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4. The economic judgments and arbitral awards: the contribution of international courts and tribunals to the development of international economic law

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1. INTRODUCTION

This chapter will take a court-by-court approach to examine how international courts and tribunals have contributed to developing principles and rules of international economic law. These courts and tribunals contribute to the development of international economic law in two ways. They may contribute through the adjudication of purely economic disputes, like those handled at the World Trade Organization and in investment arbitration. They may also contribute on a more general level through adjudicating disputes that are not purely economic but expressly contain human rights and sustainable development claims, like those before the International Court of Justice and the Permanent Court of Arbitration. The jurisprudence emerging from these courts and tribunals has contributed to developing principles of international economic law that will be examined and then assessed in turn.

The first general pronouncements on international economic law came from the Permanent Court of International Justice. This Court dealt with freedom of trade and navigation from the very inception of international adjudication. Cases like the *Oscar Chinn Case*¹ demonstrate that many principles of international economic law have been at the forefront of international law for over a century now.² At the outset, the Permanent Court of International Justice made important pronouncements on the standard of equality in the treatment of aliens and freedom of trade and

¹ *Oscar Chinn Case (UK v Belgium)* (1934) PCIJ Rep Series AB no 63, Series C no 75.

² See Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1958) 262 for a deeper discussion and analysis of this case.

navigation that played an important role in the development of the law,³ and have left their impact on the general principles of international economic law.

The *Chorzów Factory* case is a landmark case of the Permanent Court of International Justice which laid the foundation for future courts and tribunals to elaborate and develop the principles of international economic law.⁴ This Court made the first general pronouncement concerning an obligation in international law to provide compensation in the event of expropriation of alien property. It famously noted in that case that '[r]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.⁵ This has become the classic formula applied by most courts and tribunals even today to enunciate the obligation to provide compensation in the event of expropriation.⁶ The Permanent Court of International Justice therefore played an important role in kick-starting the development of international economic law.

The principles discussed and elaborated upon in the following cases, including freedom of trade and navigation and a general principle of compensation in the case of expropriation by a state of a foreign-owned property, are the building blocks of international economic law that have set the stage for future courts and tribunals to further develop principles in this regard.

³ Ibid. However it should be noted that as regards the standard of equality of treatment of aliens, the majority essentially held that there was no *de jure* discrimination and therefore the treaty was satisfied, despite the fact it seems clear from the facts of the case that Belgium's actions did create a situation of *de facto* discrimination. See *ibid* 264, particularly the discussion of the dissenting opinions in this case.

⁴ See *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) (1926) PCIJ Rep Series A no 7; *Factory at Chorzów (Germany v Poland)* (Jurisdiction) (1927) PCIJ Rep Series A no 9; *Factory at Chorzów (Germany v Poland)* (Merits) (1928) PCIJ Rep Series A no 17; *Factory at Chorzów (Germany v Poland)* (Order) (1929) PCIJ Rep Series A no 19 (*Chorzów Factory* case); most notably Series A no 17.

⁵ *Chorzów Factory* case, Merits (n 4) 47.

⁶ See Andreas F Lowenfeld, *International Economic Law* (Oxford University Press 2008) 474–6.

2. THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice is uniquely positioned to develop and broaden international economic law since it has the broadest, most general jurisdiction and membership.⁷ When it speaks, it speaks to the international community as a whole and not solely to a foreign investor and state respondent in the confidential ad hoc proceedings that make up international investment arbitration. It also deals with disputes that touch upon a broad range of issues and interests beyond purely economic considerations. Thus, when it considers and develops principles of international economic law, it inherently broadens international economic law to encompass human rights and sustainable development concerns. It therefore has perhaps done the most to develop international economic law, especially with regard to human rights and sustainable development, as compared to other international courts and tribunals active in international economic law.

From its beginning, the International Court of Justice has made pronouncements on international economic law that have guided the development of international economic law and remain as fundamental guiding posts in the field. In the *Barcelona Traction* case, the Court laid down the basic framework in international economic law by distinguishing between obligations of the host state owed to foreign investors and those owed to the international community as a whole (*erga omnes*). It famously noted:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁸

The Court further enunciated and articulated the ‘conflict of systems and interests’ in the realm of international economic law and the additional

⁷ All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice, as per art 93(1) of the United Nations Charter.

