branch, the WTO jurisprudence grew rich and strong. Perhaps exactly because of its success, this mechanism has come under growing scrutiny and criticism. For instance, the United States has raised concerns over questions of delay, judicial over-reach, and precedence.¹¹⁸ Because the United

¹¹⁶ DSU Article 3.2.

¹¹⁷ Petros Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts' (2008) 102 AJIL 421–474, 421.

¹¹⁸ See Office of the United States Trade Representative (2020), *Report on the Appellate Body of the World Trade Organization*, February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (accessed 1 February 2022).

States has blocked the appointment of several adjudicators to the Appellate Body since 2017, the organ is currently unable to hear new appeals. Nowadays, 'losing parties are in many instances likely to appeal ... panel reports to the paralysed AB, and thus prevent these panel reports from becoming legally binding' thus 'leaving the dispute unresolved'.¹¹⁹ In parallel, parties that win a case at the panel stage will likely resort to unilateral retaliation.

Therefore, the current crisis of the AB not only affects the WTO Appellate review, but undermines the whole WTO dispute settlement system. It can cause escalating global trade protectionism and a return to power-based trade relations. To find a temporary solution to the impasse, the EU and a number of trade partners set up a Multiparty Interim Appeal arbitration arrangement (MPIA).¹²⁰ The parties continue to seek resolution of the AB crisis, and agree to use the MPIA as a second instance as long as the situation continues.

5.3 *Converging Divergences*

For the purpose of this discussion, the WTO dispute settlement mechanism and investor–state arbitration are examined in parallel for legal, structural, and functional reasons. From a legal perspective, both investor–state arbitration and the WTO DSM constitute legal dispute settlement mechanisms. As noted by Alvarez, 'Investor–state dispute settlement was designed to avoid politicized espousal and the gunboat diplomacy by powerful states that often accompanied it, much as the WTO was intended to displace bilateral trade leverage'.¹²¹ From a structural perspective, as alternatives to gunboat diplomacy and power politics, both dispute settlement mechanisms are dominated by lawyers and constitute quintessentially legal dispute settlement mechanisms.¹²² In fact, although the GATT system used to be run by diplomats and economists, an increasing juridification of the system has taken place since the inception of the WTO.¹²³ More and more arbitrators, WTO panelists, and Members of the AB

¹¹⁹ Elsig, Polanco, and Van den Bossche, 'Introduction', 7.

¹²⁰ Multi-Party Interim Appeal Arbitration Arrangement under Article 25 of the DSU (MPIA), JOB/DSB/1/Add.12, effective on 30 April 2020.

¹²¹ José Alvarez, 'Beware: Boundary Crossings' (2016) 17 JWIT 171–228.

¹²² On the judicialization of investment arbitration, see e.g. Alex Stone Sweet and Florian Grisel, 'The Evolution of International Arbitration: Delegation, Judicialization, Governance', in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford: OUP 2014) 22–46, 23.

¹²³ On the judicialization of the WTO DSM, see Joseph H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Harvard Jean Monnet Working Paper* 9/00 (2000) 1–18, 2.

have some legal background.¹²⁴ Such common legal expertise can contribute to mutual influence, cross-pollination of concepts, and possible convergence between international trade law and international investment law. Moreover, several AB Members and—albeit to a lesser extent—panelists have served as investment arbitrators.¹²⁵

From a functional perspective, investment treaty arbitration and the WTO DSM do share the same function, settling international disputes in accordance with a specific set of international economic law rules and ensuring the proper administration of justice in this area. Both foreign investments and international trade are domains where conflict is latent between market freedom and free flow of capitals on the one hand, and the state regulatory autonomy on the other. Like WTO panels and the AB, arbitral tribunals may be asked to strike a balance between economic and noneconomic concerns. Moreover, certain international trade treaties present an articulated regime that the investment treaties presuppose. For instance, there is some coincidence in the subject matter of investment treaties and several WTO covered agreements.¹²⁶

