THE *CHANGING* *STRUCTURE* OF INTERNATIONAL ECONOMIC LAW

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THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW

A contribution of legal history, of comparative law and of general legal theory to the debate on a new international economic order

by

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LIST OF ABBREVIATIONS

BIS	Bank for International Settlements
C.M.L. Rev.	Common Market Law Review
COMECON	Council for Mutual Economic Assistance
ECE	Economic Commission for Europe
ECOSOC	Economic and Social Council (UN)
ECSC	European Community for Coal and Steel
EEC	European Economic Community
FAO	Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development (World Bank)
ICAO	International Civil Aviation Organisation
IDA	International Development Association
IDB	Inter-American Development Bank
IEA	International Energy Agency
IFAD	International Fund for Agricultural Development (UN)
IFC	International Finance Corporation
ILO	International Labour Organization
IMF	International Monetary Fund
ISO	International Organization for Standardization
ITO	International Trade Organization
ITU	International Telecommunication Union
LAFTA	Latin American Free Trade Area
NIEO	New International Economic Order
NILR	Netherlands International Law Review
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Cooperation
OPEC	Organization for Petroleum Exporting Countries
SEW	Sociaal-Economische Wetgeving, Journal of European and Economic Law
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNICEF	United Nations Children's Fund
UNCTAD	United Nations Conference on Trade and Development

UNFPA	United Nations Fund for Population Activities
UNIDO	United Nations Industrial Development Organization
UPU	Universal Postal Union
WFP	World Food Programme
WIPO	World Industrial Property Organization
WHO	World Health Organization

PREFACE TO THE ORIGINAL DUTCH EDITION

1. This book deals with the changing structure of international economic law. It is seen against the perspective of new problems which will have to be solved in the context of the international economic order. For this reason the first section of the first chapter sums up the new problem areas on which there was a broad consensus at the start of this study, after a brief characterization of the existing international economic order. This broad consensus has since been confirmed in numerous ways in the context of the United Nations. This agreement did not extend to specifying the problem areas in a qualitative or quantitative fashion. Even less did it include agreement on the solutions to be sought. However, the recognition of the existence of certain problem areas alone is important to the extent that the nature of these problem areas can at least shed some light on the nature of the solutions that must be aimed at. This in fact appeared to be the case.

The working hypothesis of our study did not include the idea that the solutions would require a revolutionary break with the existing economic order. On the contrary, the working hypothesis was that it is a priori unlikely that a totally new international economic order will be set up on the ruins of the existing order. For many reasons it is more likely that new developments will take place on the basis of the experiences of the past and the present, making use of the existing international organizations. For this reason the remaining sections of chapter I analyze the position of the general legal literature on international economic law at the start of our study. In connection with this literature some general attention is paid to the historical evolution of international economic law from the Middle Ages to shortly after the Second World War.

This analysis of the state of the science at the start of 1974 shows that at the start of our study legal theory had not yet or had hardly studied international economic organizations from the point of view of comparative law. The principal aim of our study was therefore to make a contribution to a general theory of international economic organizations on the basis of an extensive study from the point of view of comparative law. This study is carried out in the lengthy chapter II of this book.

The second aim of our study was to integrate the conclusions from this study from the point of view of comparative law in a general theory of international economic law. This is carried out at the start of chapter III.

In the third place, the book also aims to be a modest contribution of legal theory to the discussion about a new international economic order.

This aim is pursued, on the one hand, by confronting the primary results of the study with the new problem areas that were found earlier and on which there was a broad international consensus at the start of the study at the beginning of 1974. This confrontation takes place in the second part of chapter III.

On the other hand, an attempt is made to contribute to the discussion about a new international economic order by confronting the primary study results with an analysis of the Charter of Economic Rights and Duties of States, adopted at the end of 1974 by the United Nations, and with a selection of the extensive literature dealing with this. This analysis is carried out in chapter IV. The confrontation of the findings of chapters III and IV takes place in chapter V.

The three objectives of this book mentioned above partly overlap but it is important to distinguish them. The study of existing international economic organizations from the point of view of comparative law with a view to putting forward a general theory on this matter has taken up by far the greatest part of this study. Like the introductory first chapter it has a predominantly analytical character.

The analyses of individual international economic organizations and problem areas, carried out from the point of view of comparative law, were published in 1977 in the first part of this series of studies on international economic law in the form of twenty-nine individual studies systematically divided into six parts.[1] The basic elements of a general legal theory on international economic organizations can be found in chapter II of this book, as mentioned above.

