

1. Introduction

Julio Faundez and Celine Tan

The ongoing process of economic globalization has been accompanied by a comprehensive and ambitious agenda aimed at incorporating developing countries into the global economy. A critical feature of this agenda is the prominent role played by international economic law as a vehicle for bringing together the complex and seemingly disparate components of economic globalization. The prominent role played by law is manifested in the comprehensive codification of international trade, the proliferation of international investment treaties, the enhanced role of international adjudication and the dominant role played by international financial institutions, such as the World Bank and the IMF, in national economic policymaking and governance.

The surge of international economic law and the consequent legalisation and judicialisation of international economic relations would suggest that the weaker members of the inter-state system have fared well during the past three decades of economic globalization. After all, as a corollary to assumptions about the rule of law, it would be reasonable to expect that the development and application of international legal rules would protect the rights and interests of weaker states. This expectation is reinforced by two parallel processes that have taken place in recent years: the widespread democratisation experienced by most states in the developing world and the new prominence achieved by the international human rights movement.

Yet, despite these seemingly auspicious conditions, developing countries, as a group, have not fared as well as expected. Unlike economically powerful countries, developing countries face enormous and often irresistible pressures to adhere to rules of international economic law, some of which significantly restrict their capacity to formulate policies suitable to their needs. The lack of effective participation of most developing countries in the elaboration of many international economic rules and the often asymmetric content of these new rules suggest that the legalisation of international economic relations may not have brought about unqualified benefits to developing countries.

Indeed, some would argue that most contemporary rules of international economic law are not development-friendly as they are largely aimed at promoting a one-sided view of globalization – embodied in the so-called Washington Consensus – which is meant to be applied by all developing countries, regardless of local economic, political and social conditions. Under this approach, the rules of international economic law neither provide states in the developing world with greater voice in determining the content and orientation of the international economic system, nor do they empower them to determine the direction of their economic policies.

International economic law's lack of responsiveness to the circumstances of developing countries can be attributed to two main factors. First, the incorporation of developing countries in the postwar period into an international legal system which they had limited influence in designing meant that, historically, developing countries have had to conform to rules and institutions established for the benefit of and tailored to the circumstances of industrialised countries. Second, the continuing marginalisation of developing countries from the locus of decision-making in contemporary economic relations and international economic law has hindered their ability to redress these asymmetries. In many ways, developing countries have remained the 'objects' rather than the 'subjects' of international economic law.

Although globalization and the attendant reconfiguration of economic relations has complicated this analysis somewhat – the economic advancement of some countries, classified popularly as 'emerging economies', has meant that there is now a greater heterogeneity of interests in this collective known as 'developing countries' – the common issues which bind this group have remained largely the same. The participation of developing countries in the formulation, implementation and enforcement of international economic rules and within international economic institutions remains qualified and this has significant impacts for their social and economic development, political governance and ecological sustainability.

The objective of this volume is to investigate and assess the impact of international economic law and international economic institutions on topics of special interest to developing countries. It does not represent an agreed position, nor does it purport to be exhaustive, but it does offer a variety of critical perspectives on a range of issues: international finance, investment, trade, competition, taxation, intellectual property, the environment, food and fuel security, human rights, international labour standards, anti-corruption laws and climate change.

Julio Faundez begins (in Chapter 2) by considering the complex theoretical and empirical questions arising from the sudden and unexpected

rise of international economic law as the most important field of international law in recent years. He argues that international economic law's rise to prominence is closely linked to its association with the Washington Consensus, hitherto the prevailing development paradigm. In order to understand international economic law's rise in status, Faundez examines international law's approach to development over the past five decades and explains why, in the 1960s and 1970s, before the emergence of neoliberalism, developing countries failed to enlist the international legal system in support of their development objectives. He provides a brief explanation of the various political and economic factors that led to the consolidation of the Washington Consensus and the proliferation of international economic rules, most of which are backed by effective enforcement mechanisms. Against this background, Faundez considers the future of international economic law if, as expected, a new consensus on development emerges in the aftermath of the 2008 international financial crisis. His answer is that the future of international economic law looks promising, but this optimism is based on a negative assessment of the current international institutional framework. Indeed, he concludes that, because international economic rules are not deeply embedded in a dynamic and efficient institutional framework, this will not stand in the way of major reform.

