

Chapter-2

Nature and Sources of International Economic Law

2.1. Introduction

International Economic Law (IEL) covers a very broad range of topics as it deals with all economic aspects of relations between states. Therefore, international trade law, international fiscal law and investment law fall within the scope of IEL. The term encompasses a vast area.¹

IEL as a branch of international public law represents an aggregate of norms governing relations among subjects of international law in connection with their activities in the field of international economic relations.²

IEL may be described in various ways. No clear definition has developed in practice or in theory. Both broad and restricted descriptions have been put forward. In the broadest sense, IEL could be defined as including all legal subjects which have both an international and an economic component.³

Petersmann opined “IEL presents itself as a conglomerate of private law, state law and public international law. With a bewildering array of multilateral and bilateral treaties, executive agreements, “secondary law” enacted by international organizations, “gentlemen's agreements” central bank arrangements, declarations of principles, resolutions, recommendations, customary law, general principles of law, de facto-orders, parliamentary acts, governments decrees, judicial decisions, private contracts or commercial usages”.⁴

The process of defining IEL is closely connected with the formulation and maintenance perspectives on IEL. As such, it can be fraught with the danger of

¹ Fox, H., *International Economic Law and Developing States: An Introduction*, (1992), pp.1–23.

² Id. p 24

³ John H. Jackson, *International Economic Law: Reflections on the "Boiler room" of International Relations*, American University Journal of International Law & Policy, (1995), p.34.

⁴ Ernst-Ulrich Petersmann, *International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order, in The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, (1983), p.87

conflating definitions with perspectives⁵. There is always therefore the need to endeavour at revelation from a neutral stand-point. The description of 'IEL lends itself to a number of explanations. The controversy is about which body of law provides a complete description of the subject, as much as which one has a better claim to the description "IEL." In the latter sense, the controversy may be described as a semantic one. In the former, the underlying debate is really about how international economic phenomena should be perceived and shaped. The emphasis is on the process of comprehension and the development of the International Economic Order⁶.

The next question that arises is: If IEL is part of the system of Public International Law, is it a branch of that law or a specialism? IEL, it is contended, is not a specialist for the following reasons.

First, economic activity is central to government affairs and International Law. Secondly, International Law, and an important component of IEL, namely International Trade Law, are each underpinned by inconsistent assumptions, or fundamentally opposed assumptions. Whereas International Law is based on the State and the notion of sovereignty, IEL is based on the dictates of comparative advantage, on promoting individual cross border exchanges and specialization. Thirdly, whereas as International Law is oriented towards defence and peace and economic self-sufficiency or materialism, the international economic system as reflected in the Britton Woods Institutions, is based on the market economy and the promotion of global welfare, not so much the prevention of economic welfare. Fourthly, key features of International Law are not present in the same manner in the field of IEL. Thus, because of globalization, it is not possible to talk about national economy⁷.

The principal aim of IEL, as of international law generally, is to maintain peace. The close relationship between the preservation of peace and economic development is one of the basic ideas of United Nations Charter. International economic relations must serve the realization of that objective of the United Nations⁸.

⁵ Dominique, Patrick Juillard, *Droit International Economic*, (1978), p. 7

⁶ Ian Brownlie, *Principles of Public International Law*, (1966), p. 227-28

⁷ V.M. Koretsky, *Essays on International Economic Law*, (1928) p.34

⁸ G.I. Tunkin, *The Ideological Struggle and International Law*, (1967), p.117

Another objective of IEL is to prevent international economic relations being used to exploit less developed countries, to exert political pressure and blackmail, to set up military blocs, and establish unequal relations; to contribute by international legal means to the restructuring of international economic relations, on the basis of respect for state sovereignty, equality and mutual advantage, to the creation of favorable conditions for the development of cooperation among all States irrespective of their socio-economic systems, the size of their territory and their level of economic development.

