

**INTERNATIONAL ECONOMIC LAW**  
*EU AND INTERNATIONAL ECONOMIC LAW*

Lessons by Professor Arnaud de Nanteuil



**Teaching within the framework of the Jean Monnet Chair:  
The economic sovereignty of the European Union**

**References**

Preliminary note: as this is a course in international law applied to economic matters, it is assumed that the essentials of the latter have been acquired. It may be advisable to read a general textbook on international law to consolidate understanding of this specialised course. In addition, the following works may provide useful guidance:

- CANAL FORGUES (E.)**, *Le règlement des différends à l'OMC*, Bruylant, 2008, 212 p.  
**CARREAU (D.)**, **JUILLARD (P.)**, **HAMMAN (A.)**, **BISMUTH (R.)** *Droit international économique*, Paris, Collection Précis, Dalloz, 6<sup>e</sup> ed., 2017, 941 p.  
**DOLZER (R.)**, **SCHREUER (C.)**, *Principles of International Investment Law*, Oxford University Press, 2008, 434 p.  
**LOWENFELD (A.)**, *International economic law*, Oxford University Press, 2002, 776 p.  
**LUFF (D.)**, *Le droit de l'Organisation mondiale du commerce*, Bruylant, 2004, 1278 p.  
**MANCIAUX (S.)**, *Arbitrage entre Etats et ressortissants d'autres Etats : trente ans d'activité du CIRDI*, Litec, 2004, 728 p.  
**DE NANTEUIL (A.)**, *Droit international de l'investissement*, Pedone, 3<sup>e</sup> ed., 2020, 564 p.  
**NEWCOMBE (A.)**, **PARADELL (L.)**, *Law and practice of investment treaties*, The Hague, Kluwer, 2009, 614 p.  
**REINISCH (A.)** (ed.), *Standards of investment protection*, Oxford University Press, 2008, 264 p.

**Introductory chapter - General features of international economic law**

§ 1<sup>er</sup> - The origins of international economic law

§ 2 - Sources of international economic law

- A. National sources
- B. International sources
- C. Transnational sources

- D. Regional sources: European Union law
- § 3 - Settlement of disputes
- § 4 - The European Union's special role in international economic relations

## Part One: World Trade Organization law

### Preliminary chapter - History of the World Trade Organization

- § 1<sup>er</sup> - The GATT and how it works
  - A. The General Agreement on Tariffs and Trade of 1947
  - B. The weaknesses of GATT
  - C. The functioning of the GATT until 1994 - the establishment of the European Union
- § 2 - The Marrakesh agreements and the creation of the WTO
  - A. Remedies for GATT's weaknesses
  - B. A truly international organisation

### Chapter 1<sup>er</sup> - Overview of the WTO

#### Section 1<sup>ère</sup> - WTO bodies

- § 1<sup>er</sup> - The Ministerial Conference
- § 2 - The General Council
- § 3 - Subsidiary bodies
- § 4 - Decision-making rules within the WTO
- § 5 - The specific question of the EU within the WTO

#### Section 2 - Sources of WTO law

- § 1<sup>er</sup> - Agreements specific to the WTO
  - A. Agreements relating to goods
    - 1. GATT 1947 and 1994
    - 2. Other agreements relating to goods
  - B. Sector agreements
    - 1. The Agreement on Trade in Services (GATS)
    - 2. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
  - C. Rules governing the settlement of disputes
- § 2 - Subsidiary sources
  - A. The "jurisprudence" of the Dispute Settlement Body
  - B. The rules of public international law

### Chapter 2 - Rules applicable to trade in goods

#### Section 1<sup>ère</sup> - The principle of exclusive customs protection (Articles II and XI)

- § 1<sup>er</sup> - Prohibition of quantitative restrictions

- A. Prohibited restrictions
- B. Authorised restrictions

§ 2 - The principle of consolidating concessions

## Section 2 - **Most-favoured-nation treatment (Article I)<sup>er</sup>**

§ 1<sup>er</sup> - Scope of the clause

- A. The measures targeted
- B. The concept of a like product
- C. The concept of discrimination
- D. The concept of advantage conferred

§ 2 - Effect of the clause: unconditional extension

§ 3 - Exceptions to the clause

- A. Free trade zones
- B. Preferential treatment for developing countries
- C. Other exceptions

## Section 3 - **National treatment with regard to internal regulations and taxes (Article III)**

§ 1<sup>er</sup> - National treatment of similar products

- A. The concept of a like product
- B. The concept of differentiated taxation

§ 2 - National treatment of directly competing or substitutable products

- A. Directly competing or substitutable products
- B. Prohibition of differential treatment to protect national production