⁸ *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 (*Barcelona Traction* case) [33].

protection that states may provide to foreign investors (additional to the general international law obligation above) through bilateral and multi-lateral arrangements.⁹ It therefore found that the protection of shareholders requires recourse to treaty stipulations or special agreements commonly provided in bilateral or multilateral investment agreements, and noted the development by way of the increased number of such agreements or wider economic arrangements.¹⁰ That finding likely had a great impact on the wave of investment arbitration to follow, as foreign investors perhaps realized they might be better protected through bilateral arrangements than through the avenue of diplomatic protection by their home state at the International Court of Justice.

2.1 The Expansion of International Economic Law by the International Court of Justice: Sustainable Development and Human Rights

Perhaps the reason why diplomatic protection fell by the wayside was that foreign investors increasingly instead pursued their own claims under the terms of investment agreements, rather than letting their home state pursue claims on their behalf at the International Court of Justice where it was not possible to directly protect shareholder rights. This was the situation until the recent *Ahmadou Sadio Diallo* case,¹¹ which opened up international economic law to expressly include human rights claims and considerations, in a dispute with very tangible economic issues. The case has therefore broadened the scope of international economic law to include human rights considerations and claims. The Court proclaimed that:

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.¹²

This is an important and much needed expansion in international economic law to expressly bring in human rights concerns to balance

⁹ See *ibid* [89]–[90].

¹⁰ *Ibid*.

¹¹ *Ahmadou Sadio Diallo (Guinea v DRC)* (Merits) [2010] ICJ Rep 639 (*Ahmadou Sadio Diallo* case).

¹² *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582 [39].

with economic realities. The Court thus seemed to affirm that the protections of international economic law also extend and apply to internationally guaranteed human rights. This development has been praised by human rights lawyers and those critical of the overly economic approach of international economic law.¹³ In this vein the Court also confirmed the prohibition against inhumane and degrading treatment as customary international law and arguably as a *jus cogens* norm.¹⁴ This ensured the sound expansion of international economic law in line with general international law, so that important human rights considerations play a role in international economic law.

Similarly, the International Court of Justice has further expanded international economic law to encompass sustainable development objectives in a consistent line of case law. The Court firmly enunciated the place and role of sustainable development in international economic law in the *Gabčíkovo-Nagymaros Project* case.¹⁵ The Court observed:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.¹⁶

The Court therefore clarified that environmental considerations must be taken into account during economic activities and entrenched the role of sustainable development in international economic law. This is an important and welcome contribution to the development of the law in this area, ensuring a general obligation to consider the environment throughout economic activities.

¹³ Mads Andenas, 'International Court of Justice, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Judgement of 30 November 2010' (2011) 60 *International and Comparative Law Quarterly* 810, 810–19.

¹⁴ *Ahmadou Sadio Diallo* case (n 11) 639 [87]–[88].

¹⁵ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 (*Gabčíkovo-Nagymaros Project* case).

¹⁶ *Ibid* [140].

The International Court of Justice has continued this expansion in later cases. In the *Pulp Mills* case, the Court further expanded the role of sustainable development in international economic law by enunciating a general obligation in customary international law to conduct an environmental impact assessment where a foreign investment (or any planned activity) could have a potential transboundary effect.¹⁷ The Court has therefore instilled fundamental principles and considerations from environmental law (the obligation to conduct a transboundary environmental impact assessment) into the law governing economic activities and relations.

The International Court of Justice has thus continued to develop this line of jurisprudence, firmly entrenching the role of sustainable development and principles from international environmental law into the corpus of international economic law. The recently joined cases of the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* and *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* are examples of this.¹⁸ These cases concern economic elements and economic development issues. In its order on provisional measures, the Court reiterated the no-harm principle and indicated that there may be a correlative right to be free from transboundary harm, which is expressed through the right to receive a transboundary environmental impact assessment.¹⁹ The Court therefore confirmed that these fundamental principles of international environmental law are general principles of international economic law as well.

