GERMAN YEARBOOK OF INTERNATIONAL LAW

VOLUME 32 · 1989

DUNCKER & HUMBLOT · BERLIN

GERMAN YEARBOOK OF INTERNATIONAL LAW

Volume 32 · 1989

The Editors and the Institut für Internationales Recht do not make themselves in any way responsible for the views expressed by contributors

This Yearbook may be cited:
GYIL 32 (1989)

Communications should be addressed to:

The Editors
German Yearbook of International Law
Institut für Internationales Recht
an der Universität Kiel
Olshausenstrasse 40/60
D-2300 Kiel 1

GERMAN YEARBOOK OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 32 · 1989

DUNCKER & HUMBLOT / BERLIN

Printed by Berliner Buchdruckerei Union GmbH, Berlin 61
ISBN 3-428-06826-2

Contents

Articles

Notes and Comments

Reports

Book Reviews

ARTICLES

Is There Customary International Economic Law?

By Stephen Zamora

I. Introduction

The post-war international economic order has been undergoing structural changes since the early 1970's. Founded on the economic hegemony of the United States and codified in international agreements establishing such institutions as the General Agreement on Tariffs and Trade (GATT) and the International Monetary Fund (IMF), the post-war Bretton Woods system is gradually giving way to a new, more complex structuring of the world economy. Instead of reacting to U.S. hegemony, the world economy faces the *dispersal of economic power* among several economic poles. In our post Bretton-Woods system, economic power is distributed more evenly among the European Community (EC), Japan, the newly industrialized countries (NICs) of the Pacific region, North America (U.S., Canada, Mexico), and, to a lesser extent, the Soviet and developing country blocs.[1]

The dispersal of economic power combines with a second important characteristic of the post-Bretton Woods order — *a high level of economic interdependence.* Many industries that were predominantly national in scope — banking, capital markets, the manufacturing process, communications, to name a few — are now more highly integrated with their counterparts in other nations. Consequently, it is harder than ever for national economies to be insulated from the effects of currency fluctuations, capital movements, trade patterns, and other economic factors.

The creation of a decentralized, highly interdependent economic order may be the crowning achievement of the Bretton Woods system. At the same time, however, heightened competition among relative equals strains the effectiveness of the Bretton Woods regime, one designed for a less integrated world economy that responded to the economic and political hegemony of the United States. New rules of international economic law, and new institutional frameworks, must eventually be developed to reflect these new conditions.

[1] *Theodore Geiger*, The Future of the International System: The United States and the World Political Economy, Boston 1988, 2-8. *Geiger* argues that coordination of the international economy has gradually eroded since the 1970s, as the hegemony of the United States has disappeared, and as countries have pursued the short term benefits of individual actions.

These structural changes are also likely to affect the way in which the substantive rules of international economic law will be developed. In the Bretton Woods era, the rules of a liberal economic order were embodied in formal treaties — multilateral agreements negotiated and ratified by a majority of Western nations. The most important agreements came about as initiatives of the United States, and that country strongly influenced both their substantive content and the institutions and practices that grew out of them.[2]

Due to the relative success of agreements establishing international economic organizations such as the IMF, the GATT, the World Bank, and others, we have come to assume that international economic law is treaty-based (that is, embodied in formal international agreements), although it is also recognized that the decisions and practices of these same organizations also create international economic rules.[3] If the existing rules of international economic law are to adapt to structural changes, the normal assumption is that appropriate changes must be negotiated in multilateral conferences and reduced to formal international agreements.

Unfortunately, it has become increasingly difficult in multilateral conferences to negotiate specific, binding rules that would govern economic relations between States. This is due to structural changes already mentioned: in a world economy of heightened interdependency, the stakes at such multilateral conferences are considerably higher than those of earlier decades; because economic power is dispersed among powerful competitors, it is becoming harder to achieve agreement on new multilateral treaties, amendments to existing treaties, or new economic codes.

1. The Role (or non-Role) of Customary International Economic Law

Another source of international rules — customary international law — has been generally ignored in analyses of international economic law. Does this mean that customary international law plays no role in international economic relations? Is there even such a thing as "customary international economic law"? Will customary international law affect the development of new rules to meet the changing structure of the world economy?