The first part of chapter III discusses the integration of a general theory of international economic organizations in the system of a general theory of international economic law and goes on to analyze the shortcomings of the existing international economic organizations. These shortcomings are partly taken from the experiences of the organizations themselves, with the system of international economic law as a frame of reference, but partly also from a confrontation with the tasks for the future given in chapter I. The existing pattern of organizations that was studied admittedly is not exclusively determined by Western ideas, but they are predominant. For this reason our conclusions from our analysis of this pattern inevitably also have a predominantly Western character. An attempt has been made, however, to place this predominantly Western character of our findings in a worldwide perspective as far as possible, i.e. by including the experiences of COMECON, OPEC, commodity agreements and regional organizations of developing countries. For the same reason a great deal of legal literature from non-Western countries was also included in these individual studies.

Chapter IV aimed to lay down an analytical basis for an answer to the question to what extent it is possible to arrive at a synthesis of Western legal principles with the principles of the Charter of Economic Rights and Duties of States. This was done by confronting our conclusions with the Charter, which is predominantly determined by the developing countries. Although some attention is also given to the "Declaration" and the "Programme of

Action" of the UN regarding a new international economic order, these documents as such are less suitable for a study from the point of view of comparative law. They contain policy objectives rather than legal principles. However, they do show that a number of striking gaps in the Charter are not based on a conscious policy of the developing countries but on shortcomings in the coordination in drawing up the three documents.

In the final chapter the findings of the preceding chapters are summarized and a number of concluding remarks are made. No attempt is made to produce a blueprint for a new international economic order as this could only be elaborated in interdisciplinary cooperation and with a much greater knowledge of the individual problem areas. However, some alternative solutions are briefly outlined. Ultimately politicians will have to decide on the form of a new international economic order. In chapter III the analysis of the shortcomings of the existing organizations shows that fairly considerable fundamental changes are necessary also from a Western point of view, certainly to solve the problems of the future. However, at the same time we come to the conclusion that these fundamental changes can certainly be based on legal principles of the existing order that are currently developing. This double conclusion of chapter III is not contradicted by our analysis of the Charter of Economic Rights and Duties of States, but rather supported by it.

It therefore explains the title of this book.[2] The historical development of the existing international economic order appears to provide legal bases and therefore a firm foundation for a new order. The explanatory title gives a further indication of the way in which we developed the legal bases that were found.

For the motives which led up to the study, refer to the beginning of chapter V. In view of their rather arbitrary character there is little point in explaining them in detail here. One of the motives given in chapter V, the experience gained from a study of the economic law of the Member States of the EEC from the point of view of comparative law, also helped to determine our study method which was basically also a method of comparative law.

2. The preceding paragraphs showed that the study on which this book is based has a largely analytical character. To the extent that the last three chapters also comprise some normative considerations, an attempt has been made to base these as far as possible on an objective analysis of the development of the normative developmental trends that were discovered. To the extent that the analysis of existing international economic organizations or of the Charter of Economic Rights and Duties of States did not provide an adequate opportunity for this, experiences in other fields of law were used. As these were taken mainly from Western legal systems, this modest part of our study dealing with general principles of law reinforces the Western character of the final conclusions.

If only for the reasons mentioned above, this book can make only a modest contribution to the discussion about a new international economic order. The practical use of our study is that it shows that fundamental

changes are needed in the existing international economic order, also from a Western point of view, although it is possible to build on existing experiences and principles. The crisis in which organizations such as GATT, the IMF and the European Communities have been since the early 1970s underlines the necessity for fundamental shifts of emphasis. In particular the developing legal principles of substantive equality and solidarity will have to be more strongly emphasized, according to our findings.

Obviously there are other more important reasons why this study can only make a modest contribution to the discussion about a new international economic order. To begin with, the study method from a historical, comparative and systematic viewpoint on law such as the one we used is common in Western Europe, though not at all in the United States. On the whole, a study dealing with specific individual problem areas is prefered there.[3] This is not limited to aspects of public international law. The aspects of national public law and private law of specific problem areas are often involved in the study. Insofar as the microcosm of these specific problems adequately reflects the "macro-legal" relations, this type of case study is a valuable alternative. Insofar as this is not the case, it is certainly a necessary supplement. Our own study inevitably has the character of a macro-legal investigation which needs a confrontation with more detailed studies on specific organizations and problems. The study method is typically West European, as we have noted before, although the study is mainly concerned with developments outside Western Europe. As we explain in chapter I, other fundamentally different study methods are actually used also within Western Europe. However, these often have a systematic character too and are then concerned with the interrelations between a great number of separate legal problems.

Finally, it is clear that legal theory is neither the only nor the most important scientific discipline which must deal with the study and solution of the economic problems of the future. Economics, political and other social sciences, the humanities and numerous other scientific disciplines will also have to contribute to this study. In many cases they have already made more important contributions than has legal theory. Some of these contributions are mentioned in chapter I.