The International Court of Justice has also contributed to the development of international economic law through the enunciation of the general duty to cooperate with other states. In the *Kasikili/Sedudu Island* case, the Court noted the general duty on states to cooperate to develop the region in the context of economic development activities.²⁰ By elaborating upon a general principle of international economic law, to cooperate with other states during economic development activities, the

¹⁷ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 (*Pulp Mills* case) 83 [204].

¹⁸ See *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures Order) [2013] ICJ Rep 398.

¹⁹ See *ibid* [19].

²⁰ See *Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045.

Court contributed to the promotion of the general principle of cooperation in international economic law.

Through the above jurisprudence, the International Court of Justice has greatly contributed to the development of international law, first by providing the baseline from which other courts and tribunals have built the foundations of international economic law, off the back of the minimum standards of treatment and duty to compensate in the event of expropriation. The Court has moreover been a pioneering force in the field of economic law by firmly entrenching the place of sustainable development and other environmental principles along with respect for human rights. In this way, it has ensured that the development of international economic law encompasses other facets beyond economic realities and activities. By adjudicating disputes that are not purely economic in character, the International Court of Justice has ensured that international economic law is concerned with more than economics, and also considers the wider areas of sustainable development and human rights.

3. THE PERMANENT COURT OF ARBITRATION

The Permanent Court of Arbitration is also well positioned to make general pronouncements on international economic law and to incorporate sustainable development principles into international economic law, as it deals with disputes at the interstate level. Several arbitrations under its auspices have enunciated basic principles of international economic law that have been woven into the fabric of the discipline. For example, a Permanent Court of Arbitration Tribunal was the first international court or tribunal to enunciate the general duty under international law to provide compensation. In the *Norwegian Claims* arbitration award of 1922, the Tribunal noted that '[w]hether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under the international law, based on the respect for private property'.²¹ However, more recent tribunals within the auspices of the Permanent Court of Arbitration have also further broadened and solidified the place and role of sustainable development in international economic law. In the *Iron Rhine* arbitration, the Tribunal incorporated environmental law principles and considerations by interpreting older agreements in an effective way in the

²¹ *Norwegian Shipowners' Claims (USA-Norway)* (PCA Arbitral Tribunal, Award 13 October 1922) (*Norwegian Claims* case).

twenty-first century. Moreover, it made important observations that continue to guide the development of international economic law. It noted:

both international and [European Community] law require the integration of appropriate environmental measures in the design and implementation of economic development activities ... Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm [which] in the opinion of the Tribunal, has now become a principle of general international law.²²

The Tribunal therefore confirmed the role of environmental law in the development of international economic law as the general duty to prevent and mitigate harm arising out of economic activities. This pronouncement ensures that international economic law develops in tandem with other areas of international law and ensures the mutually reinforcing position of environmental law and economic law through the cross-fertilization of principles. In this way these Tribunals contributed to the expansion of international economic law, through the incorporation of sustainable development and other environmental considerations, into the fabric of the law itself. Other tribunals within the auspices of the Permanent Court of Arbitration, such as the Tribunal in the *Railway Land* case, reinforce the basic principles of international economic law above as related to sustainable development and environmental considerations.²³

4. INVESTMENT ARBITRATION

The law governing international investment is hardly uniform and many investment tribunals render contradictory or conflicting awards.²⁴ Nonetheless, these arbitral tribunals do contribute a great deal to international economic law by providing the necessary meaty substance to the system. Without these tribunals and their activity, one can only wonder whether 'investment law' would even exist as a distinct field of law. They provide the system's material by creating and perpetuating the body of investment

²² *Iron Rhine Railway (Belgium v the Netherlands)* (PCA Arbitral Tribunal, Award 24 May 2005) XXVII RIAA 35 (*Iron Rhine* case) [59].

²³ See *Railway Land Arbitration (Malaysia-Singapore)* PCA Case no 2012-01 (PCA Arbitral Tribunal, Award 30 October 2014) (*Railway Land* case).

²⁴ See Lowenfeld (n 6) 590.

law in and of itself. Thus, although the individual cases may not have contributed to the development of international economic law on the scale of other courts or tribunals, the existence of the body of cases as a whole is perhaps the catalyst behind international economic law as a discipline. Otherwise it may be presumed that the discipline could simply be 'international trade law', while investment issues would remain squarely in the open domain of public international law as diplomatic protection issues. As can be seen from the cases at the International Court of Justice, however, investors, and particularly shareholders, were left with little choice but to pursue and develop investment arbitration and thus investment law. The following section will therefore focus on some general principles of international economic law and the contribution of certain investment cases to these principles in one way or another, rather than focusing on each case.