However, investor–state arbitration and the WTO DSM present a number of notable differences. Although the present investment treaty network has been characterized as multilateral in nature due to the similarities among different treaties and dispute settlement mechanisms, it is still structurally based on a myriad of bilateral investment treaties.¹²⁷ There is no world investment organization charged with governing foreign investments, nor is there a ‘World Investment Court’. By contrast, since its inception in 1995, the WTO has emerged as the world forum for multilateral trade negotiations, and the AB has been frequently analogized to a World Trade Court. While *ad hoc* arbitral tribunals settle investment disputes without an appellate review by a permanent body, at least until recently WTO panel reports could be appealed before the AB.

¹²⁴ José A. Fontoura Costa, ‘Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields’, *Oñati Socio-Legal Series Working Paper* 1/4 (2011), 1–25, 16.

¹²⁵ *Id.* 20.

¹²⁶ See e.g. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299; Agreement on Trade Related Investment Measures, 15 April 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 186; General Agreement on Trade in Services, 15 April 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183.

¹²⁷ See generally Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: CUP 2009); Efraim Chalamish, ‘The Future of BITs: A De Facto Multilateral Agreement?’ (2009) 34 *Brooklyn Journal of International Law* 303–354.

Investor–state arbitration differs from the WTO DSM along further three key dimensions: standing (that is, the right to file grievances), the nature of the remedy, and the remedial period. First, while only states can file claims before the WTO panels and the Appellate Body, private investors also have standing before arbitral tribunals under investment agreements. This is not to say that, at a substantive level, individuals do not play any role at the WTO; rather, many cases have been brought by states to protect the interests of given industrial sectors.¹²⁸ Yet, at a procedural level, companies cannot enforce their rights against a foreign state at the WTO; rather, they ‘depend on their state of nationality taking up a WTO case on their behalf.’¹²⁹ The various factors which influence the choice of a WTO member to bring a case against another member state include the magnitude of the impact of the measure in question, political considerations, and the lobbying efforts of the relevant industry sectors.¹³⁰

Second, the trade and investment regimes offer different remedies to the aggrieved actors. In order to encourage trade liberalization and prevent protectionism, the WTO DSM can authorize trade retaliation by the injured state.¹³¹ However, this is possible only after a state fails to withdraw or modify an offending measure within a ‘reasonable period of time.’¹³² The investment regime, on the other hand, provides a monetary remedy or, in some cases, even restoration (*restitutio in integrum*) to foreign investors whose investments have been affected because of government action.¹³³

Third, while trade agreements typically provide for only prospective remedies covering harm done subsequent to a ruling (*ex nunc*), the damages awarded in investment disputes routinely cover past as well as future harms

¹²⁸ See e.g. Panel Report, *US–Section 301–310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para 7.73 (stating that ‘it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.’).

¹²⁹ Daniel Sarooshi, ‘Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?’ (2014) 49 *Texas International Law Journal* 445–466, 447.

¹³⁰ Jürgen Kurtz, ‘The Use and Abuse of WTO Law in Investor–State Arbitration’, (2009) 20 *EJIL* 749–771, 757.

¹³¹ DSU Article 22.

¹³² DSU Articles 19–21.

¹³³ PCIJ, *Case Concerning the Factory at Chorzów*, (Claim for Indemnity) (Merits), *Germany v. Poland*, Judgment, 13 September 1928, 1928 PCIJ (ser. A) No. 17.

(*ex tunc*). Furthermore, arbitral tribunals can award damages to the foreign investors, while remedies at the WTO involve states only.

In conclusion, there are several reasons for juxtaposing investor–state dispute settlement and the WTO DSM. International investment law and international trade law belong to the same branch of international law, namely international economic law. Moreover, there are overlapping provisions in international investment law and international trade law. In addition, the nature of problems that both systems encounter is similar—that is, arbitral tribunals and WTO adjudicative bodies are often required to review domestic regulation pursuing certain noneconomic values against a set of obligations of a purely economic character (unlike, for instance, other international courts and tribunals).