3. The development of our study over the years has had important consequences for the structure of this book. The first version of chapter I had to be written before the individual studies on separate organizations and problem areas were completed. It was only possible in this way to ensure that these individual studies were able to take into account the position of the theory of international economic law at the start of our study. If the final version of chapter I had also dealt with the literature that has been published since 1974, this would have produced a distorted picture of the development of our line of thought. For this reason the more recent legal literature is not discussed until chapter IV.

For the sake of a logical progression of ideas, Chapter II, as mentioned before, is based exclusively on a dynamic analysis of existing international economic organizations and new problem areas that were generally recog-

nized in 1974. Despite the fact that adaptations were later introduced, the uniform scheme of analysis did not appear to be optimally effective in all respects for finding a general explanatory theory of the development of international economic organizations. However, as this would have made it necessary to rewrite all the individual studies which were completed and published, this insight could not lead to rewriting the chapter. Only continued study may possibly lead to the adaptation of the methods of analysis used for the conclusions of our studies.

In numerous discussions with experts of international organizations and with American experts in April and May 1978, I was assured that the Charter of Economic Rights and Duties of States is taken too seriously in the Western European and some of the American literature, as well as in our study. The defective character of the Charter would also be admitted by numerous experts and politicians in the developing countries. Nevertheless, as there is no more authoritative document on the legal principles adopted by the developing countries, the critical analysis of the Charter in chapter IV has been retained. In addition, justice is done to other ideas in the analysis of the literature in this chapter.

4. An attempt has been made to make this book comprehensible to readers who are unfamilar with the first part of this series. As we have said before, it does aim to make a contribution to further theorization but actually has, to a large extent, the character of a macro-legal investigation. However, it would not have been possible to carry out this sort of investigation without the enthusiastic cooperation of an inter-university workgroup formed for this purpose from the faculties of law at the Universities of Utrecht and Leyden. The members of this workgroup did not only elaborate the individual studies of the first part of this series. Many members of the workgroup also made numerous valuable critical remarks about the first version of this book. Parts of chapters I and IV are based on preliminary studies by P.J.G. Kapteyn. In addition, our advisor, Professor J. Tinbergen, made numerous valuable remarks about the first version of all the chapters of this book which were incorporated in the final version. For this reason we refer to the study above as a joint effort. Finally, numerous eminent legal experts and other leading experts of the United Nations, the IMF and the World Bank Group, as well as many American university and other experts, made extremely valuable comments to a summary of our provisional findings during my study trip to the United States in April-May 1978. I should like to thank all these people sincerely, without mentioning any names. An attempt was made to take all their comments into account in editing the final version of the book. Obviously I remain solely responsible for the many shortcomings the book will inevitably have.

5. Extensive lists of literature on the individual organizations and problem areas that were studied are provided in the individual studies of the first part of this series. The general literature on our study that was published up to the beginning of 1974 is mentioned and analyzed in chapter I, while the most

important literature after the UN resolutions of 1974 about a new international economic order appears in Chapter IV. As little other literature is covered in the other chapters, we have not included a summarizing bibliography at the end of the book in order to save space. Furthermore, the character of the book makes an index rather superfluous. It is not a reference book but a continuous line of reasoning. The development of the analysis and the subjects that are covered can be looked up in the detailed table of contents. An index of subjects would give the incorrect impression that it would be possible to obtain an understanding of various aspects in detail by reading particular passages in certain chapters which are concerned with these aspects. This is not the case. However, every chapter, apart from being a link in the entire argument, is also a complete entity which could be read separately. To increase the unity of the book, conclusions drawn later were often indicated in earlier chapters when the different chapters were revised.

Pieter VerLoren van Themaat

NOTES TO PREFACE

1. For more details see appendix I.
2. As will be explained in the preface to the English edition, this title of the Dutch edition ("Rechtsgrondslagen van een Nieuwe Internationale Economische Orde") refers to a notion which has been developed in Belgian, French and German legal literature and which cannot be translated into English without creating confusion. It does not merely mean "the legal principles of a new international economic order".
3. Some recent exceptions to this rule, in addition to the articles mentioned in chapter IV, include O. Schachter, *Sharing the World's Resources* (New York, 1977) and the politological study by H.K. Jacobson which is parallel to our own and leads to analogous conclusions on some important points: *Networks of Interdependence: International Organizations and the Political System* (Alfred Knopf, 1979). The author of this latter book gave us the opportunity of studying the manuscript of his important study before it was published.

PREFACE TO THE ENGLISH EDITION

The content of this English edition of the concluding part of our study on the development of international economic law corresponds to that of the original Dutch text. Only a few additions and clarifications have been added in this English text. Therefore the preface to the Dutch edition has been retained as a general introduction to the work.

