

# BESPRECHUNGSAUFSÄTZE

## The Changing Structure of International Economic Law

On a recent book by P. VerLoren van Themaat<sup>1</sup>

»It is of the essence of legal thinking . . . that the lawyer strives to make the whole system consistent«

F. A. v. Hayek<sup>2</sup>

From 1974–1978, a group of 15 international lawyers from the Universities of Utrecht and Leyden under the direction of P. VerLoren van Themaat and with the assistance of J. Tinbergen and other economists undertook a comprehensive research project on the legal changes of the International Economic Order (IEO). The first part of this project was published in 6 volumes in 1977 under the title »Studies over Internationaal Economisch Recht«. It comprised, inter alia, 29 individual studies of International Economic Organizations (IEOrg.) and of selected problems of the IEO which, in the analysis of the organizations, used a uniform scheme of comparative legal analysis based on subdivisions relating to »objectives«, »scope of operation«, »institutional characteristics«, »characteristics of substantive law« and »relation to other organizations«. The second part of the project was written by VerLoren van Themaat and first published in 1979 under the title »Rechtsgrondslagen van een Nieuwe Internationale Economische Orde«. The English edition, which corresponds to that of the original Dutch text with a few additions, was published in 1981 under the title »The Changing Structure of International Economic Law« and can be understood without knowledge of the voluminous first part of the study. It represents the most systematic comprehensive effort at elaborating a general theory of IEOrg. and of International Economic Law (IEL) since

Abbreviations: Es = European Communities; GATT = General Agreement on Tariffs and Trade; IEL = International Economic Law; IEO = International Economic Order; IEOrg. = International Economic Organizations; LDC = Less Developed Country; MTN = Multilateral Trade Negotiations 1973–1979; NIEO = New International Economic Order; TNE = Transnational Enterprises.

- 1 *Pieter VerLoren van Themaat*, *The Changing Structure of International Economic Law*, T. M. C. Asser Institute/The Hague, and *Martinus Nijhoff Publishers/The Hague, Boston, London*, 1981, 395, US 72.—
- 2 *F. A. v. Hayek*, *Law Legislation and Liberty*, Vol. I, 1973, p. 66.

the earlier works by G. Erler,<sup>3</sup> G. Schwarzenberger,<sup>4</sup> J. H. Jackson,<sup>5</sup> Carreau/Flory/Juillard<sup>6</sup> and Bollecker-Stern/Dahan/Kopelmanas/Blanc/Rigaux.<sup>7</sup> At the same time, it also contains a most valuable contribution from a historical, systematic and comparative legal viewpoint on law to the ongoing discussion about a New International Economic Order (NIEO).

## I. The Problems to be solved

The study begins with an analysis of the »problems to be solved and the state of their academic discussion at the start of the study« (Chpt I). It first describes the multilateral attempts since 1945 to achieve trade liberalization simultaneously with a well-ordered monetary system and development financing in a framework of worldwide, transcontinental and regional economic organizations. The development of new and often interrelated problem areas such as shortages in the supply of energy or food, environmental pollution or the law of the sea, which often cannot be solved by market mechanisms alone due to the existence of »market imperfections« nor at a purely national level because of their transnational nature, raise fundamental legal questions:

- a) On what common foundation can new worldwide economic and legal rules and an adequate political legitimation of international decision-making processes be based in a world composed of more than 170 sovereign states with different degrees of economic development and divergent national economic and legal systems?
- b) How to deal with the increasing tension between national and IEL resulting from the increase in national policy objectives and interventions of modern welfare states, on the one side, and from the simultaneous limitation of effective national sovereignty due to international economic interdependence, on the other side?
- c) How to replace the old system of the hegemony of one country (Great Britain during the 19th century, the USA after 1945) or of convergent objectives of certain core countries (the last years before 1914) by a system of convergence between more than 170 countries of at least three main types: the OECD countries, the communist countries and Less Developed Countries (LDCs)? To what extent can the achievement of an economic and legal world order be facilitated by the interposition of organizations of a limited scope (*ratione materiae* or *ratione personae*) whose development may be enhanced by greater homogeneity of the economic, political and legal systems of their member states?
- d) How to cope adequately with the interdisciplinary character of the new problems and with the problem of the »limits to growth« that question the simple growth objective as one of the basic assumptions of the old world economic system, after other basic