## Section 4 - **Rules on dumping and subsidies**

§ 1<sup>er</sup> - Dumping regulations

- A. The concept of dumping
- B. Criteria for identifying dumping
  1. Price inferiority
  2. Damage to an industry
- C. Appropriate responses to dumping: anti-dumping duties
  1. Anti-dumping investigation
  2. Authorised reactions

§ 2 - Subsidy regulations

- A. The spirit of subsidy regulation
- B. The notion of subsidy
  1. Notion of financial contribution from public authorities
  2. Notion of advantage
- C. Prohibited subsidies, tolerated subsidies
  1. Subsidies prohibited in all circumstances
  2. Subsidies likely to be prohibited
- D. The right response to subsidies
  1. The procedure for introducing countervailing duties
  2. The principle of proportionality of countervailing duties

## Section 5 - **Exceptions to the rules applicable to trade in goods**

- § 1<sup>er</sup> - The general exceptions of article XX
  - A. The structure of Article XX
  - B. The application of Article XX by the DSB
    - 1. Application of the special paragraph
      - a. The existence of a risk covered by Article
      - b. The need for measures to offset this risk
    - 2. Applying the hat
      - a. The measure must not be a means of arbitrary or unjustifiable discrimination
      - b. The measure must not be a disguised restriction on international trade
- § 2 - Safeguard measures (Article XIX)
  - A. Conditions for using the safeguard clause
    - 1. The risk of serious internal disruption
      - a. Unforeseen changes in circumstances
      - b. Damage or threat of damage to a domestic industry
    - 2. Necessity and proportionality of the measure
  - B. Authorised safeguard measures
- § 3 - Specific exceptions
  - A. Treatment of developing countries
    - 1. Developing countries
    - 2. The least developed countries
  - B. Exemptions for free trade areas or customs unions
  - C. Specific exemptions

## Chapter 3 - **Rules applicable to trade in services**

### Section 1<sup>ère</sup> - **The scope of the GATS**

- § 1<sup>er</sup> - The concept of service
  - A. Services covered
  - B. Excluded services: public services
- § 2 - The special nature of GATS

### Section 2 - **Transposing the rules applicable to goods to services**

- § 1<sup>er</sup> - The most-favoured-nation clause
  - A. The principle
  - B. Exceptions
- § 2 - Transparency
- § 3 - Mutual recognition
- § 4 - Regulation of exceptions
  - A. The general exceptions in Article XIV
  - B. Safeguard measures
  - C. Restrictions linked to the level of development of certain partners
- § 5 - Specific regulations for certain services

## **Chapter 4 - Rules applicable to intellectual property rights**

### **Section 1<sup>ère</sup> - The fundamental principles of the TRIPS Agreement**

§ 1<sup>er</sup> - Scope of the agreement

§ 2 - Content of protection

- A. Most favoured nation treatment
  - 1. Principle
  - 2. Exceptions
- B. National treatment
  - 1. Principle
  - 2. Exceptions

### **Section 2 - Protected rights**

§ 1<sup>er</sup> - Copyright and related rights

§ 2 - Trademarks

§ 3 - Geographical indications

§ 4 - Industrial designs

§ 5 - Patents

### **Section 3 - Protection procedures**

§ 1<sup>er</sup> - The role of the TRIPS Council

§ 2 - Sanctions in national legal systems: the question of direct effect

### **Section 4 - Some special schemes**

§ 1<sup>er</sup> - Pharmaceutical products

- A. The balance achieved by the agreement
- B. The special case of compulsory licences
  - 1. The concept of a compulsory licence
  - 2. How compulsory licences work

§ 2 - Protection of traditional knowledge

- A. The risk of conflict between TRIPS and the United Nations Convention on Biological Diversity
- B. The Accord solutions

## **Chapter 5 - Dispute settlement at the WTO**

### **Section 1<sup>ère</sup> - The dispute resolution procedure**

§ 1<sup>er</sup> - Main features of dispute resolution

- A. An exclusive mechanism
- B. A para-jurisdictional mechanism

§ 2 - Conduct of the procedure

- A. The negotiation phase
- B. Appearance before the panel
  - 1. The special group

- a. Composition of the panel
  - b. Mandate of the panel
- 2. The panel's report
  - a. The DSB adopts the report by a negative consensus
  - b. The content of the report
- 3. Appearance before the Appeals Body
  - a. Presentation of the Appeals Body
  - b. Mandate of the Appeals Body
  - c. The Appellate Body report

