Ignaz Seidl-Hohenveldern

International Economic Law

3rd Revised Edition

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IGNAZ SEIDL-HOHENVELDERN
Emeritus Professor of Public International Law and of Public Law,
University of Vienna, Austria

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Preface

This book is based upon the General Course held by the author at The Hague Academy of International Law in 1986.[1] In its present, form the book takes account of events up to March 1999. As large parts of public international law are of direct concern to international economic relations, the author presents his views on international economic law in the sequence used in his outline of Public International Law.[2]

The author thanks Kluwer Law International for having enabled him to publish his views in the present expanded form. He hopes that the addition of indexes will facilitate the use of the book. The author profited from his discussions with Professor Kazuo Sato of Ayoma Gakuin University preparing the Japanese translation of the present book. The author likewise thanks Professor Elisabeth Back-Impallomeni for having invited him as visiting professor to the University of Padova in the Spring of 1988. These lectures and discussions gave him ample opportunity to update his views at that time. Events since the second edition of the present book in 1992 have required important modifications and additions.

This preface, finally, enables the author to thank his colleague James Crawford (Cambridge) publicly for his invaluable help in improving the English text of the lectures upon which this book is based. The author offers his thanks to the staff of Kluwer Law International for their kind efforts to cope with the insertion of the vast amounts of new information.

Vienna, 31 March 1999 IGNAZ SEIDL-HOHENVELDERN

Biographical note

Ignaz Seidl-Hohenveldern, born on 15 June 1918 in Mähr-Schönberg.

Studies in Vienna, Geneva and Innsbruck. Dr. of Law (Innsbruck) 1946. 1946-1947 Liaison Service to Allied Council for Austria in Austrian Federal Chancellery. 1947-1949 Assistant Legal Adviser in Constitutional Service of Austrian Federal Chancellery. 1949-1950 Assistant Legal Adviser, Organization for European Economic Co-operation. 1951 Privatdozent (Vienna), – 1950-1954 Deputy Legal Adviser in Foreign Affairs Department of Austrian Federal Chancellery. 1954-1958 Professor Extraordinarius, University of the Saar. 1958-1964 Professor of Public Law and Public International Law, University of the Saar. 1963-1964 Dean, Faculty of Law, University of the Saar. 1964-1980 Professor of Public International Law and Public Law, Law Faculty, University of Cologne and Director of the Institute of Public International Law and Foreign Public Law of the University of Cologne. 1980-1988 Professor of Public International Law, Law Faculty, University of Vienna and Director of the Institute of Public International Law and International Relations. Professor emeritus since 1988. 1956-1960 Rapporteur, International Law Association, Committee on Foreign Property and Nationalization. 1956-1974 Visiting Professor, College of Europe, Bruges. Since 1974 Visiting Professor Europa Instituut, Amsterdam University. Since 1960 Corresponding Member of the Real Academia de Ciencias Morales y Politicas and since 1987 Member of the Österreichische Akademie der Wissenschaften. Since 1965 Member of the Commission médico-juridique de Monaco. 1969 Associé and 1979 Member of the Institut de droit international. 1978 Docteur honoris causa de l'Université Paris V.

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List of Unfamiliar Abbreviations

ARIEL	Austrian Review of International and European Law
BGBl	Bundesgesetzblatt
CIS	Commonwealth of Independent States
Coll. Essays	I. Seidl-Hohenveldern, Collected Essays on International Investments and International Organizations, The Hague, Kluwer Law International, 1998.
ECT	Energy Charter Treaty
JBl	Juristische Blätter
ÖJZ	Österreichische Juristenzeitung
RIW	Recht der Internationalen Wirtschaft
SEA	Single European Act
TEC	Treaty establishing the European Community (Maastricht version)

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CHAPTER I

Introduction

1. DEFINITION OF INTERNATIONAL ECONOMIC LAW

International economic law, in its widest meaning, refers to those rules of public international law which directly concern economic exchanges between the subjects of international law.[3] Seen from this angle, international economic law thus covers only a part, albeit an important one, of the discipline of public international law as a whole. This statement will be unwelcome to those who maintain that international economic law is or should be a discipline of its own, separate from public international law.[4] Such a claim may be useful as a plea to increase the number of academic posts in the field of international law, yet, in our opinion, international economic law is so closely embedded in the discipline of public international law that the latter would be crippled by such a separation. Peaceful relations between subjects of international law are, after all, to a very large extent directly concerned with economic exchanges.