Nonetheless, the dispute settlement mechanisms reflect the cultures of the legal frameworks to which they belong and thus have distinctive identities. Due to different treaty language, actors, and procedures, the two dispute settlement mechanisms require a critical assessment being cognisant of their inherent differences.

6 The ‘Legitimacy Crisis’ of International Economic Law

While investor–state arbitration and the WTO DSM have become increasingly popular and the number of disputes has grown significantly, international economic law and, more broadly, global economic governance have attracted criticism by scholars, states, and society at large. The system seems unable to address some of the greatest challenges of our time including environmental protection, redistributive justice, and the safeguarding of cultural diversity.¹³⁴ International economic law and adjudication can adversely affect state regulatory autonomy in important public policy-related fields, and even prevent regulation in such areas. The regulatory chill hypothesis suggests that states ‘fail to regulate in the public interest in a timely and effective manner because of concerns’ of international economic disputes.¹³⁵

¹³⁴ Alessandra Arcuri, ‘International Economic Law and Disintegration: Beware the Schmittean Moment’ (2020) 23 JIEL 323–345.

¹³⁵ Kyla Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor–State Dispute Settlement’ (2018) 7 *Transnational Environmental Law* 229–250, 229.

Some scholars contend that global institutions have gone too far in eroding national sovereignty.¹³⁶

Is international economic law and adjudication facing a 'legitimacy crisis'? A multidimensional concept used in different fields of study, legitimacy indicates the acceptance of a legal system.¹³⁷ A system is considered to be legitimate when it operates in a manner that is consistent with widely held values, rules, and beliefs. The legitimacy of the international legal system in general and international economic governance in particular has been discussed intensively.¹³⁸ Scholars have questioned whether international economic law lacks input legitimacy, criticizing how adjudicators are selected, and the procedures by which decisions are rendered and power exercised.¹³⁹ They have questioned whether international economic law lacks output legitimacy, that is, reasonable performance.¹⁴⁰ They have questioned whether international (economic) law has prioritized economic interests over noneconomic concerns.¹⁴¹

Legitimacy concerns relate to both substantive and procedural aspects of international economic governance.¹⁴² From a substantive perspective, international economic law and adjudication are seen as having an increasing impact on sovereign policy objectives.¹⁴³ States sign and ratify international economic agreements, expressing their consent to be bound by the same to foster foreign direct investments and promote free trade.¹⁴⁴ However, they do

¹³⁶ Arcuri, 'International Economic Law and Disintegration', 324 (reporting this criticism).

¹³⁷ Jean-Marc Coicaud, *Legitimacy and Politics* (Cambridge: CUP 2002) 10.

¹³⁸ On the legitimacy of international trade courts, see generally Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, and Michelle Zang (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge: CUP 2018). On the legitimacy of international investment arbitration see David Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration' (2011) 2 JIDS 471–495; Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?' (2008) *Chicago JIL* 471–498.

¹³⁹ Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: OUP 2017) chapter 9.

¹⁴⁰ Id.

¹⁴¹ Rüdiger Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in Rüdiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law* (Berlin: Springer 2008) 1–24, 2.

¹⁴² David Caron, 'Investor–State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2009) 32 *Suffolk Transnational LR* 513–26, 514–515.

¹⁴³ Edward Guntrip, 'Self-determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law' (2016) 65 *ICLQ* 829–857, 829–830.