Faundez's discussion is complemented by an economist's perspective on international economic law in Chapter 3. Here, Yilmaz Akyüz considers the issue of national autonomy and asks whether – and if so how – existing multilateral rules restrict the capacity of countries to formulate national policies. While his focus is mainly on multilateral rules in finance and trade, he includes a discussion of trade-related areas such as investment and technology. Akyüz argues that there is an urgent need to reform multilateral disciplines so as to bring about more coherence between the rules of international trade and international finance, and a better balance between countries' international obligations and their national autonomy. In his view, this balance can be achieved if multilateral rules are combined with policy flexibility at the national level. Akyüz's argument for greater policy space does not favour a particular type of economic policy. It is simply a plea for a framework of international rules that would enable states to experiment with different ways of organising their economies, provided their policies do not discriminate against or create negative consequences for other countries.

Following on from general analysis of international economic rules and institutions, the subsequent three chapters address the critical role of international law and international organisations in a globalized financial system. In light of the financial crisis of 2008 and its aftermath, these

chapters aim to sketch the contours of the current regulatory framework for international financial flows, including international aid transactions which continue to make up the bulk of resource transfers to developing countries, and consider the conditions under which such financial flows are taking place in the era of globalization and the question of how such flows are regulated and governed.

Daniel Bradlow (Chapter 4) addresses the critical issue of international financial governance in his assessment of international financial reform. After mapping the historical context for the contemporary international financial architecture, Bradlow establishes the main purposes of international financial governance and outlines the key standards that should be used in evaluating the efficacy of such governance. He then tests the current international regulatory framework against these five standards – holistic vision of development, comprehensive coverage, respect for applicable international legal standards, coordinated specialism and good administrative practice. Bradlow finds that, while some changes have taken place, current international law and existing international organisations remain problematic in regulating international financial flows, and he provides some proposals for reforms to the architecture in the short and long term.

Enrique Carrasco supplements the discussion on reform of international financial governance in Chapter 5 by examining the evolution of the Financial Stability Forum (FSF), now the Financial Stability Board (FSB), the inter-governmental forum established in the wake of the Asian financial crisis in the late 1990s. He assesses how the global financial crisis provided the opportunity for emerging economies to advocate for greater voice in international financial decision-making and the reform of international financial institutions by using the example of how economic and geopolitical factors contributed to the transformation of the FSF.

The issue of international financial reform is also crucial for lower income developing countries that depend on official rather than private financial flows as a means of resource generation. For many countries dependent on official development assistance, the discipline of the international aid architecture has significant effects not only on their domestic economies but also on their social and political organisation. In Chapter 6, Celine Tan considers the impact of the new regime of aid governance – perceived as a departure from the strictures of the conditionality-dominated framework of aid delivery of structural adjustment – on developing countries' engagement with the global economy and the international economic law which sustains it. She argues that, instead of departing from policies of the past, the new modalities of concessional financial transfers have been altered to serve a deeper and more intrusive form of disciplinary control

over recipient countries and this has adverse impacts on their relationships with the exterior.

Aside from financial transfers, taxation is a substantial means of income generation for developing countries. The regulatory framework of taxation is therefore a crucial one for these countries and one considered in Chapter 7. Here, David Salter examines the issue of policy autonomy in the context of taxation. He identifies the various domestic and international constraints that developing countries face in designing and implementing fiscal and taxation policies and notes that, in recent years, the autonomy of many developing countries has been compromised by the requirement to implement tax reform packages prompted by IMF conditionalities. Salter argues that these conditionalities follow a similar pattern and generally include the replacement of sales or turnover taxes by a broad-based value added tax, low rates of corporate and personal income taxes and the gradual elimination of import and export taxes. Quite apart from the 'one-size-fits-all' nature of the tax reforms required by the IMF, Salter notes that the current financial crisis raises serious questions as to the sustainability and wisdom of these reforms. Indeed, the reluctance of the various groupings of African, Caribbean and Pacific (ACP) countries to conclude the new Economic Partnership Agreements (EPAs) with the EU can be explained, in part, by the fact that, under these new agreements, developing country partners stand to lose significant revenue since they would be required drastically to reduce, and eventually eliminate, tariffs.