3 G. Erler, *Grundprobleme des Internationalen Wirtschaftsrechts*, 1956.

4 G. Schwarzenberger, *The Principles and Standards of International Economic Law*, RdC 1966 I, pp. 1-98.

5 J. H. Jackson, *Legal Problems of International Economic Relations*, 1977.

6 Carreau/Flory/Juillard, *Droit International Economique*, 2. A. 1980.

7 Bollecker-Stern/Dahan/Kopelmanas, *Droit Economique*, 1980; Blanc/Rigaux, *Droit Economique II*, 1980.

assumptions of this system had already been undermined in theory and in practice (e.g. monopolistic competition, Keynes' theory)? To what extent can problems such as the welfare gap between rich and poor countries or the population growth in LDCs be adequately solved by relying on market forces?

e) To what extent have private individuals and Transnational Enterprises (TNEs) to be recognized as legal subjects of rights and duties under public international law?

f) What are the necessary institutional structures, decision-making processes, distribution of powers and optimal legal and quasi-legal instruments for dealing with the mutually interdependent problem areas?

The specific objectives and problem areas of an NIEO which have been almost universally recognized in numerous UN resolutions, are listed as follows:

1) The liberalization of international trade based on general and equitable rules of conduct which take into account the interests of LDCs.

2) A reliable international monetary system, attuned to the general economic objectives.

3) The development of LDCs and the guaranteeing of a minimum standard of basic needs.

4) The question of the supply of energy and raw materials, taking into consideration the interests of producing and of consuming countries.

5) The population question.

6) The protection of the environment.

7) The problem of food supply.

8) The ocean regime.

9) The control of TNEs and of international cartels.

10) The coordination of economic policies and of IEOrg.

The field of law that was studied – »International Economic Law« (IEL) – is defined as »the total range of norms of public international law with regard to transnational economic relations« (p. 9). With a few exceptions, national public law and private law with regard to transnational economic relations are left out of consideration in this definition mainly because the nature of the problem areas studied require international norms for which national norms are only part of the totality of facts that are to be regulated by public international law. It is also pointed out that private and public national law must be interpreted primarily within the context of national concepts of law: »Thus the unity of interpretation is lost if the norms of national and public international law are treated together with regard to the problem areas« (p. 11). Only to the extent that the solution of the more detailed regulation of particular problems can be delegated to national and private law, does the study devote some attention to those systems of law. Other limitations of the study result from the definition of »International Economic Organizations« (IEOrg.) which, for practical purposes, is confined to »any lasting form of cooperation in the economic field between at least five countries, which is based directly or indirectly on one or more treaties of public international law« (pp. 12, 25, 381).

In analyzing the investigated field of IEL, it is rightly pointed out that »no general

theory of international economic law has yet been fully developed« (p. 13). The following systematization of IEL is suggested:

- 1) General bases or starting points of the IEO (i. e. coexistence and economic interdependence of economically sovereign units, the measure of freedom of transnational economic transactions, of communication and freedom of the sea).
- 2) Basic principles of substantive economic law, in particular the seven classical standards of international treaty practice which have been analyzed by G. Erler and G. Schwarzenberger: the principle of reciprocity; the principle of equal treatment between foreigners and nationals; the most-favoured-nation principle; the open door principle (particularly in connexion with dependent areas); the principle of preferential treatment; the principle of equity or fair treatment; a minimum standard for those cases where the other principles do not apply.
- 3) The further regulation of the control over natural resources, investments and international economic transactions.
- 4) The IEOrg.
- 5) Settlement of disputes between states.

While modern national public economic law really came into being only during the 20th century, the historical development of IEL originates as long as the 12th century. The importance and the inherent logic and dynamics of this long historical development of IEL are illustrated by the gradual development of the basic principles and classical standards of IEL which are, by and large, variations of principles of formal or substantive equality aimed at achieving greater liberalization of international trade. Economic sovereignty, the coexistence and »sovereign equality« of states, and the actual extra-territorial effects of national economic government interventions – in contrast to their territorially limited juridical effects due to the principle of territorial sovereignty – are mentioned as further structural principles of the IEO. An essential value of the principles and standards lies in their universal applicability independent of particular economic systems: They can be reconciled with divergent economic systems and do justice to both the need for international cooperation based on interdependence as well as to the diversity of national economic and legal systems. The principles and standards of substantive IEL show a remarkable line of continuity and of gradual evolution from the Middle Ages up to the present law of IEOrg. such as GATT or the EEC which have developed further variations of these principles. In particular the most-favoured-nation clause, which is to be found in many international trade agreements since the treaty between England and Burgundy of 1417, contributed to the coordination and liberalization of national trade laws and to the gradual coming into being of a multilateral trading system.<sup>8</sup> Since the negative experiences with monopolistic competition and with nationalistic economic regulation between the two world wars, it has become universally

<sup>8</sup> See also: *E. U. Petersmann*, Principles of World Trade, in: *R. Bernhardt* (ed.), Encyclopedia of Public International Law, Instalment 8 (1984).

recognized that many objectives of national economic policies can no longer be achieved without multilateral agreements and IEOrg.