4.1 The Most Favoured Nation Principle

Investment arbitration tribunals have devoted a great deal of jurisprudence to the discussion and development of the most favoured nation principle. Although these developments are not without controversies, they nonetheless highlight the contribution of these tribunals to the body of international investment law, and have certainly provided scholars and professionals with plenty of material to debate.²⁵ The Arbitral Tribunal established under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for the Settlement of Investment Disputes Arbitral Tribunal) in *Maffezini v Kingdom of Spain* sparked this controversy. It was the first court or tribunal to apply a most favoured nation clause to dispute settlement provisions to entitle the investor to rely on the less onerous waiting period provided for in a bilateral investment treaty between Chile and Spain.²⁶ It determined that:

²⁵ See for example Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) *Journal of International Dispute Settlement* 97 for highlights of the debate and controversies.

²⁶ See *Maffezini v Kingdom of Spain*, ICSID Case no ARB/97/7, Decision on Jurisdiction 25 January 2000 (2001) 16 *International Centre for the Settlement of Investment Disputes Review – Foreign Investment Law Journal* 212 (*Maffezini* case). See also Douglas (n 25); Lowenfeld (n 6) 572 for a full discussion and analysis of the case.

Notwithstanding the fact that the basic treaty containing the [most favoured nation] clause does not refer expressly to dispute settlement as covered by the most-favoured-nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of traders under treaties of commerce ... [I]f a third-party treaty contains provisions for settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause.²⁷

This was a huge development but has been very controversial. It produced two schools of thought and thus two contradictory outcomes of cases, depending on the view of the particular arbitrators making up the tribunal.²⁸ Although most cases have followed *Maffezini* in applying most favoured nation clauses to dispute settlement provisions, there have been many contradictions and there can hardly be an authoritative pronouncement of the law on this matter given the blatantly contradictory authorities.²⁹

On the other side of the most favoured nation coin in this context is the Arbitral Tribunal established by the International Centre for the Settlement of Investment Disputes in *Plama Consortium Ltd v Republic of Bulgaria*.³⁰ This Tribunal did not apply the most favoured nation provision to a more favourable dispute settlement provision in a third treaty.³¹ Although *Plama* may be distinguished on several grounds from *Maffezini*, these two authorities represent opposing views on essentially the same matter.³² Although *Maffezini* developed the law in this area, its impact is limited by the contradictions and controversy that followed. In any event, these cases and the academic debate they sparked³³ greatly contributed to the body of international economic law.

²⁷ *Maffezini* case (n 26) [54], [56], [64].

²⁸ See Douglas (n 25) and Lowenfeld (n 6) 572–7 for additional background.

²⁹ See Lowenfeld (n 6) 575–6.

³⁰ *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case no ARB/03/24, Decision on Jurisdiction 8 February 2005 (*Plama* case).

³¹ See *ibid*; Lowenfeld (n 6) 575–7; Douglas (n 25) for a deeper discussion and analysis of this case.

³² See Lowenfeld (n 6) 576 for some of the distinguishing elements between the two cases, although note that such a distinction does not override the blatant contradiction between the two authorities.

³³ See Douglas (n 25).

4.2 Expropriation

There are further controversy and contradictions from investment tribunals surrounding what amounts to expropriation in the context of investment disputes. The particular controversy concerns whether expropriation can be extended to situations where there is no physical taking, but rather where certain actions by the government render the investment a practical impossibility/infeasibility.³⁴ In the *Metaclad* case, the Arbitral Tribunal established under the Additional Facility Rules of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States concluded that the deprivation of the right to operate the investor's hazardous waste disposal facility after it had been built (by refusing to provide the necessary environmental authorization) amounted to expropriation.³⁵ The Tribunal found that:

Expropriation under [the North American Free Trade Agreement] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily obvious to the host State.³⁶

It therefore expanded expropriation to cover incidents of so-called indirect expropriation. This is quite a significant development in international economic law.