There is little doubt that since its establishment the WTO has rapidly become one of the most significant actors in the global economy. In many respects it has become the emblem of the efforts to establish a global system of international trade based on the principle of non-discrimination, as reflected in its two fundamental rules: the most-favoured nation clause and the principle of national treatment. In her contribution to this volume, Fiona Macmillan in Chapter 8 acknowledges the importance of the WTO, but does not see it as a vehicle for furthering developing country interests. Instead, she argues that the organisation serves as a mechanism for maintaining developing countries in a permanent state of dependency towards more powerful economic countries. She notes that the rise of corporate capitalism, as reflected in the powerful role of multinational companies, undermines the doctrinal foundations of the WTO. Indeed, in her view, today the policy of free trade and its underlying doctrine of comparative advantages have become devices used by multinational companies to secure absolute advantage.

An alternative viewpoint on the role of transnational corporations (TNCs) is offered by Peter Muchlinski (Chapter 9). In his contribution, Muchlinski asks whether international investment law, as embodied

mainly in bilateral investment treaties, should be redesigned to take into account the development interests of host states. This proposition raises an important question since there are many who assume that the only way to achieve good development outcomes is through full and unrestrained investment liberalisation. Nevertheless, as Muchlinski shows, this view has recently been challenged. In recent investment disputes, some arbitral tribunals have been asked to consider whether issues relating to national development priorities should be taken into account in the interpretation of bilateral investment treaties. UNCTAD has urged developing countries to negotiate development-friendly investment treaties, and some international NGOs have prepared model international investment agreements that seek to strike a balance between their national development policies and the guarantees and incentives they offer to foreign investors.

The enormous power that transnational corporations acquired under the current process of globalization raises the question whether private companies have direct international responsibility for human rights violations. The traditional answer to this question has been negative, both in terms of the nature of international law – which applies mainly to state actors – and in terms of jurisdiction – as there is no international forum to judge human rights violations by non-state actors, except to a limited extent in the area of international criminal law. This traditional view, however, is slowly changing. In Chapter 10, James Harrison critically reviews a range of recent initiatives aimed at securing TNCs' compliance with international human rights standards. Focusing on the 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and the alternative framework prepared by Professor John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations, Harrison evaluates both approaches in the context of the limitations of the international framework in altering the behaviour of TNCs generally.

The difficulties in implementing international human rights standards in the current context of unrestrained globalization is as much a structural problem related to the nature of international law as it is an ideological problem regarding the nature of development. Indeed, as Tonia Novitz shows (Chapter 11), under the prevailing results-based approach to development, the social dimensions of globalization are regarded as subsidiary social goods that are readily sacrificed if perceived to stand in the way of achieving measurable economic outcomes. This approach does not allow any room for notions such as sustainable or participatory development. In the area of core international labour standards, Novitz is hopeful that a process-based approach to development will make it easier to forge more effective links between the economic and social aspects of globalization.

She proceeds to explain the origins of the notion of core international labour standards and reviews the way in which labour conditionalities are employed in multilateral and bilateral instruments. Although acknowledging that imposing conditions in order to secure respect for the social dimension of globalization is a firmly established practice, she argues that such conditionality would yield better development outcomes if they were the product of a more participatory process, one that takes into account the interests of all relevant stakeholders.

Conditionality has also been pursued in different international arenas to achieve other objectives, such as combating corruption. For more than two decades, international organisations, such as the World Bank, and bilateral donor agencies have focused their efforts on measures to tackle corruption. These measures have included the establishment of anti-corruption units in developing countries, the enactment of domestic legislation in developed countries aimed at discouraging so-called 'foreign corrupt practices' and the conclusion of various anti-corruption Conventions under the aegis of the UN and other international organisations. Kevin Davis in Chapter 13 turns his attention to the globalization of anti-corruption measures, and, in particular, whether the intervention of foreign legal institutions in resolving questions that, arguably, should be resolved by domestic institutions has a positive or a negative effect. Davis offers a detailed analysis of the arguments for and against involving external bodies in the resolution of this problem. Noting that the lack of empirical evidence on the impact of the transnational anti-corruption regime makes it impossible to draw general conclusions, he argues however that it is often the problem of the lack of political will to combat corruption that poses the biggest obstacle to addressing corruption, particularly when important economic and political interests are at stake.