The focus of the study on IEOrg. is explained, inter alia, by the fact that the problem areas of a NIEO largely coincide with subjects covered by IEOrg. The need for effective coordination of activities in the various problem areas requires recognition of common objectives and principles by states in spite of their divergent political, economic and legal views and national systems. The study addresses in particular the question: »what contribution can legal theory make to the development, reform or supplementing of international economic organizations into a coherent system of international economic organizations so that it can achieve in the best possible way the main objectives« (p. 26)? The study methods used include the history of law, comparative law and the systematic analysis of law. A central task is considered to consist in »the elaboration of the relationship between ends and means into a theory of optimal differentiation of juridical instruments and their application to the particular problems of a system of states, which in principle are sovereign, as the most important subjects of international economic law« (p. 27).

The review of the state of the literature confirms the absence of a »general theory of international economic law« (p. 28) or of a »law for international organizations, in the sense of a general law, that regulates the structure, authority and activities of the many specific organizations. Each organization has its own institutional law« (p. 29). Reference is made to G. Erler's analysis of the erosion of the traditional principles of sovereignty and equality in the law of international organizations resulting from the transition from unanimity to majority decisions, from equal to power-weighted voting, from formal equality to substantive justice, from advisory conferences to controlling secretariats, the taking into account of non-governmental interest groups with regard to decision-making, and the direct legal effects of certain legal acts of international organizations for the subjects of participating states. The nature of international organizations is described as an agreed matrix for the multilateral pursuit of national interests and policies in an interdependent »multi-state system«. The study describes five functions of international organizations which are usually distinguished in the literature: »clearing house« and »fact finding« functions; quasi-legislative functions (drawing up international conventions and recommending on national actions); operational functions; elaborating and administering regulations; and supervisory functions. As regards the institutional structure, six types of organs are commonly distinguished in the literature under different names: the »general assembly«; the board type »council« which a limited composition; the »secretariat«; specialized organs; interparliamentary organs; and judicial organs. Decision-making in international organizations can be classified according to whether decisions or resolutions are legally binding and are arrived at by unanimity, consensus or majority vote. The administrative and operational expenses of international organizations are traditionally financed by contributions from the member states or, as in the case of international financing organizations and the European Communities (EC), by income from own means or international loans.

## II. The existing system of International Economic Organizations

Chapter II on »The existing system of International Economic Organizations« (pp. 67–220) aims at investigating, amongst other things, the extent to which the existing pattern of organizations needs to be changed so as to make a maximum contribution to the solution of the existing problems confronting the IEO. The chapter follows the uniform scheme of analysis applied in the individual studies. It examines objectives, scope of operation, institutional characteristics, basic principles, instruments of intervention, conflict-solving procedures of IEOrg., the relations between the existing IEOrg., and the question whether these various elements form a coherent system which is also consistent with the economic, political and legal systems of member states.

The close connection between the objectives and scope of operation of IEOrg., on the one hand, and the economic and political infrastructure of their member states, on the other hand, is analyzed and illustrated by various case-studies. For example, the centralized national economic planning in COMECON member states requires national common ownership of the means of production and inevitably leads to emphasis on national economic sovereignty which excludes legally binding majority decisions by international organizations with regard to subject matters regulated by national central planning. The market economies and parliamentary democracies of EEC member states are reflected in EEC law in permanent legal guarantees for the »5 economic freedoms« (in trade, services, movement of persons, payments and capital), in the European competition law, the independent supranational Commission and parliamentary and judicial Community organs, as well as in the fact that countries without a parliamentary democracy are excluded from membership. In regional organizations among LDCs, the less-developed economic and political infrastructure (e.g. little mutual trade, political and legal instability) often lead to a fragile legal and institutional suprastructure of these economic organizations which could almost never fully achieve their objective of a free-trade area, customs union or common market. Differences in organizations' structures, powers and instruments are thus largely explainable in terms of differences in the national infrastructure (e.g. degree of development, economic and political system, homogeneity and interdependence of national systems). The mainly financial instruments and rather technical nature of international financial organizations permit a membership with extremely divergent economic structures and systems.