If, on the other hand, one were to extend the notion of international economic law even to all those aspects of international law as are indirectly affected by economic activities, this envisaged new discipline would swallow-up the old discipline altogether. Law reflects the interests of the ruling class and international law, in particular, reflects the interest of the most prominent ("hegemonial") powers of the period concerned. These interests, in turn, are influenced to a very large extent by the aim of obtaining material gains, and thus by economic considerations, even if the actors concerned may not always be aware of the materialistic background to their actions, which, ostensibly, may appear prompted by more idealistic motives.

Be that as it may, the present book will deal only with the rules of public international law directly concerned with economic exchanges. For example, presupposing the audience to be familiar with the general problems of self-determination and of the use of force, we will discuss only the right of economic self-determination and the use of economic force.

However, the effect of this reduction of the scope of the book is offset by the necessity at least to touch upon all aspects of international economic law. We would fail to cope with the realities of present-day international life, if we omitted to deal with phenomena like the existence of multinational enterprises or of contracts concluded by States with nationals of other States. Some authors still may consider that international law should deal only with relations between States[5] and – possibly – with international organizations,[6] thus giving priority to a preconceived doctrine over present realities. We intend to follow the more modern doctrine which extends the categories of subjects of international law[7] so as to include individuals, and

which takes into account the possibility of other sources of international law than those enumerated in Article 38, paragraph 1, of the Statute of the International Court of Justice (ICJ) or, at least, the necessity of re-interpreting these sources.[8]

Consideration of these two factors may pave the way for the admission of a new body of rules into international economic law, the so-called "*lex mercatoria*".[9] Comparative law shows that traders all over the world are beginning to develop uniform conditions for doing business which are more or less cut loose from any national law and enforceable mainly by arbitration. Thus, the "Law Merchant" of the Middle Ages seems to come alive again. By definition, the *lex mercatoria* will apply merely between merchants. Joint inter-State enterprises[9a] may elect to base their relations merely on the *lex mercatoria.* Non-profit making international associations, likewise desirous of demonstrating their independence from any domestic law, cannot do likewise. G. van Hecke,[9b] shows that the basis of common practice of these entities is too small for legal notions common to all of them to develop.

In its content, the *lex mercatoria* does not aim to regulate relations between States directly and thus it does not fit into the classical notion of international law. On the other hand, by definition the *lex mercatoria* does not form part of the national law of any State. Yet domestic courts have rejected the plea that awards based on *lex mercatoria* were not based on law and should therefore be annulled. [10] If we extend the notion of subjects of international law so far as to include traders as subjects at least of international economic law, the non-national *lex mercatoria* could be counted among the sources of that law.

The difficulties in practice of separating commercial from State activities are shown by the development of the euro-dollar market. On this market, traders place for a limited period of time amounts of currency (usually United States dollars) in a bank outside of the country where this currency is issued and where it is legal tender. These traders thus create payment facilities additional to those offered by the bank of issue of the several States, earning higher interest than in the United States, as the bank granting the loan is not obliged to keep a corresponding interest-free deposit with the US Federal Reserve Board.[11] The conditions for lending euro-dollars ("Euro-loans") have a great influence on the national interest rate. The almost unfettered circulation of vast amounts of money exercises a great influence on the rate of exchange for national currencies.[12]

By thus stretching the notion of international law in order to accommodate the facts of present-day international economic life, we are again confronted with such an unwieldy mass of material that we are once more obliged to make a choice. Many inter-State economic relations are today handled within the framework of the law of the particular international organizations. The law and the activities of these organizations, concerning exclusively or, *inter alia*, certain fields of economic co-operation, are relatively well covered by monographs. Where this is the case, we will limit ourselves to discussing merely those of their activities which we consider most striking. Knowing quite well how subjective such choice will appear, it has nevertheless to be made or else the present book would grow into a multivolume treatise.

The same reasons of space prevent, *a fortiori*, any extension of the notion of international economic law to include transnational (economic) law,[13] i.e., to include all rules capable of affecting human relations across national borders, without regard to the national or international origin of such rules, thus including, e.g., national rules of conflict of laws.