Even though the multilateral treaty process may not respond efficiently to the changing needs of the world economy, few commentators have paused to consider whether customary international law plays a role in intergovernmental economic relations. Indeed, the assumption has been that customary international law has

[2] On U.S. influence in the negotiation of the GATT Agreement, *see John Jackson*, World Trade and the Law of GATT, New York 1969, 36-46. On U.S. (and British) influence in the drafting of the IMF Agreement, *see Richard W. Edwards, Jr.*, International Monetary Collaboration, Dobbs Ferry, N.Y. 1985, 4-8.

[3] *Kenneth Dam*, The Rules of the Game: Reform and Evolution in the International Monetary System, Chicago 1982, 3 (alluding to monetary rules): "International rules today arise largely out of international organizations".

little, if anything, to do with international economic relations.[4] Academic studies of customary international law contain virtually no discussion of international economic law,[5] books on international economic law rarely mention customary international law.[6] American law casebooks represent customary international law as marginally important, if at all, to the subject of international economic law.[7] Finally, and perhaps most significant, courts in the United States have given limited effect to customary international economic law.[8]

Many experts believe that international "legislation" — treaties and rule-making decisions of international economic organizations — has usurped any potential role that customary international law might play in regulating economic relations between States. This is the position taken by the drafters of the Third Restatement

[4] *Georg Schwarzenberger*, The Principles and Standards of International Economic Law, in: Recueil des Cours (RdC) 117 (1966/I), 7-98 (12): "Compared with the other two law-creating processes of international law — international customary law and the general principles of law recognised by civilised nations — the emphasis in International Economic Law is on treaties."

[5] For instance, *Anthony D'Amato*, in his comprehensive study of customary international law, only mentions a subject of international economic law once: to point out that the principle of most-favoured-nation treatment is not a rule of customary international law. *Anthony A. D'Amato*, The Concept of Custom in International Law, Ithaca/London 1971, 130, 131. *Mark E. Villiger*, Customary International Law and Treaties, Dordrecht 1985, *passim*, is equally silent on the subject of international economic law.

[6] *Pieter VerLoren van Themaat*, The Changing Structure of International Economic Law, The Hague 1981, 9, places customary international law outside the scope of his study "for reasons of efficiency". *Palitha Tikiri Bandara Kohona*, The Regulation of International Economic Relations Through Law, Dordrecht 1985, is also silent on customary international law. *See also Dominique Carreau / Patrick Juillard / Thiebaut Flory*, Droit International Economique, Paris 1978, 17, 437, 438. The authors recognize that the sources of international economic law are contained in Article 38 of the Statute of the International Court of Justice (which includes international custom), but only in the discussion of the international law of expropriation of property do they obliquely refer to "international law" in such a way as to indicate that customary norms may exist in this area.

[7] *See, e. g., John H. Jackson / William J. Davey*, Legal Problems of International Economic Relations, 2d ed., St. Paul, Minnesota 1986, 261: "When we search for customary norms of international law that relate to economic transactions, there is precious little to be found apart from the extensive developments on expropriation of property." *See also Louis Henkin / Richard Pugh / Oscar Schachter / Hans Smit*, International Law: Cases and Materials, St. Paul, Minnesota 1987, 1163: "This is an area dominated by international agreements; little customary law affecting economic relations has developed." Compare *Joseph Modeste Sweeney / Covey T. Oliver / Noves E. Leech*, Cases and Materials on the International Legal System, 2d ed., Westbury, N.Y. 1988, 1132, 1133: "... [T]here is no customary international law imposing duties and creating correlative rights [in hypothetical cases of economic injury cited in the text] ... Except for the increasingly disputed nationalization area [involving expropriation of property of aliens] ... and some rules about the trading rights of neutrals in pre-UN wars — rules that in World War I and II were not followed because the enemy continued to breach closely related rules — the rules of the international legal systems as to economic activity are found in international agreements."

[8] *See* text accompanying notes 123-133.