IEL must contribute to economic cooperation among States in the interests of social progress of the peoples of the world, raise their standard of living and well-being, and must also serve to unite efforts by States to solve universal economic problems in the fields of energy, food, transportation, raw materials, environmental protection and others.

The implementation of these objectives must be consistently expanded to include the field of interstate economic relations, and there must be consistent adherence in this field to the basic principles of modern international law.

The special principles of IEL which constitute its basis as a branch of international law are: the principle of sovereignty of States over their wealth and natural resources; the principle of freedom in choosing the forms in organizing external economic relations of the country; the principle of economic non-discrimination⁹.

This chapter deals with the guiding philosophy for the reconstruction of IEL with relevance of Nozick's super liberalism and Rawls's moderate liberalism and the value of IEL¹⁰. It also focuses on IEL and international economic integration and explains the participation of the developing countries in the construction and the changing structure of IEL.

⁹ Oscar schachter, *Just Prices in world Markets; Proposals de Lege Ferenda*, (1975), p 101 at p.108

¹⁰ U.S. Department of States Press Release No.630 of dec 30, 1975, *International Legal Materials*, (1976), p. 18.

2.2. Sources of IEL

The sources of IEL, as of international law generally, are international agreements and international legal customs.

Treaty sources include international economic treaties and the numerous political treaties that contain decisions relating to economic matters. In addition, treaty sources include charters and other founding acts of economic and other international organizations operating in the sphere of international economic relations¹¹. These acts frequently establish principles and other norms governing the mutual relations of member-states and also their relation with third states. Examples include: the preamble to the United Nations Charter, and also Arts 1, 55 and 56; the preamble to the Charter of CMEA, and also Art. 1(2). Principles deriving from the charters and other norms of international organizations not only enter directly into IEL but also exert a large influence on the creation of other norms. International organizations must bear in mind these principles and norms when they draw up their resolutions and decisions, and when they formulate draft international treaties and so also must the signatory-states when they conclude such treaties¹².

The customary norms of international law play a quite significant role in the legal regulation of international economic relations¹³. In the creation of IEL as a branch of general international law, an important part is played by the resolutions adopted by universal international organizations and conferences.

In the forming of IEL a particularly large role is played by the following acts: principles adopted at the first session on UCTAD in 1964, the Declaration and Programme of Action on the establishment of a New International Economic Order adopted by the 6th Special Session of the UN General Assembly in 1974; the Charter of Economic Rights and Duties of States adopted at the 29th session of UN General Assembly in 1974; the Lima Declaration and Plan of Action on Industrial Development and Cooperation adopted at the conference of UNIDO in 1975; the Final Act of the Conference on Security and Cooperation in Europe in 1975.

¹¹ Batuk Gathani, Tunnel of Darkness (article), the Hindu, August 5, 1976

¹² International Legal Materials, (1976), p. 175.

¹³ Id. pp.171-177.

There are essentially two dimensions to a consideration of the sources of IEL. International Law, considered merely as a body of rules, comprises those sources of law as enumerated in Article 38(1) of the Statute of International Court of Justice. These are stated as follows:

- “(a) international conventions, whether general or particular, establishing rules recognized by the contesting states;
- (b) international custom as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations.”

However, it needs to be noted that International Law is not defined universally merely as a body of rules alone. A broader conception of International Law is entertained by some. Whilst it includes the sources mentioned in Article 38, this broader perspective of law comprehended it as a process of decision making¹⁴.

IEL derives mainly from agreements arrived at between States either on a bilateral, regional or multilateral level¹⁵. This is because treaties suit exigencies of international economics, being efficient in norm creation, adaptable and capable of generating detailed rules. International economic treaty practice has often progressed from bilateral to multilateral arrangements. However, the existence of a network of bilateral arrangements can also inhibit progression to a multilateral state because it involves the setting aside of a vast network of bilateral agreements¹⁶.