The need for IEOrg. derives in particular from the necessity to coordinate the external effects of national economic interventions and to address a number of problems which – because of their transnational nature – can be satisfactorily solved only by international cooperation. The existing IEOrg. are classified into multilateral systems without implementation organs (e.g. Law of the Sea Conventions 1958/60, Code of Conduct for Liner Conferences 1974), intergovernmental organizations without any form of permanent secretariat (only found in case of cooperation between two countries), intergovernmental organizations with a permanent secretariat (but purely intergovernmental decision-making processes), and organizations with organs with independent powers of

their own. Nearly all existing organizations with more than two member states belong to one of the last two categories because even the mere exchange of economic information between more than two states requires a permanent secretariat. Only the most developed organizations dispose of judicial and parliamentary organs and of independent powers to pass substantive executive decisions directly binding member states and, in some cases, their nationals. Independent policy powers and majority decisions appear to occur more frequently in the rule-oriented application of the principles of a market economy than in more discretionary economic steering measures or in the elaboration of international »legislation«. However, »the general picture with regard to the function of executive organs is so varied that it is difficult to generalize about their development« (p. 119). The analysis of the formation, legal instruments and decision-making processes of the various organs reveals various legal and institutional tendencies: a trend to unanimity or consensus in the adoption of binding international regulations and of economic steering measures; a proliferation of subsidiary and auxiliary organs dealing with the international coordination of national steering measures with external effects; the emergence of independent judicial organs as well as of parliamentary organs with powers of their own; the increasingly varied character of the legal instruments used, including three main legal variations of a principle of solidarity (obligations to prevent adverse external effects of domestic policies and to take into account the interests of other states or their nationals, to grant mutual aid to overcome temporary or structural economic difficulties, and to cooperate for the sake of coordination of national economic policies to the extent that these have external effects); or the considerable increase in the direct effects of international measures benefiting private citizens. It is rightly pointed out that the legal and institutional differences cannot satisfactorily be explained by a purely legal theory (pp. 145, 332).

In the analysis of IEOrg. from the point of view of substantive law, a distinction is made between basic norms that are in principle permanent and usually of a qualitative nature, and steering instruments which are rather of a temporary nature, changeable and often concerned with quantitative developments. The permanent basic norms in the law of GATT, the IMF and of customs unions and free-trade areas are largely derived from the classical standards. In particular, the increasingly frequent application of the most-favoured-nation clause in bilateral treaties contributed to the progressive transition from preferential trade arrangements to a multilateral trading system and to the setting-up of international trade organizations; GATT is insofar described as »the logical conclusion of the centuries-old most-favoured-nation clause« (p. 333). The old principle of preferential treatment among limited groups of countries continues, however, also to be recognized in the GATT exceptions in favour of customs unions and free-trade areas (Art. XXIV). It is rightly emphasized that »the development of the classic standard norms has not advanced further anywhere than in the European Communities« (p. 150) where the permanent basic norms and their implementation provisions also lead to directly applicable individual rights and obligations. In the EC, the principle of reciprocity has become superseded by a large number of directly applicable rights and obli-

gations which exclude the invocation of another member states' non-compliance with treaty obligations as a justification of one's own non-compliance. The classical principle of national treatment (cf. Arts. III GATT, 7 EEC-Treaty) has been further developed into rights and freedoms with regard to trade in goods, services and factor movements within the EEC and to the harmonization of competition conditions through Community legislation. Legal variations of principles of substantive equality and of solidarity are expressed in various norms prescribing common economic policy objectives (Art. 104), the taking into account of common interests (Arts. 103, 107), the granting of mutual economic assistance and of regional and social aids (Arts. 108, 123–128, 130), as well as in various obligations to cooperate (Art. 5) and to coordinate national economic policies (Art. 6).

Another important observation is that, in accordance with the historical development of the classical standard norms, binding basic norms of substantive law occur in IEOrg. most of all in connection with the aim of liberalization, whereas organizations primarily aimed at coordinating national economic steering policies have only few permanent substantive basic norms, apart from procedural and institutional rules (p. 155). In most cases, international measures aimed at steering the economic policies of states go no further than the exchange of information, consultation procedures, indicative plans or objectives, and financial steering instruments. Inversely, common policies may lead to norms granting rights or imposing obligations not only for states but also for enterprises and individuals. However: »Basic norms of substantive law play no role at all in the relations between state trading countries« (p. 156). The pattern of IEOrg. increasingly reflects a mixed economic order: »a mixture of, on the one hand, a market order aimed at the liberalization of trade and at equal opportunities for competition and, on the other hand, coordinated planning or intervention« (p. 336).