Subsequent cases have varied in their acceptance of the above assertion; some have followed the jurisprudence and accepted that indirect expropriation requires compensation (even where there is no physical taking), while others have not.³⁷ In the *Pope & Talbot* case, the Tribunal considered that the terms of the North American Free Trade Agreement did not broaden the traditional understanding of expropriation and therefore did not extend expropriation to situations not involving a physical taking.³⁸ It held that:

³⁴ See Lowenfeld (n 6) 559.

³⁵ *Metaclad Corp v United Mexican States*, ICSID Case no ARB (AF)/97/1, Final Award 30 August 2000 (*Metaclad* case) [103]–[105].

³⁶ *Ibid* [103].

³⁷ See Lowenfeld (n 6) 559–64.

³⁸ See *Pope & Talbot Inc v Government of Canada* (Arbitral Tribunal under UNCITRAL rules, Interim Award 26 June 2000) (*Pope & Talbot* case); Lowenfeld (n 6) 560.

... the Tribunal does not believe that the phrase ‘measure tantamount to nationalization or expropriation’ in [North American Free Trade Agreement] Article 1110 broadens the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect ... While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.³⁹

There are thus two contradictory authorities as to whether expropriation extends beyond physical takings. This contradiction limits any contributions these cases might otherwise have made to the outright development of international economic law. Nonetheless, the developments contribute to the expansion of international economic law by providing the substance to international investment law itself.

4.3 Fair and Equitable Treatment

Fair and equitable treatment (or the minimum standard of treatment) has arguably been the victor in investment arbitration, as it seems to have been the principle most consistently and coherently developed by the investment tribunals.⁴⁰ Foreign investors prevail on this claim more than any other,⁴¹ which suggests that it is the catch-all provision to cover any foul play during the life of the investment. The broadest pronouncement on the fair and equitable treatment standard emanates from the Arbitral Tribunal in the *Metaclad* case. The Tribunal concluded that:

Mexico failed to assure a transparent and predictable framework for [the investor’s] business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the [North American Free Trade Agreement].⁴²

This demonstrates the broad reach of this standard and is yet another example of the broadening of international economic law by an international tribunal.

³⁹ Ibid [97]–[100].

⁴⁰ See Lowenfeld (n 6) 556.

⁴¹ Ibid.

⁴² *Metaclad* case (n 35) [99].

5. THE WORLD TRADE ORGANIZATION

Given the specialized nature of the World Trade Organization to deal with disputes arising from its Covered Agreements, this section will set out the general principles and discuss how the cases have contributed to the development of these principles of international economic law and public international law more broadly. In general, the World Trade Organization cases are very technical and specific in nature and it is therefore difficult to extrapolate principles for general application/utility in international economic law. Nonetheless, the Organization and particularly its Appellate Body does a great deal to contribute to the system as a whole and to the substance of international economic law. Moreover, the more technical specialized jurisprudence of the World Trade Organization impacts other regional trade institutions and is therefore an equally important contribution to international economic law at regional level, in the regional economic integration courts and tribunals.

5.1 Sustainable Development

The World Trade Organization Appellate Body contributed a great deal to international economic law through its proclamations regarding the role of sustainable development at the World Trade Organization in the *Shrimp/Turtle* case.⁴³ In that case, the Appellate Body firmly establishes the role of sustainable development in the world trading system and upholds the right of World Trade Organization Members to take trade restrictive measures to protect the environment under certain conditions. The Appellate Body observed:

The words of Article XX(g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the [World Trade Organization] Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the

⁴³ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WTO-AB) (12 October 1998) WT/DS58/AB/R (*Shrimp/Turtle* case); see Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013) 548 for an in-depth discussion of this case and other cases involving article XX of the General Agreement on Tariffs and Trade 1994.

[World Trade Organization] Agreement – which informs not only the [General Agreement on Tariffs and Trade] 1994, but also the other covered agreements – explicitly acknowledges the objective of sustainable development ... From the perspective embodied in the preamble of the [World Trade Organization] Agreement, we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.⁴⁴

The Appellate Body therefore confirms the expanded view of international economic law to incorporate sustainable development and human rights issues. This interpretation also gives new life to the General Agreement on Tariffs and Trade and brings a text negotiated over 50 years ago into the twenty-first century. This demonstrates the real value that these international courts and tribunals play; they help to make sure the law is not static but develops along with the international community so that existing agreements can remain relevant and applicable. This is a huge contribution to international economic law. For an adjudicatory mechanism established to deal with purely economic disputes involving very technical specialized applicable law, to proclaim the role of sustainable development in that framework is monumental. This case therefore represents the final victory bell for sustainable development in international economic law.