2. A NEW INTERNATIONAL ECONOMIC ORDER – PROGRAMME OR REALITY?

Having thus defined the scope of our subject, we are immediately confronted with the formidable challenge that the world at large thoroughly disagrees on much of its content. In particular, spokesmen of the Third World [14] declare most of the traditional rules of international economic law to be totally inadequate for present-day conditions. As the Third World States, by their voting strength, dispose of comfortable majorities in most world-wide international organizations, their demands for a New International Economic Order are – to a large extent – reflected in decisions of these organizations.[15] Echoing these demands, there have been demands for "new orders" in other fields which remain, however, more or less closely connected with economic aims and hence relate to the quest for a "New International Economic Order". Let us mention especially the United Nations Educational, Scientific, and Cultural Organizations (UNESCO) efforts towards a "New World Information and Communication Order"[16]

It is one of the grave problems of the present distribution of world economic power that the economic power of the Third World States and of the few remaining Socialist States requesting such a change does not at all match that of the industrialized market-economy countries (the "Western and Others" Group of States in United Nations parlance). Placed in a hopeless minority position in most organizations belonging to the United Nations family, these States resist most of these demands by long-drawn-out holding tactics, and by more or less ignoring them in the realities of economic life. The States having voted against or having abstained in the vote on United Nations General Assembly (UNGA) Resolution 3281 (XXIX), the "Charter" of the Economic Rights and Duties of States supported by the Third World accounted for 65,9 per cent of world trade,[17] whereas the States having voted for this resolution represented 70 per cent of the world population.[17a] As world-wide economic relations are still dominated by the States belonging to groups, the "Western and Others" international economic law as proclaimed by the resolutions of most world-wide organizations differs greatly from the rules actually applied.

On the other hand, these rules themselves no longer correspond to the "classical" rules developed in the era before the First World War, which mirrored correctly the economic as well as the power relations existing at that time. Prompted by "enlightened self-interest" the market-economy industrialized States themselves have gradually withdrawn from positions so favourable to them as to be provocative. Thus, the

fight for the "New International Economic Order", in reality, was not a fight against a classical "old order", but against an order itself already some distance from it.

What, then, was this classical old economic order? If we were to follow the most extreme views advanced by the adherents of economic liberalism,[18] this order is not a man-made order but simply the result of the free and unfettered play of economic forces resulting from the law of supply and demand. Seen in this light, this "old" international economic order was in perfect harmony with the doctrine of sovereignty prevailing at that time. The then dominant doctrine was still that of absolute sovereignty,[19] placing the will of the individual State above the rules of international law. Yet, even the oncoming new doctrine of relative sovereignty, making the will of the sovereign State subordinate to the rules of international law, assumed that, in case of doubt, international law should be interpreted in such a way as not to conflict with the national law concerned.[20]

Given this attitude, adherents of either doctrine could only welcome the idea that international economic law was not the result of man-made rules, whether made by a nation State or by an international authority, but was simply the automatic reflection of the operation of market forces. Yet we may well doubt whether such a perfectly free market economy existed anywhere else than in the minds of some liberal philosophers. Reality was, and is, different – as may be demonstrated by the related phenomenon of the so-called absolute right "to use and abuse" one's own property. Even while lip-service was paid to this unfettered freedom, practice limited the absolute right of the owner by obliging him to respect some social functions of property.[21]

Much in the same vein, even in the nineteenth century, international economic relations were not as free of influences on the part of the national States as they should have been according to the ideals of economic liberalism. Thus States regulated the access of foreigners to their markets and collected customs duties. Even apart from these hurdles, a free market could not exist without some market regulation.

For example anti-cartel laws were adopted for the very purpose of ensuring freedom of competition on the market,[22] at the price of reducing freedom of contract, a principle just as dear to liberal doctrine.[23] Yet, at that time, important parts of the regulation of international markets were left to private initiative. Thus, the production quotas allotted, at present, in international commodity agreements to the several producing countries in order to prevent a swamping of the market find their precursors in private cartel agreements to the same effect.[24]

Present-day international economic law requires new rules and at least some changes in existing rules. Economic life has undergone considerable changes in this century. One of the most salient changes is the rise and fall of the Socialist State, concentrating all means of production and hence the near-totality of economic activities in the hands of the State. In this respect, the Socialist State differed from the pre-liberal mercantilist State,[25] where State trading, State monopolies and State-owned manufactures co-existed with enterprises in private ownership. Increases in the EC's and WTO's fight against State monopolies, subsidies, nationalistic procurement rules and counter-trade[25a] aim to establish, in the long run, a global market