## Section 2 - Procedure for enforcing reports

### § 1<sup>er</sup> - Problem-free execution

- A. The deadline for compliance
- B. Multilateral monitoring of compliance

### § 2 - Execution with problems

- A. Disagreement on compliance and return to the original panel
- B. Countermeasures
  - 1. Nature of countermeasures
  - 2. Level of countermeasures
  - 3. Countermeasures authorisation procedure

## Part Two: International investment law

### Chapter 1<sup>er</sup> - The origins of investment law

#### Section 1<sup>ère</sup> - State contracts at the origin of investment law

### § 1<sup>er</sup> - General issues: the protection of foreign nationals in international law.

- A. Joint commissions and their legacy
- B. The minimum standard of treatment

### § 2 - The emergence of the State contract

- A. Insufficient diplomatic protection
  - 1. A reminder about diplomatic protection
  - 2. The weaknesses of diplomatic protection
- B. The emergence of the State contract
  - 1. Position of the problem: private ID solutions as to the applicable law
  - 2. The application of international law through contractual practice
    - a. The parties' choice of international law
    - b. No direct choice: stabilisation or intangibility clauses
  - 3. The application of international law in arbitration practice
- C. Institutional consolidation of arbitration

### § 3 - The Libyan case confirms the existence of the State contract

## Section 2 - The birth of investment law

- § 1<sup>er</sup> - The development of bilateral investment treaties (partial reference)
- § 2 - The internationalisation of the relationship: the *AAPL v. Sri Lanka* award
  - A. The principle of deferred consent
  - B. The 'baby boom' in transnational litigation

## Chapter 2 - Sources of investment law

### Section 1<sup>ère</sup> - National sources

- § 1<sup>er</sup> - Applicability of national law to the investment relationship
  - A. Direct applicability of national law
  - B. The applicability of national law as reflected in international law
- § 2 - Investment codes
- § 3 - Internal mechanisms for public liability
  - A. Contractual liability
  - B. Extra-contractual liability

### Section 2 - International sources

- § 1<sup>er</sup> - Investment protection and promotion treaties (BITs)
  - A. Bilateral development
  - B. Regional attempts
    - 1. Chapter 11 of NAFTA
    - 2. The Energy Charter Treaty
    - 3. CAFTA
  - C. The Multilateral Agreement on Investment and its failure
- § 2 - Treaties containing investment protection provisions
  - A. WTO law (GATS, TRIPS, TRIMs)
  - B. European Union law
  - C. Trade and investment treaties negotiated by the European Union
- § 3 - The question of international custom
  - A. The minimum standard of treatment
  - B. The applicability of rules of general international law
- § 4 - International case law

## Chapter 3 - Players in international investment law

### Section 1<sup>ère</sup> - Investment

- § 1<sup>er</sup> - Position of the problem: subjective and objective approaches
- § 2 - Approaches to practice
  - A. Conventional practice: major trends
  - B. Arbitration practice: the Salini criteria
- § 3 - Conditions for protecting an investment transaction: compliance with local law
  - A. Compliance with the local law of the host country
  - B. The issue of denying benefits
- § 4 - The question of the investor's nationality
  - A. Nationality as a condition for benefiting from the treaty

- B. The specific problem of effectiveness and legal persons

## Section 2 - The State

- § 1<sup>er</sup> - The question of consent to arbitration
- § 2 - The question of imputation
  - A. The actions of state bodies
  - B. The actions of entities other than itself

## Chapter 4 - Settlement of investment law disputes

### Section 1<sup>ère</sup> - Dispute resolution bodies

- § 1<sup>er</sup> - The International Centre for Settlement of Investment Disputes (ICSID)
  - A. The traditional ICSID mechanism
  - B. The additional mechanism
- § 2 - The Court of Arbitration of the International Chamber of Commerce
- § 3 - Other bodies
- § 4 - The European permanent court project

### Section 2 - Consent of the parties to the arbitration

- § 1<sup>er</sup> - The double consent rule in international arbitration law
  - A. The current dispute: the compromise
  - B. The potential dispute: the arbitration clause
- § 2 - Deferred consent
  - A. Consent in law
  - B. Consent in a TBI