Experience with the Dutch edition has shown that the book can be understood without knowledge of the voluminous first part of our study. This first part of our study—in twenty-nine individual studies, published in six volumes in 1977—analyzes in detail the experience of the most important existing international economic organizations, both on the world level and on subregional, regional and interregional levels. Partly because most of these existing international economic organizations have also been analyzed in English legal literature, no translation of this first part of our study is planned. For scientific reasons references to those individual studies have been maintained in the English text. Experience with the Dutch edition again proved that these references are not disturbing for the reader who has no knowledge of the individual studies in the first part of our study. Those aspects of these individual studies which are relevant for our conclusions in this book have, of course, been summarized there.

What has been changed is the title of the book. The Dutch title referred to a notion which has been developed in Belgian, Dutch, French and German legal literature ("economisch grondslagenrecht", "constitution économique", "Wirtschaftsverfassung") but which is hardly known to lawyers who are familiar only with English legal literature. The notion will be dealt with in chapter IV, because it has some relevance for the legal nature of the Charter of Economic Rights and Duties of States. In order to avoid confusion with the notion of a written constitution—which is, of course, well-known outside continental Europe but which has a completely different legal meaning—I have chosen a different title for the English version of the book, which does not run the risk of leading to such confusion. This title, "The changing structure of international economic law", in fact seems perhaps even more adequate to indicate what the book is talking about than the original Dutch title. While the "seven standards" found by Schwarzenberger, Erler and others with regard to the basic principles of substantive international economic law show a remarkable line of continuity and gradual evolution from the Middle Ages up to the Charter of Economic Rights and Duties of States, the structure of international economic law has changed considerably, particular-

ly since the Second World War. An advantage of the English title is moreover that it implicitly pays a tribute to the memory of my friend, Wolfgang Friedmann, who wrote his famous book on new developments in international law in general under a similar title. It was, in fact, together with Wolfgang Friedmann that I wrote many years ago my first study in English on new problems of international economic law, i.e. on the international legal aspects of anti-trust law.

With the help of the T.M.C. Asser Institute for international law in The Hague I was lucky to find in Tony Langham and Plym Peters an Anglo-Dutch couple of experienced translators to undertake the difficult job of translation. They in turn would like to acknowledge the invaluable assistance given in checking and advising on legal points by Miss Peters' father, Paul Peters. The translation was difficult in particular, because the Dutch text–not only in the title but throughout–refers to notions which are not familiar to English readers. Alongside the notion of "Wirtschaftsverfassung", notions such as "Ordnungspolitik", "ordnungspolitische Dauernormen", "Prozesspolitik", "Lenkungspolitik" and "Lenkungsinstrumente" play an important part in my reasoning. They have been developed in particular in German economic and legal literature on fundamental aspects of economic law. Afterwards they were taken over by Belgian and Dutch doctrine. As these notions are not familiar to most readers outside Germany, they had to be circumscribed in the English text in various ways. I also have to thank my German colleague Ernst-Joachim Mestmaecker of the Max Planck Institute in Hamburg for giving valuable suggestions to this end. The importance of the notions mentioned lies in the fact that they stress the fundamental legal difference between permanent basic principles of substantive law (such as the "seven standards" of Schwarzenberger and, more recently, principles of external responsibility of states), permanent legal rules and short-term or middle-term flexible instruments, discretionary decisions and procedures of many kinds to adjust economic developments to general goals of economic policy. From the viewpoint of economic policy the crucial distinction in these notions is that between competition and intervention or planning. In order to function in an "orderly" manner the market mechanism or competition needs permanent legal rules, including civil law, company law and anti-trust law. Even if interventionist policies in part also have to rely on permanent legal principles and rules (e.g. the equality principle and permanent rules on procedures and sanctions) they are based in the first place on discretionary decisions. Therefore from a legal point of view the distinction between "Ordnungspolitik" and "Lenkungspolitik" largely coincides with a distinction between "government by rules" and "government by discretionary decisions". It will be clear that the notions mentioned are also of great importance for the solution of institutional problems of international economic organizations. The reader will have to judge how far we have succeeded by our joint efforts in making the text on these issues comprehensible and easily readable for readers unfamiliar with Belgian, Dutch and German literature on economic law.

Finally, the translation of this book would not have been possible without a substantial financial grant by the Dutch Foundation for Scientific Research,

for which I am most grateful. Nor would the publication have been possible without the painstaking final editing of Sijthoff and Noordhoff International Publishing Co. and their willingness to bring this book out on the international market.

Pieter VerLoren van Themaat

TABLE OF CONTENTS