¹⁴⁴ Georges Scelle, 'Essai sur les Sources Formelles du Droit International', in *Recueil d'Etudes sur les Sources du Droit en l'Honneur de François Gény* (vol. III) (Paris: Sirey 1934), 400–30, 410.

not intend to surrender their ability to govern.¹⁴⁵ Yet, investment and trade disputes can touch, and have touched, upon crucial public interests, ranging from access to water¹⁴⁶ to tobacco control,¹⁴⁷ from environmental protection¹⁴⁸ to the safeguarding of cultural heritage.¹⁴⁹

As a result, both scholars and practitioners contend that international economic law and adjudication are constraining state sovereignty to an extent unknown before.¹⁵⁰ Concerns have arisen that IIAS 'become a charter of rights for foreign investors, with no concomitant responsibilities or liabilities, no direct legal links to promoting development objectives, and no protection for public welfare in the face of environmentally or socially destabilizing foreign investment.'¹⁵¹ Analogously, the legitimacy crisis of the WTO 'occurred not—or not just—because the WTO became ... more powerful and intrusive' in examining regulatory barriers to trade over the course of the 1980s and 1990s. Rather, what led to the WTO's legitimacy crisis was its exercise of public power in the international economic field in a manner separated from the pursuit of other public objectives.¹⁵² In other words, states perceive the WTO as a threat

145 Catharine Titi, *The Right to Regulate in International Investment Law* (London: Bloomsbury 2014).

146 See Ana María Daza-Clark, *International Investment Law and Water Resources Management* (Leiden: Brill 2016); Edith Brown Weiss, Laurence Boisson de Chazournes, and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (Oxford: OUP 2008).

147 See Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Abingdon: Routledge 2012); Benn McGrady, *Trade and Public Health—The WTO, Tobacco, Alcohol, and Diet* (Cambridge: CUP 2011).

148 See Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge: CUP 2012); James Watson, *The WTO and the Environment* (Abingdon: Routledge 2013); Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford: OUP 2009).

149 See Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014); Tania Voon, *Cultural Products and the WTO* (Cambridge: CUP 2007).

150 See generally Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, and Claire Balchin, 'The Backlash Against Investment Arbitration: Perceptions and Reality', in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, and Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) xxxviii.

151 Howard Mann, 'The Right of States to Regulate and International Investment Law: A Comment', in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives* (Geneva: UN 2003) 212.

152 Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford: OUP 2011) 346.

to sovereignty because it seems irresponsible to the development of international law.¹⁵³

In other words, in their capacity as citizens, people also desire social goods, be they adequate standards of living, a clean environment, a rich cultural life, or appropriate health and labour standards. All these public objectives require individual efforts, internal regulation, and international cooperation. As states ratify international instruments, coherence and coordination are needed among these different sets of international law norms pursuing various non identical objectives. International economic law is not a self-contained regime.¹⁵⁴

Alongside these substantive concerns, several procedural factors feed into the perception of a legitimacy crisis. Investor–state tribunals are constituted *ad hoc*, under different arbitral rules. The fact that arbitrators are untenured can fuel the perception of conflicts of interest within or between arbitral tribunals. While the selection of arbitrators can lead to requests for disqualification, such requests are rarely successful. There is no appellate court to ensure consistency in their rulings. Inconsistent awards have caused concern,¹⁵⁵ leaving many observers with the impression that investor-state arbitration lacks coherence.¹⁵⁶ Lack of transparency may preclude public awareness of the very existence of investor–state arbitrations.¹⁵⁷ Forum-shopping—either by using the most-favored-nation clause, or by corporate restructuring in order to be protected by a given IIA—risks altering ‘the delicate equilibrium between the complainant’s freedom of choice ... and protection to the defendant’, in addition to increasing the risk of conflicting awards.¹⁵⁸ In parallel, although the dispute settlement system of the WTO worked efficiently for two decades since its inception, it is now facing a number of criticisms for judicial overreach and issues of precedence.

153 Thomas Cottier, ‘Recalibrating the WTO Dispute Settlement System: Towards New Standards of Appellate Review’ (2021) 24 JIEL 515–533, 517.

154 Valentina Vadi, ‘The Multilateral Trade Regime: Which Way Forward? A Look at the Warwick Report’ (2008) 6 *Global Trade and Customs Journal*, 203–215, at 211.

155 Compare *Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 and *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 and Final Award, 14 March 2003.