### Section 3 - How the procedures work

- § 1<sup>er</sup> - Conditions for referral to an international arbitrator
  - A. The relationship with diplomatic protection
  - B. The question of exhaustion of domestic remedies
    - 1. A condition rejected in principle
    - 2. The possibility of bringing an action before the national courts and the *fork in the road* clause
  - C. The obligation to respect a certain time limit
  - D. Inter-state investment disputes: the *Barcelona Traction*, *ELSI* and *Diallo* cases before the ICJ.
- § 2 - The law applicable to the dispute
  - A. The instruments chosen by the parties: the treaty and the contract
  - B. The question of the applicability of public and private international law

### Section 4 - Enforcement of arbitration awards

- § 1<sup>er</sup> - The normal enforcement procedure
  - A. The principle of *exequatur*
  - B. The question of State immunity
- § 2 - Actions for annulment of awards



- A. In the context of ICSID
    - 1. The *Ad Hoc* Committee
    - 2. Causes of cancellation
  - B. Outside ICSID
- § 3 - Other possible appeals against awards

## Chapter 5 - Investor protection (1): treatment by reference

### Preliminary section - Temporal application of protection

- § 1<sup>er</sup> - Protection from the admission phase onwards
- § 2 - Recognition of freedom of establishment

### Section 1<sup>ère</sup> - Reference to a standard: the minimum standard of protection

- § 1<sup>er</sup> - The origin of the minimum standard of protection
  - A. The concept of a minimum standard
  - B. The value of the standard
- § 2 - Content of the minimum standard
  - A. The elements identified by the *Neer* ruling
  - B. The evolving nature of the minimum standard and its relevance today

### Section 2 - Reference to the treatment of other investors

- § 1<sup>er</sup> - Most-favoured-nation treatment
  - A. The purpose of the clause
    - a. The issue of dispute settlement provisions
    - b. The *ejusdem* generis principle
    - c. The question of similarity of situations
  - B. The difference in treatment
- § 2 - National treatment
  - A. National treatment as a response to the minimum standard
  - B. The difference in treatment

## Chapter 6 - Investor protection (2): treatment defined in absolute terms

### Section 1<sup>ère</sup> - Full protection

- § 1<sup>er</sup> - An active obligation on the part of the State
- § 2 - Protection of the physical integrity of the investment
  - A. The principle
  - B. The limits

### Section 2 - Fair and equitable treatment

- § 1<sup>er</sup> - The relationship between the EER and the minimum standard
  - A. Arguments against assimilation
  - B. The case for assimilation
  - C. The value of the fair and equitable treatment standard

§ 2 - The content of fair and equitable treatment

A. Procedural obligations

1. Prohibition of denial of justice
2. The obligation of *due process of law*
3. Prohibition of harassment
4. Prohibition of discriminatory or arbitrary measures

B. Substantive obligations

1. The issue of protecting investors' legitimate expectations
2. Transparency

**Section 3 - Expropriation and indirect expropriation**

§ 1<sup>er</sup> - The principle of protection

A. The assimilation of expropriation, nationalisation and indirect expropriation

B. Expropriation, a power confirmed in principle

C. Controlled power

1. The classic conditions: public interest, non-discrimination, *due process*, financial compensation (referral)
2. The condition of financial compensation
  - a. The challenge of applicable law since the 1950s
  - b. The standard of "prompt, adequate and effective" compensation.

§ 2 - The problem of indirect expropriation

A. The principle of protection and the risk to the State's legislative freedom

B. The problem of identifying expropriation

1. The single effect theory
2. The theory of police powers
3. Recourse to the principle of proportionality

C. The development of clauses to protect the interests of the State

§ 3 - Compensation for unlawful expropriation

A. Uncertainty in arbitration practice

B. Adjustment factors taken into account by case law

**Section 4 - The free transfer guarantee**

§ 1<sup>er</sup> - The principle of the guarantee

§ 2 - Particular difficulties

**Section 5 - Prohibition of performance requirements**

§ 1<sup>er</sup> - The purpose of prohibition

§ 2 - Prohibited requirements

**Section 6 - Insurance of investment transactions**

§ 1<sup>er</sup> - Institutional aspects of international investment insurance

§ 2 - The content of the guarantee and the principle of subrogation

**Chapter 7 - Exceptions to investment protection under international law**

§ 1<sup>er</sup> - Exceptions provided for by the treaties themselves

- A. Excluding certain investments from the scope of the Treaty
- B. The exclusion of certain State measures from the scope of the Treaty

§ 2 - Exceptions based on general international law

- A. Countermeasures
- B. Force majeure
- C. The state of necessity
  - 1. The conditions for recognising a state of necessity in international law
  - 2. Case law practice and the Argentine crisis