In the same vein, the World Trade Organization Appellate Body has made further pronouncements to ensure that international economic law does not develop in isolation from public international law more generally. In *United States-Gasoline*, the Appellate Body confirmed that World Trade Organization law (and international economic law more generally) should not be considered separate from wider public international law.⁴⁵ It famously confirmed that ‘the General Agreement is not to be read in clinical isolation from public international law’.⁴⁶ This opened up the World Trade Organization and international economic law to wider obligations and considerations from general international law.

5.2 The Prohibition against Discrimination

World Trade Organization law has greatly developed the non-discrimination obligations through the most favoured nation principle and

⁴⁴ *Shrimp/Turtle* case (n 43) [109].

⁴⁵ *United States – Standards for Reformulated and Conventional Gasoline* (WTO-AB) (29 April 1996) WT/DS2/AB/R (*United States-Gasoline* case). See also Van den Bossche and Zdouc (n 43) 546.

⁴⁶ *United States-Gasoline* case (n 45) 17.

the national treatment principle. These are the two sides of the non-discrimination coin at the World Trade Organization and more or less represent the general state of the non-discrimination obligation in international law as contained in the minimum standards of treatment and most favoured nation provisions. The most favoured nation provision applies in relation to the treatment accorded to producers of 'like' products from a third state, while the national treatment provision applies in relation to the treatment accorded to similarly situated domestic producers.⁴⁷ Although the most favoured nation principles and international standard of treatment have a long history in international law,⁴⁸ the Appellate Body has made significant contributions to international economic law through the elaboration of these non-discrimination obligations in the context of the World Trade Organization.

In the *Japan-Alcoholic Beverages* case, the World Trade Organization Appellate Body clarified that the national treatment principle does not just apply to prohibiting discrimination against imports but applies to preventing the protection of domestic industry.⁴⁹ The Appellate Body elaborated on the substance of the national treatment provision in article III of the General Agreement on Tariffs and Trade 1994:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production'. Towards this end, Article III obliges Members of the [World Trade Organization] to provide equality of competitive conditions for imported products in relation to domestic products. ... Moreover, it is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the *equal competitive relationship between imported and domestic products*.⁵⁰

⁴⁷ See Van den Bossche and Zdouc (n 43) 315 and Daniel Bethlehem, Isabelle Van Damme, Donald McRae and Rodney Neufeld (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 630 for a more in-depth discussion.

⁴⁸ See Bethlehem et al. (n 47) 630.

⁴⁹ See *Japan – Taxes on Alcoholic Beverages* (WTO-AB) (4 October 1996) WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R (*Japan-Alcoholic Beverages* case) 16–18.

⁵⁰ *Ibid* 16 [emphasis added]. See *ibid* 16–23 for the full analysis of the national treatment obligation in the General Agreement on Tariffs and Trade art III.

In this case the Appellate Body emphasized that national treatment concerns the competitive relationship between imported and domestic products and not merely the trade effects of a measure, however, it further elaborated that the obligation only applies to like products, and therefore that it concerns the competitive relationship between two products that can be considered 'like' within the meaning of World Trade Organization jurisprudence. In this regard the Appellate Body has considered several criteria to assess whether products are 'like' and therefore whether the national treatment and most favoured nation obligations apply.⁵¹ It has noted in the *EC-Asbestos* case that 'a determination of "likeness" ... is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products'.⁵²

However, the Appellate Body has made it clear that non-discrimination does not end there at the World Trade Organization; it is not simply a matter of different treatment of like products. In the *Korea-Beef* case, the Appellate Body noted that:

A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of [the national treatment principle]. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.⁵³

This focus on less favourable treatment to be determined whether the conditions of competition are actually modified, rather than a simple formal difference of treatment, is a new development in international economic law, crystallizing the development of the law in the process.