There are a number of problems that characterize this source of IEL. Some of the main problems may be described as follows: First, given the abundance of international agreements, there are serious questions as to the coordination of such obligations. A state may have entered into multilateral, regional and bilateral agreements involving the same subject matter. There is the need to ensure the avoidance of conflicting obligations undertaken in different treaty arrangements¹⁷. Thus, questions of conflict have been raised in relation to the WTO code and the IMF; the WTO code and environmental treaties; the WTO code and double taxation

¹⁴ Documents and Resolutions. *The 26th Congress of the Communist Party of the Soviet Union*, p.21.

¹⁵ The details are taken from Mr. S S Mehta, commodities-small concession, in the 16th Issue of the World Focus (1981), p.14.

¹⁶ Carol Gerdart and Peter Lyon, *North-South Monitor, Third World* (1981), p.210 at p.212.

¹⁷ Iain Guest from Geneva in *The Guardian*, (1980), p.34

agreements; and the IMF and the European Monetary Union. Further, the particular feature of the most favoured nation standard in international economic relations calls for an added vigilance by states when negotiating new commitments¹⁸.

Secondly, the process of interpreting international economic agreements can involve particular difficulties. These can stem from the language of the agreement itself; from the institutional processes involved in interpreting an agreement in international economic institutions; from the differences in interpretations of international agreements by national courts; from the lack of agreement as to the particular national law to be applied which is conclusive of the meaning of a term in an international agreement; in the determination of the status of an international interpretation in national law. In particular, the mechanisms for the interpretation and implementation of international agreements often involve internalized mechanisms of interpretation and dispute resolution. These procedures can have a tendency to ensure a pragmatic rather than a strict rule oriented solution. Further, given the multitude of international economic agreements and the various principles enunciated under General International Law, the interpretation process of a particular international economic agreement has to take into account of the corpus of IEL as it governs the relations between the parties¹⁹.

Finally, there are questions relating to the reception of international economic agreements into domestic law. State practice differs as to the status of international agreements in domestic law and the manner of their reception in domestic law²⁰.

Conventional IEL is to be found in bilateral, regional and multilateral agreements. Examples of bilateral agreements are Friendly-Commerce-Navigation treaties; double taxation agreements; trade agreements and bilateral investment treaties. Examples of regional agreements are mostly those which facilitate regional economic integration – trade agreements and agreements for the establishment of customs unions²¹. Chief examples of multilateral agreements comprise those

¹⁸ Venkatagiri, (1982), pp.213-4

¹⁹ Ibrahim Shihata, *the OPEC Fund for International development*, Third World Quarterly, (1981), p 251.

²⁰ Barbara ward, *Another Chance for the North Foreign Affairs*, (1980). pp 386 at p.391

²¹ Roger D Hansen North-South Policy – *What's the Problem? Foreign Affairs Summer*, (1980), p 1104 at p.1116.

establishing the international economic organizations and those arrived at under their framework.

2.3 Customary IEL

At one level, customary IEL provides the foundations and the background for the institutions of international economic relations. Examples of such norms are those that pertain to freedom of communication, for instance freedom of the high seas; diplomatic protection and international claims; the principle of *pacta sunt servanda* and the standards in relation to the treatment of aliens. In addition to state practice generally, State treaty practice in the economic field and the practice of international economic organizations can give rise to the formation of customary IEL. The general principles of law also serve as a source of international economic law. The sources of IEL may be determined by judicial decisions and the teachings of the most highly qualified publicists of various nations²². Judicial decisions include those of national and international courts. In International Law, there is no binding precedent system. The International Court of Justice has thus far not played a significant role in the development of IEL²³.