With regard to the regulatory measures used in IEOrg., the study concludes »that the legal nature of the instruments used in the international steering or adjustment of the market mechanism hardly seems to differ fundamentally between the international economic organizations that were studied. Exactly the same main types of instruments are found in the most highly developed organizations with a national infrastructure predominantly based on a market economy, and in the most developed organizations with an infrastructure that is predominantly based on planning« (p. 336). The following types of steering instruments are distinguished and described for the various organizations (pp. 157–185): exchange of informations; consultation procedures and indicative advice and planning; financial incentives and conditions attached to it; substantive or procedural binding norms of permanent or limited duration. There are, however, important differences in the modalities of application of the various instruments in particular with regard to binding norms: For example, common policies and supra-national binding regulations, directives and decisions which are typical of the EC, do not occur in COMECON, OPEC and most regional organizations of developing countries where they are replaced by contractual methods of coordination, by non-binding resolutions or binding national implementing decisions.



As regards settlement of disputes, the various types of international disputes between organizations, states and private subjects, as well as the various types of dispute settlement procedures, are described. Since the experience within the EC has clearly demonstrated that a well-organized independent judiciary can offer valuable legal protection in particular to smaller member states and individuals and can promote an ongoing integration process, it is rightly pointed out that »the developing countries would also be well served by an independent judiciary in a new international economic order« (p. 338).

In concluding Chapter II, it is convincingly shown that all substantive legal characteristics of existing IEOrg. can be reduced to principles of freedom (for states and often also for their nationals), principles of equality (with many formal and substantive variations), and principles of solidarity (with three main variations). The complementary and dialectic relationship between these principles is illustrated by the contribution of the most-favoured-nation clause to the multilateralization of trade liberalization and to the setting-up of international trade and monetary organizations. The decisive breakthrough was the transition from the conditional to the unconditional most-favoured-nation clause (p. 191). Since then it became more rational to start negotiating about further-reaching liberalization measures in a multilateral context as well. It was only in this multilateral context that all the effects of trade liberalization could be reviewed and a number of specific multilateral trade problems could be dealt with such as subsidies, cartels and other market distortions. The multilateral cooperation and coordination of trade policy measures induced governments to agree on permanent legal framework agreements and institutions such as the GATT. The multilateral liberalization of trade in goods also required an international payments and monetary system providing for the free flow of payments on the trade transactions and for predictable exchange rates. Since the gold standard had lapsed, the necessary monetary complement to the international trading system could no longer be assured without international monetary organizations dealing with exchange rates, foreign exchange restrictions, balance of payments and international liquidity.

The bilateral treaty principles of freedom, of most-favoured-nation treatment, national treatment or preferential treatment thus developed into multilateral treaty law and into international organizations. The gradual extension of economic freedoms was supported by the many variations of the principle of equality and reinforced the economic interdependence of countries which necessarily led to the development of principles of solidarity in various forms. The principle of solidarity, for example in the form of preferential treatment of LDCs or of monetary assistance to overcome balance-of-payments difficulties, again supports the maintenance of economic freedoms and equality. Since the internal dynamics of these three basic principles of IEL are considered to be able to explain the legal development of the IEO over the last seven or eight centuries and seem to be suitable for further development, the »elaboration of the three principles into an economic constitution or even a charter of the economic rights and duties of states and their subjects seems to be possible« (p. 197). It is, however, also pointed out

that, while the development and various forms of the principle of solidarity and of the steering instruments used in IEOrg. reveal parallel developments in the law of many organizations, there are still considerable differences among the views of developing, developed and communist countries with regard to state sovereignty, individual freedoms and the various legal modalities of substantive equality and solidarity.

As regards the relations between the existing IEOrg., various shortcomings in the scope and territorial area of operation of the existing organizations as well as overlaps and potential conflicts are described. In respect of the 10 problem areas of the IEO that appear to need legal regulations at a world level (see above Chpt. I), the study concludes »that all the problem areas are currently dealt with at a world level, but in most fields no effective solutions have yet been achieved« except »with regard to the regulation of international trade and the international monetary system, even though a lot remains to be done also in these fields« (p. 201). The territorial area of operation of various international organizations is also considered »totally inadequate« (p. 202).

### **III. Inherent shortcomings and legal principles for their solution within the existing system of International Economic Organizations**

Chapter III on »Inherent shortcomings and legal principles for their solution within the existing system of International Economic Organizations« considers interactions between the objectives, scope of operation, institutional and substantive legal characteristics and, in particular, between ends and means in existing IEOrg. For example, a customs union must lead to a common external trade policy. During the transitional period for the establishment of a common market within the EC, a liberalizing integration method (free movement of goods, services, persons and capital, common competition law) was considered necessary also in order to ensure the international coordination of decisions of governments and of private economic actors through market mechanisms in view of the insufficient economic policy powers of the Community institutions. Binding international steering decisions with consequences for the entire national steering policy usually cannot be taken without the agreement of the authorities responsible for the national steering policy.