As the process of economic globalization has intensified, there are many who favour the establishment of a competition law regime at the international level. Recently, the argument has focused on the advantages and disadvantages of establishing a global competition regime within the framework of the WTO. In theory, as the process of global economic integration moves forward, the argument in favour of establishing a global regime on competition is attractive. Developing countries, however, have strongly resisted the idea of establishing a global competition law regime. In Chapter 12, Kathryn McMahan analyses the objections of developing countries to the globalization of competition law and reflects upon the consequences of not having such a regime. She discusses alternative mechanisms to coordinate international responses to anti-competitive behaviour and analyses the impact of two key landmark cases, the WTO's 2004 *Telmex* decision (*Panel Report: Mexico – Measures Affecting*

Telecommunications Services) and the recent US Supreme Court decision in the case concerning *F. Hoffman-La Roche Ltd v. Empagran*.

Aside from competition policy, the regulation of intellectual property represents one of the other most controversial and divisive issues on the current international lawmaking agenda. In Chapter 14, Pedro Roffe offers a succinct but comprehensive analysis that explains how the participation of developing countries has evolved, since the inception of the international intellectual property system in the nineteenth century. He notes that, while the experience of specific countries within the international intellectual property system has been different, developing countries have tended to make their claims collectively through the United Nations system since the establishment of UNCTAD in 1964. Roffe's chapter also demonstrates that, notwithstanding the proliferation of international institutions with responsibilities over specific issues of intellectual property, the intellectual property regime, as a whole, is tilted in favour of private interests and, as a consequence, does not adequately respond to the needs and interests of developing countries.

The issue of intellectual property rights is also considered by Mary Footer (Chapter 15) in the context of biotechnology and the international regulation of food and fuel security. Here, Footer considers the challenges posed by the twin problems confronting the world today – the growing demand for food and fuel – and evaluates one of the most contentious solutions to both: the use of biotechnology in agriculture to facilitate greater yield and quality of produce to meet these demands. She maintains that, while there is still scepticism over the use of biotechnology to secure food and fuel security, the main hurdle facing developing countries' application of such technology in agricultural production remains the problem of access. Footer thus argues that there is a need not only to develop a fresh methodological approach towards evaluating the potential use and impact of biotechnology in developing countries but also to consider new innovative models of technology ownership and cooperation to overcome the access barriers posed by the current intellectual property regime.

The last two chapters of this volume tackle the crucial link between international economic law and the environment. Traditionally viewed as separate spheres of international lawmaking, the relationship between economic law and protection of the environment is becoming a crucial aspect of negotiations in both international trade and investment regimes and multilateral environmental agreements.

In Chapter 16, Philippe Cullet addresses the three main links between international environmental law and economic development – the reconciliation of conservation and development objectives, the manifestations of notions of equity in principles of international environmental

law (notably the principle of common but differentiated responsibilities) and the implementation of international environmental law in developing countries. In particular, Cullet examines the evolution of the concept of sustainable development, a yet legally unclear umbrella notion, and discusses the varied and contradictory trends which characterise the relationship between environmental law and development.

The tensions between economic growth and development and environmental protection are similarly highlighted by Vicente Paolo B. Yu III (Chapter 17) in his discussion of the international climate change regime. Yu presents a policymaker's perspective on the United Nations' Framework Convention on Climate Change (UNFCCC) from a developing country's standpoint. Arguing that the Convention represents the only multilaterally agreed, legally binding agreement governing the international community's actions vis-à-vis climate change, he evaluates the difficulties that developing countries have faced in securing their interests in negotiations under the UNFCCC. Yu reviews the scientific basis underpinning the lawmaking process within the regime, particularly as it relates to the notion of historical responsibility of developed countries for carbon emissions, and the links between climate regulation and socio-economic development in developing countries, reiterating the principle of equity underlying the Convention. Yu argues for the establishment of a balanced framework for global cooperative action on climate change guided by a fair and equitable apportionment of responsibility and taking into account differing capacities of countries in combating the threat of climate change.