2.4 Guiding Philosophy for the Reconstruction of IEL

IEL in the current crisis of legitimacy can realize the reconstruction of value is critical to its virtuous development. It is necessary for modern IEL rooted in the free market economy to seek for a guiding philosophy in the liberalist thought. In view of its development history, the theory of justice has followed the two principal paths of equality and freedom. Practices have proven that freedom and equality embody the value of justice, the lack of either of which may render justice weakened as the paramount virtue of human being. However, contradiction or conflict may usually exist between freedom and equality: The expansion of freedom may intensify the level of inequality while the pursuit of absolute equality always leads to the strangling of freedom. Nevertheless, whether related to freedom or equality, the core of the theory of justice is the justice of distribution, an issue of reasonableness and fairness

²² The Hindu, September, 15, 1981.

²³ Romesh Bhandari, *the Cancun Summit: A Step Forward*, Indian and Foreign Review, (1981), p. 10 at p 11.

of distribution of fundamental or principal social benefits, interests and material achievements among people²⁴.

2.4.1 Relevance of Nozick's super liberalism and the value of IEL

Nozick determined the principle of the legitimacy of state, i.e. or the principle of the minimal state. Logically, under the principle of the minimal state, the sole moral standard that individual acts observe is the principle of rights based on the moral standard of supremacy of individual rights, which consists of the following three basic requirements:

1. The principle of justice in acquisition, which means that any person shall acquire property with his/her own capability and labor;
2. The principle of justice in transfer, which means that the transfer and distribution of any property shall be based on individuals' will that shall not infringe individual rights in any way;
3. The principle of justice in rectification, which means that all the acts and consequences infringing individual rights during distribution shall be rectified by way of justice²⁵.

As Hayek said, "The central thought of liberalism is that in implementing the general principle of protecting the widely recognized just individual behaviors in private life, the highly sophisticated human behaviors may spontaneously form an order, which is always beyond any specific arrangement, and thus, the coercion of the government shall be limited to implementing such rules, no matter when the government manages specific resources that are dominated for such purpose or provides any other services"²⁶.

2.5 Relevance of Rawls' moderate liberalism and the value of IEL

Rawls has established the plural justice principle in the theory of justice as fairness.

²⁴ Gu Su. *Basic Theories of Liberalism*. Beijing: Central Compilation & Translation Press, (2003), p. 493.

²⁵ Supra note 29, p.87.

²⁶ Hayek F (2000). *Principles for a Free Society // Economics, Science and Politics: Spirits of Hayek thoughts* (trans. Feng Keli). Nanjing: Jiangsu People Press, 41, 392.

1. Each person has the same inalienable right under a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all (i.e. the principle of equal liberty).
2. Social and economic inequalities are to satisfy two conditions: First, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity (i.e. the principle of fair equality of opportunity); Second, they are to be the greatest benefit of the least-advantaged members of society (i.e. Difference principle)²⁷.

2.6 IEL and International Economic Integration

IEL is most visible in the GATT/WTO systems, although it is growing in other regional organizations and in multilateral or plurilateral organizations with sectoral responsibilities. The design and history have been marked by a functionalist approach²⁸. The IEL revolution described here is most importantly a revolution in international law. It is a transformation of society that draws from and contributes to intensified relations among states, which in turn draws from and contributes to increasing possibilities for institutionalization of these relations (although the degree of institutionalization desirable will vary). This process is driven by several facts. First, each state's domestic legal system and regulatory structure has an intended or unintended effect on each other state, either in terms of externalities or in terms of competition. Every field of business regulation is a trade issue, and trade is dependent on every other area of business regulation.

2.7 The participants and their role in the development of IEL

IEL concerns itself to varying degrees with the relationships between the State participants, between individual participants, between the State and the individual, between the State and international economic organizations and as between international economic organizations. The participants are those entities having economic rights and duties under the international economic system. They have a recognized personality which entitles them to operate on the international plane²⁹. The range of entitlements varies and depends on the kind of participant involved. Thus,

²⁷ Rawls J. *Justice as Fairness: A Restatement* (trans. Yao Dazhi). Beijing, (2002), pp. 72, 70

²⁸ Dominique Carrean, Patrick Juillard, Thiebaut Flory, (1978), p.7.