156 Susan Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham LR* 1521–1625, 1537–8.

157 But see United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (New York, 2014) (the Mauritius Convention on Transparency) adopted on 10 December 2014, in force 18 October 2017.

158 Luiz Eduardo Salles, *Forum Shopping in International Adjudication* (Cambridge: CUP 2014) 46.

In response to growing unrest about international economic governance, states have increasingly felt the need to protect their regulatory space and to limit economic integration. While a few developing countries withdrew from the ICSID system, other countries moved away from the Energy Charter Treaty and terminated existing IIAs.¹⁵⁹ EU states have terminated almost 300 intra-EU BITs due to the exclusive competence of the Union in the field.¹⁶⁰ Finally, a number of states are revising their Model BITs, reducing the level of protection provided by the treaty, restating their right to regulate, and expanding the scope of exception clauses.¹⁶¹ Several countries have omitted investor–state arbitration from their treaties.¹⁶² In 2017, the UNCITRAL entrusted its Working Group III with a broad mandate to elaborate the possible reform of ISDS. In parallel, the EU aims to replace ISDS with an envisaged Multilateral Investment Court, a two-instance standing court system, including a first instance and an appellate tribunal, composed of permanent judges appointed by adhering states.

In parallel, at the WTO, the latest round of trade negotiations among the WTO membership—the Doha Round—has not progressed smoothly and has been under way for almost two decades. Moreover, several states are weakening the multilateral order, by resorting to the national security exception in defense of their trade measures and by stalling the work of the WTO Appellate Body.

The ongoing debate about the perceived legitimacy of international economic law highlights the need for some rethinking of the system. Such debate has both evolutionary and revolutionary potential. On the one hand, evolutionary approaches assume that international economic governance is experiencing growth pains, but many legitimacy concerns can be resolved overtime. Evolutionary approaches rely on the traditional tools of treaty interpretation and negotiation to fine-tune international economic law to emerging circumstances. For instance, as IIAs are periodically renegotiated, states are recalibrating their treaties introducing some exceptions and reaffirming their right to regulate. At the WTO, the adoption of waivers and amendments can enable, and has enabled, the reconciliation between economic interests

159 Tania Voon and Andrew Mitchell, ‘Denunciation, Termination, and Survival: The Interplay of Treaty Law and International Investment Law’ (2016) 31 *ICSID Review* 413–433.

160 CJEU, *Slowakische Republik v. Achmea BV*, Case C-284/16, Judgment, 6 March 2018 (affirming the incompatibility of arbitration clauses contained in intra-EU BITs with EU law.)

161 Eric De Brabandere, ‘The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform’ (2021) 36 *ICSID Review* 319–338.

162 Jürgen Kurtz, ‘Australia’s Rejection of Investor–State Arbitration: Causation, Omission, and Implication’ (2012) 27 *ICSID Review* 65–86.

and noneconomic concerns in certain areas of the field.¹⁶³ Reform proposals include setting up an ombudsman to mediate between potential disputants, improving the quality of the work of panels by appointing a roster of full-time professional adjudicators, and introducing financial compensation in the list of possible remedies available to the WTO in case of noncompliance of a Member State.¹⁶⁴

On the other hand, revolutionary approaches assume that the overall structure of international economic law is deeply flawed and requires some major reforms. With regard to international investment arbitration, revolutionary approaches suggest, *inter alia*, returning to state-to-state dispute resolution, the introduction of an appeals body to review arbitral awards, and the institution of a permanent world investment court. With regard to international trade law, revolutionary approaches go as far as proposing the abolition of the WTO,¹⁶⁵ the abolition of the AB,¹⁶⁶ or revitalizing the WTO as a forum for rule-making. The revival of the WTO as a forum for dialogue among civilizations seems particularly promising: In fact, its traditional focus on technical issues is insufficient to maintain the salience of the organization; rather, some fundamental rethinking of the aims and objectives of the organization is needed for the WTO to move forward.