The same considerations (less favourable treatment of like products) come into play concerning the most favoured nation principle, but the comparator for like products is other imports rather than domestic

⁵¹ See *ibid* 18 for the typical four characteristics noted by the World Trade Organization Appellate Body as relevant to assess the likeness of products: the physical characteristics of the product; the end uses of the product; consumer tastes and habits; and any harmonized system of tariff classification that is sufficiently detailed. See also Van den Bossche and Zdouc (n 43) 375.

⁵² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (WTO-AB) (12 March 2001) WT/DS135/AB/R (*EC-Asbestos* case) [99].

⁵³ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WTO-AB) (11 December 2000) WT/DS161/AB/R; WT/DS169/AB/R (*Korea-Beef* case) [137] [original emphasis].

products like the national treatment principle. The World Trade Organization Appellate Body has further confirmed that the most favoured nation principle applies to prohibit both de facto and de jure discrimination.⁵⁴ This is a great contribution to international economic law as it ensures that the actual impact of a measure is taken into account. This is certainly a development since the *Chorzów Factory* case at the Permanent Court of International Justice and demonstrates that the law has developed thanks to these courts over the last century.

5.3 The General Principle of Good Faith (Principle of Effectiveness)

The World Trade Organization Appellate Body has also greatly enriched international jurisprudence on good faith as a general principle of economic law. Good faith includes the principle commonly described as ‘effectiveness’.⁵⁵ The Appellate Body has noted that the principle of effectiveness represents a ‘fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31’.⁵⁶ It has further determined that:

[i]n light of the interpretative principle of effectiveness, it is the *duty* of any treaty interpreter to ‘read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.’ An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as whole.⁵⁷

⁵⁴ See *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WTO-AB) (9 September 1997) WT/DS27/AB/R.

⁵⁵ Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 148.

⁵⁶ *Japan-Alcoholic Beverages* case (n 49). See also Gardiner (n 55) 160.

⁵⁷ *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (WTO-AB) (12 January 2000) WT/DS8/AB/R, para 81 [original emphasis]. See also *Auditing Accounts between the Kingdom of The Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides* (*Netherlands v France*) (PCA Arbitral Tribunal, Award 12 March 2004) [62], which held that the rule of interpretation under the Vienna Convention on the Law of Treaties art 31 ‘should be viewed as forming an *integral whole*, the constituent elements of which cannot be separated’. *United States-Gasoline* (n 45) further held that ‘[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility’. See also *Brazil – Export Financing Programme for Aircraft* (WTO-AB) (20 August 1999) WT/DS46/AB/R fn 110; *Brazil – Export*

This is a very useful contribution to international economic law and general international law more widely, as it allows for old agreements to be interpreted in an effective way in the twenty-first century.

6. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The 1982 United Nations Convention on the Law of the Sea declares the seabed area beyond national jurisdiction (the 'Area') as a common heritage of mankind. All exploration and exploitation of minerals in the Area are governed by the International Seabed Authority under the auspices of that Convention. In order to explore and exploit minerals in the Area, an entity must be sponsored by a State Party to the Convention.⁵⁸ This particular aspect of the law of the sea triggers the same elements and principles discussed above from international economic law to meet the needs of economic and sustainable development.

In the advisory opinion on the *Responsibilities and Obligations of State Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea enunciated the due diligence obligation of states sponsoring economic activities in the Area along the lines of the International Court of Justice in the *Pulp Mills* case.⁵⁹ The Chamber made perhaps one of the most decisive statements in international case law regarding the principle of due diligence and its relevance for economic activities:

The content of 'due diligence' obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the

Financing Programme for Aircraft (WTO Panel) (28 August 2000) WT/DS46/ARB fn 17: 'We therefore read these provisions as a whole and give a useful meaning to all, in application of the principle of effective interpretation (*ut res magis valeat quam pereat*).'

⁵⁸ See Peter Holcombe Henley, 'Minerals and Mechanisms: The Legal Significance of the Notion of the "Common Heritage of Mankind" in the Advisory Opinion of the Seabed Disputes Chamber' (2011) 12(2) *Melbourne Journal of International Law* 373.