²⁹ V.M. Koretsky, *Essays on International Economic Law*, (1928), p. 224.

entitlements involve for example, being able to enter into economic agreements; being able to enforce international economic agreements; being beneficiaries of international economic agreements; and being able to participate in dispute settlement mechanisms involving economic rights³⁰.

There are mainly three participants, with varying degrees of personality. First, given the perspective here, the primary subjects are States. It is State action or inaction that is the object of international economic regulation. Equally, it is States which have been critically responsible for the development of IEL.

Some States have of course made a great imprint than others. Thus, the role of economically powerful States needs to be acknowledged. This is particularly so given that a significant body of international economic norms are generated from international financial institutions, and institutions whose *modus operandi* is characterized by reciprocity. In such circumstances those States or Regional Economic Organizations which command financial organizations, and which have more to offer in terms of trade concessions, will almost inevitably have a greater role in the shaping of the development of IEL³¹. The second category of participants comprises the international economic organizations. These organizations can be considered as actors in the system, although they are not in a strict sense the beneficiaries of the international economic regulation as the other are³².

The third category of participants comprises individuals. The role of the individual in IEL is more pronounced now, given its liberal trade focus, which emphasizes individual rights; the power of multinational companies and their accompanying responsibilities; and the increasing entrenchment of domestic remedies for individuals in relation to international arrived at standards, as well as the availability of international dispute settlement mechanisms. Individuals here include corporate entities.

2.8 Participation of the developing countries in the construction of IEL

The principal causes for the development of matters are internal causes rather than external causes. Therefore, inappropriate economic and trade policies of

³⁰ Supra note 34, p.87.

³¹ G.I. Tunkin, *The Ideological Struggle and International Law*, (1967), p.117.

³² Supra note 39, p.89.

developing countries, the construction of their domestic market system and objective social environment are obviously the principal causes that constrain their development, while the inequality of the old international economic order and the inclination of the recent lawmaking of IEL that deviates from social justice are one of the important external factors that constrain the economic development of developing countries³³.

2.9 The changing structure of IEL

The lawmaking of IEL in globalization is variegated, which can be explored in view of the macro subjects and micro subjects of international market. At the level of states, macro subjects of international market, the unfairness of international economic rules is an important reason for the predicament of developing countries. The history of economic development of the world indicates that the economic development of states is unbalanced. Whether a state is powerful or weak is constrained by numerous factors at home and abroad, among which the competitive environment resulted from international economic rules is a very important factor. To some extent, the recent lawmaking of IEL favoring procedural justice in form is an institutional arrangement conducive to developed countries³⁴.

2.10 Conclusion

Traditionally speaking, IEL did not pay much attention to environmental concerns. International economic and commercial activities continued to expand until recently with little concern for the harm done to the environment by these activities. The main international economic agenda in the post-Second World War period involved promoting the free movement of goods and capital across borders and enabling states to exploit their natural resources to the maximum extent possible for their economic development.

IEL tried to catch up with this expansion of international economic and commercial activities and regulate wherever and whichever aspect possible, but without paying much serious attention to environmental aspects of economic development. However, more recently, developments taking place within international environmental law have influenced the development of international

³³ S.C Resolution no 330, (1973), p.21.

³⁴ T.S Rama Rao, *International Custom*, (1979), P. 515 AT 515

economic law. The international environmental law principle of sustainable development, a relatively new principle, has had a profound impact on international economic law³⁵.

Within the UN's economic development agenda, a significant shift in emphasis in the theory of economic development began in 1987 with the introduction of the concept of sustainable development, which sought to impose some restraints on economic development in favor of the need to protect the environment. This new idea also sought to unite both the developing and developed countries in pursuit of a common agenda.

³⁵ See Weiss, F., et al. (eds), *International Economic Law With A Human Face*, (1998), p.34.