In both evolutionary and revolutionary scenarios, legitimacy concerns do not merely indicate dissatisfaction with how the system works. They can also strengthen the system's perceived legitimacy by raising important issues, stimulating debate, and spurring novel approaches. They should be taken into account to allow global economic governance to develop properly. Whether states will opt for evolutionary or revolutionary approaches to the system remains to be seen. What is needed is to 'reimagine the international economic order following a different aspiration than just protecting capital.'¹⁶⁷ International economic law should be recalibrated to deliver not only economic growth but also enable environmental sustainability, cultural diversity, and social justice. This can be achieved through the adoption of diverse and

163 Dominic Rushe and Phillip Inman 'Hopes Rise for Covid Vaccine Patent Waiver after Key Countries Agree on Proposal', *Guardian*, 3 May 2022.

164 Vadi, 'The Multilateral Trade Regime: Which Way Forward?', 210.

165 Josh Hawley, 'The WTO Should be Abolished', *New York Times*, 5 May 2020.

166 Warren H. Maruyama, 'Can the Appellate Body Be Saved?' (2021) 55 *JWT* 197–230; Bernard M. Hoekman and Petros C. Mavroidis, 'To AB or Not to AB? Dispute Settlement in WTO Reform' (2020) 23 *JIEL* 1–20.

167 Arcuri, 'International Economic Law and Disintegration', 337.

competing developmental models, respect for culturally diverse worldviews, and intercivilizational approaches.¹⁶⁸

7 Final Remarks

Given that international economic law is at a crossroads, there is urgent need to rethink its aims and objectives. While economic activities can be conceived as innate in human nature and as useful growth engines, their regulation has become more problematic than ever under current international economic law. The field is thus under unprecedented pressure from governments, scholars, and public opinion.

How can policymakers reconcile trade and investment on the one hand with noneconomic concerns such as environmental protection and the safeguarding of cultural diversity on the other hand? Should international economic law broaden its agenda, taking noneconomic issues into account? More generally, how can international economic law face emerging challenges and acquire renewed legitimacy?

Like other specialized international courts and tribunals, international economic courts may have an 'in-built bias' (*Missionsbewusstsein*).¹⁶⁹ Their mandate is to adjudicate on the eventual violation of relevant international economic law provisions. While their review of domestic regulations can strengthen the rule of law and good governance, an overly intrusive review may undermine state regulatory autonomy and the pursuit of legitimate public policy goals. In turn, this may fuel the alleged 'legitimacy crisis' of international economic law.

By contrast, international economic law should not be perceived as a self-contained system; rather, it should be conceived as a part of general international law. The boundary drawn between the economic and other values 'is analytically untenable and yet, this argument has often been made to insulate trade and investment law from the demands of justice. There is obviously no sane economy without healthy environments or ... respect for human dignity.'¹⁷⁰ Rather than taking the path of functionalism and addressing demands of

¹⁶⁸ See e.g. Alvaro Santos, Chantal Thomas, and David Trubek (eds), *World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization* (New York: Anthem Press 2019); Valentina Vadi, 'Inter-Civilizational Approaches to Investor-State Dispute Settlement' (2021) 42 *University of Pennsylvania Journal of International Law* 737–797.

¹⁶⁹ Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 *EJIL* 73–91, 81.

¹⁷⁰ Arcuri, 'International Economic Law and Disintegration', 341.

justice in rather fragmented ways, international law should address such demands in a holistic fashion.¹⁷¹

Trade and investment should not be considered as ends in themselves, but as tools to promote human well-being. At the legal level, well-being can be conceived as a fundamental dimension of sustainable development which is one of the objectives of the WTO.¹⁷² Thus, international economic law, being part of public international law, needs to be rethought according to the new evolving kaleidoscope of international governance. The linkage between trade, investment, and non-economic concerns such as cultural heritage needs to be explored and co-ordinated.

¹⁷¹ Id.

¹⁷² Marrakesh Agreement Establishing the World Trade Organization, preamble.