⁵⁹ See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) ITLOS Seabed Disputes Chamber Case no 17 (1 February 2011); see also Henley (n 58) and David Freestone, 'Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area' (2011) 15 *ASIL Insights* 7.

fact that ‘due diligence’ is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. As regards activities in the Area, it seems reasonable to state that prospecting is, generally speaking, less risky than exploration activities which, in turn, entail less risk than exploitation. Moreover, activities in the Area concerning different kinds of minerals, for example, polymetallic nodules on the one hand and polymetallic sulphides or cobalt rich ferromanganese crusts on the other, may require different standards of diligence. The standard of due diligence has to be more severe for the riskier activities.⁶⁰

The request for an advisory opinion was prompted by the concerns of certain developing states – in particular, the Republic of Nauru – with respect to their obligations under international law deriving from economic activities conducted by entities and persons that they sponsor in the Area. Nauru presented its concerns as follows:

In 2008 the Republic of Nauru sponsored an application by Nauru Ocean Resources Inc. for a plan of work to explore for polymetallic nodules in the Area. Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment). Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru’s sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States). Unlike terrestrial mining, in which a State generally only risks losing that which it already has (for example, its natural environment), if a developing State can be held liable for activities in the Area, the State may potentially face losing more than it actually has.⁶¹

The Seabed Disputes Chamber also recognized that due diligence may impose more strict and rigorous requirements for activities that are more

⁶⁰ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 59) [117].

⁶¹ *Ibid* [4].

risky.⁶² It further noted the obligation to apply the precautionary approach found in principle 15 of the Rio Declaration and determined that it is now part of emerging customary international law,⁶³ further entrenching the role of sustainable development principles in international economic law. The Chamber moreover noted that the duty of prevention is also now a customary international law norm, fulfilled and enabled through the precautionary principle. In addition, it found that damage caused by the failure of a State Party to comply with its obligations shall involve the liability of the State Party.⁶⁴ It is thus a very important opinion for international economic law, as it sets the highest standards of due diligence and endorses a legal position to apply the precautionary principle and the obligation to conduct a transboundary environmental impact assessment as part of customary international law.⁶⁵ This is a necessary and fundamental development in this area of the law traditionally centred around purely economic activities and concerns.

These important enunciations were further consolidated in the latest International Tribunal for the Law of the Sea advisory opinion regarding the *Request Submitted by the Sub-Regional Fisheries Commission*.⁶⁶ The request was dealing with issues regarding illegal, unreported and unregulated fishing activities within the Exclusive Economic Zones of certain states in West Africa. The advisory opinion of the Tribunal in that case has further consolidated the role of sustainable development principles – the duty of prevention, to apply the precautionary principle and to conduct an environmental impact assessment – in international economic law and transactions. In particular, it stressed that ‘the ultimate goal of sustainable management of fish stocks is to conserve and develop them as a viable and sustainable resource’.⁶⁷ The jurisprudence of the International Tribunal for the Law of the Sea has thus contributed to the development of international law in this area and to the crucial role of sustainable development principles in the regulation of economic activities.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Freestone (n 59).

⁶⁶ See *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SFRC)* (Advisory Opinion) (ITLOS, 2 April 2015).

⁶⁷ Ibid [190].

7. CONCLUSION: GENERAL ASSESSMENT

International courts and tribunals have done a great deal to develop international economic law. Although the law itself may not be established by these tribunals, these tribunals provide the meat and substance to the text, and in many instances bring older agreements in line with the twenty-first century through interpretive tools. Without them, the law in this area would be little more than static sentences on paper with little meaning or depth. It is the jurisprudence noted above that has developed international economic law into its own sphere of law within public international law.

The International Court of Justice has been able to expand international economic law to include human rights and sustainable development principles in its fabric. The Permanent Court of Arbitration has followed suit, given its position dealing with interstate disputes at the general level. Despite the specialized nature of the World Trade Organization and the International Tribunal for the Law of the Sea, these tribunals have been able to greatly contribute to the development of international economic law, particularly by legitimizing and elevating the position of sustainable development therein. Furthermore, it is particularly the rich and thick jurisprudence of the World Trade Organization that has provided the interpretive tools necessary to ensure the law evolves with science and with the international community. These developments are fundamental to international economic law itself and serve to reinforce and inform public international law more generally.