On the basis of the various horizontal and vertical relationships described, the following schematic structure for a general explanatory theory of the law of IEOrg. is proposed (p. 228):

»a) starting points or infrastructural principles (the existence of sovereign states; the extent of the freedom of decentralized decision-making and the extent of the recognition of enterprises' and citizens' own rights and duties with regard to economic transactions relevant at an international level; the extent of economic interdependence of states);  
b) general and specific objectives which have to be achieved through international economic law and, in connection with this, the scope of operation of international economic organizations;

- c) the basic norms of substantive law of freedom, equality and solidarity (for states and their subjects) and the problem of their application;
- c) the legal steering instruments necessary for achieving the general and specific objectives;
- e) territorial and personal area of operation and the institutional structure necessary to achieve the general and specific objectives;
- f) settlement of disputes and other problems (including gaps) in the relationships between organizations (the problem of coordination);
- g) the settlement of disputes in other relations.«

It is pointed out that the most important basic option, for which there is a considerable margin of freedom, relates to the emphasis that is put on the principles of freedom and equality for nationals and enterprises, on the one hand, and for states, on the other hand (p. 340). Following the proposed scheme of analysis, various important shortcomings of the existing international economic legal order are set out (pp. 230 ff., 340 f.), including:

- 1) As to the »infrastructural principles«, the starting point of national sovereignty is still too absolute, and many states do not recognize internationally protected rights and obligations of enterprises and citizens in the economic field.
- 2) Flaws with respect to objectives and scope of operation are revealed by the too fragmented and too one-sided way in which the 10 main problem areas of an IEO are dealt with.
- 3) Flaws in the substantive basic norms of freedom, equality and solidarity are shown with respect to the insufficient international protection of individual economic freedoms and with respect to the necessary further extension of international legal principles of substantive equality and solidarity (e. g. obligations to prevent adverse external effects of domestic policies).
- 4) The bearing of international steering instruments on national policies of member states needs to be strengthened, and financial incentives should be used more extensively as a steering instrument.
- 5) The territorial scope of operation of many organizations shows serious gaps. The financial means of many organizations are inadequate for carrying out their tasks properly. Additional regional organizations are needed which can come up with more effective arrangements for many problem areas. The personal scope of operation of many organizations should be extended to the nationals of member states who will have to be accorded rights and obligations.
- 6) The coordination problem has not been satisfactorily resolved even within the UN.
- 7) There are also large gaps in the arrangements of IEOrg. for the settlement of disputes.

Various possible solutions for dealing with these shortcomings are discussed (pp. 235–257) which conclude »that the centre of the problem lies in the further development of the principle of solidarity« (p. 235). The internal and external exercise of state sovereignty will have to be further limited so as to prevent and control national measures with disadvantageous external effects for other states, adverse governmental market

distortions, or internal interferences with individual rights. Economic freedoms, equal conditions of competition (including preferential treatment of LDCs) and the various legal variations of the principles of substantive equality and of solidarity should be further developed in the law of IEOrg. Various improvements in the legal steering instruments, in the scope of operation and institutional structure of IEOrg. are suggested such as, for example, the incorporation of GATT and UNCTAD in one single international trade organization covering the whole world (p. 249), more effective coordination and dispute settlement procedures.

#### **IV. The Charter of Economic Rights and Duties of States**

In Chapter IV, the Charter of Economic Rights and Duties of States of 1974 is analyzed using the same scheme of IEL as in the preceding chapters. The lack of a clearly defined system and the only incomplete indications with regard to objectives, steering instruments, institutions and dispute settlement procedures are criticised: »Neither the Charter nor the two other UN resolutions of 1974 provide a clear presentation of a new order. An ›order‹ should, after all, be characterized by a coherent system of starting points, objectives, principles and institutional and instrumental means that can achieve the formulated objectives and principles in an orderly fashion, and the inherent dynamics of the system should be apparent for this purpose. However, these three documents are too full of gaps, contradictions and weaknesses to comply with this elementary definition of an ›order‹ « (p. 264).

Some important problem areas such as the international monetary system, the control of international cartels, or the energy and food problems are not dealt with in the Charter. As regards legal principles, central provisions such as those on permanent sovereignty over natural resources and nationalization (Art. 2), the right to associate in organizations of primary commodity producers (Art. 5), or on the indexation of import and export prices of LDCs (Art. 28) did not meet with the approval of major western developed states. In particular, the emphasis on internal and external sovereignty appears hardly realistic in view of the actual worldwide economic interdependence and the many redistributive demands by LDCs. The existing IEOrg. and additional institutional means, steering instruments, coordination and dispute settlement procedures necessary to implement the Charter objectives hardly receive any attention in the Charter. It is also rightly pointed out that the Charter remains behind legal standards in the law of some existing IEOrg., for example with respect to the legal protection of »fair competition« (cf. Arts. VI, XVI, XVII GATT) or of individual rights.

Chapter IV also depicts »the painful lack of a coherent counterproposal from the Western side. This is particularly painful because . . . the existing international economic order is in need of considerable changes and additions from a Western point of view as well. It is no longer capable of achieving either the old or the new objectives of the Western countries in an efficient manner and in accordance with the fundamental Western ideas of both national and international law« (p. 342). Chapter IV concludes

with a detailed survey and critical assessment of the legal literature on the Charter of Economic Rights and Duties of States and the proposals for an NIEO.<sup>9</sup>

The legally non-binding character of the Charter is generally recognized in the literature and is seen as an advantage rather than as a weakness for future legal reforms of the IEO.

## V. Summary and conclusions

Chapter V summarizes the main results of the study and presents a number of legal considerations about the possible further legal evolution of the IEO. Comprehensive counterproposals for the Charter of Economic Rights and Duties of States are explicitly not attempted since, inter alia, »the content of an »international economic constitution« cannot be determined by legal theory alone« (p. 342).

While the existence of sovereign states has still to be considered as an important starting point of the IEO (p. 343), it is assumed that the actual increase in economic interdependence of states will require the legal recognition of additional limitations of the exercise of sovereign rights of states, of additional partial transfers of sovereign rights to international organizations and of obligations to international solidarity in various forms. With regard to the »infrastructural principles«, an important and characteristic legal feature is seen in that »the private ownership of means of production is not protected in any international economic organization« and that Art. 222 of the EEC Treaty, as the establishment treaty of the currently most developed IEOrg., »illustrates the fact that even states geared to a market economy accept that the law relating to ownership is a matter for national law« (p. 344).

The objectives and problem areas of IEL that need further legal regulation, are considered to deserve a more systematic recognition and periodic review, since they determine the substance of the basic legal norms, the choice of effective steering instruments and the institutional structure of IEOrg. From the legal structure of the 10 identified problem areas of the IEO (see above) it is concluded that – with an eventual exception for the universally recognized objective of trade liberalization – a free market mechanism alone with permanent legal framework rules cannot solve them. An NIEO will therefore have to be a mixed economic order based on market mechanisms, general rules, discretionary interventions or planning.

As regards the basic legal norms of freedom, equality and solidarity and the problems of their application, the central place of the principle of »sovereign equality of states« continues to be justified, inter alia, »because the principle underlines the pluriform nature of economic, social, cultural and political systems which ought to form an essential starting point of a new international economic order« (p. 346). This should, however, not hinder the necessary legal restrictions of the exercise of state sovereignty.

<sup>9</sup> For a survey of the most recent literature see also: *E. U. Petersmann*, Charter of Economic Rights and Duties of States, in: *R. Bernhardt* (ed.), *Encyclopedia of Public International Law*, Instalment 8 (1984).

In particular, »the right of enterprises, persons and groups of persons to self-determination will particularly need to be developed further« (p. 347). It is suggested that acceptance of a general obligation of states to ensure certain minimum rights for a decent human existence of their subjects would be facilitated by recognition of a complementary right to international aid when national resources are exhausted. Legal principles of substantive equality are increasingly recognized as necessary complements to the liberalization of trade and of production factors and for ensuring equal conditions of competition. Legislation with an influence on the competition conditions will need to be further harmonized. The main rationale for legal differentiations in favour of LDCs or of less-developed regions is also seen in considerations of substantive equality. The primary concern of the three main variations of the principle of solidarity in the law of IEOrg. »is to reconcile unequal economic situations with each other, while respecting divergent policy objectives of the states« (p. 351). Chapter III gives a survey of 16 actually used legal techniques and conceivable ways in which the principle of solidarity might be elaborated in more detail.

Various additional principles are proposed for an elaboration of a legally non-binding »Charter of Economic Rights and Duties of States and of their nationals«. It should contain »an obligation for all states to take into account the interests of other countries and their nationals and in particular to prevent, repair or compensate for any harmful effects arising from their measures of economic policy for other states or their nationals. Further rules for this would have to be made by each of the international economic organizations within their own area of competence« (p. 352). Another suggestion is to add »an obligation for all states to cooperate within the context of international economic organizations and particularly within the context of the United Nations on the ten problem areas mentioned earlier and to further elaborate and adapt the basic substantive norms in relation to these« (p. 352). Since the final objective of an NIEO is described in terms of the prosperity and basic needs of mankind and since non-governmental economic actors often have a greater influence on the international economic process than states, it is also suggested »that a charter of economic rights and duties should not only be concerned with states but also with enterprises and other nationals« (p. 353). It is pointed out with good reasons in this context that »the developing countries' idea that this would put multinational enterprises on a par with states seems to be based on a misunderstanding« (p. 353). A Charter of Economic Rights and Duties which intends to contribute to fundamental changes in the IEO, should also mention the legal steering instruments, institutional principles, coordination and dispute settlement procedures which are necessary to achieve the pursued objectives (cf. pp. 354–459). As an alternative to the unsystematic structure of the Charter of Economic Rights and Duties of 1974, which resulted in numerous gaps and contradictions, a new systematic structure for a »Charter of Economic Rights and Duties of States and their Subjects« is proposed (pp. 360 f.). Alternative solutions for substantive legal principles (pp. 361–366) and possible variations of a new international organization pattern (pp. 367–375) are pointed out in detail.

## VI. Some concluding comments

VerLoren van Themaat's book presents the most extensive analysis of public IEL undertaken until now and, at the same time, contains a very comprehensive Western contribution to the worldwide discussions and ongoing negotiations on legal reforms of the IEO. The historical, systematic and comparative legal methods used show that legal theory has to make an important contribution to the negotiations on a NIEO and that the elaboration of legal principles and rules for the main 10 problem areas of an NIEO can build on centuries of legal experience accumulated in all parts of the world. The difficulty in fully grasping the wealth of analyses and suggestions is due in part also to the commendable effort of the book to show that there are many conceivable variations of substantive, procedural and institutional law for reforms of the IEO. The ultimate conclusion of the book is a positive one: »centuries of experience show that despite seemingly catastrophic blows, the international economic legal order is nevertheless developing slowly but with increasing speed. The progress in the last five decades . . . has been greater than the progress made in the five preceding centuries« (p. 375).

The research method applied – i. e. the confrontation of the results of a historical, comparative and systematic legal analysis of the development of public IEL in general, and of the experience of existing IEOrg. in particular, with the main 10 economic and political problem areas of an IEO and with the various UN-resolutions for an »NIEO« – appears promising for the elaboration of a more consistent legal theory of IEO and of IEL. It has shown that, in a world composed of more than 170 sovereign states with interventionist national economic policies, an economically efficient and politically equitable IEO is no longer conceivable without an international legal order based on a coherent system of legal principles, rules and institutions. The method of the research project – despite its comprehensiveness which almost surpasses the capacity of an individual researcher – may nevertheless be criticized as being incomplete in particular for two reasons:

First, in view of the highly decentralized legal structure of the IEO it seems indispensable to take into account more fully private law and national public law so as to study in greater detail the fundamental problem of the »optimal level of legal regulation«, namely the questions to what extent private law and public national law can provide more efficient decentralized regulatory means for the various problems of the IEO at the level of private law or state law instead of public IEL. The global transformation of the world economy due to the emergence of more than 10 000 TNEs which manage vast economic resources through globally integrated corporate strategies transforming over a third of world trade and finance into »intra-corporate business«, as well as the increasing recourse to legally nonbinding »codes of conduct«<sup>10</sup> for the regulation of TNEs, of restrictive business practices or of international transfer of technology illustrate the

<sup>10</sup> For a survey of the numerous international »codes of conduct« see: *E. U. Petersmann*, Codes of Conduct, in: *R. Bernhardt* (ed.), *Encyclopedia of Public International Law*, Instalment 7 (1984).

importance of private law and public national law for the regulation of the world economy. The necessary rethinking of the relations between legal principles of freedom, of formal and substantive equality and of solidarity (for states and non-governmental actors, respectively) is also not possible without taking into account the individual freedoms and property rights guaranteed, in particular, in the national constitutional laws of the 24 OECD states which account for more than 60 % of world trade and in which most TNEs are incorporated. Certain problems areas of the IEO, such as the control of the Euro-money markets or the rapid population growth in LDCs, have proven to be hardly accessible to binding regulation at the level of public IEL. The paradox that almost all states agree on the economically harmful effects of trade protectionism and have subscribed to detailed rules on trade liberalization on the level of public IEL but continue to give way to protectionist pressures, can also be largely explained in terms of national law, in particular by the bias in national decision-making procedures about trade and by insufficient legal rules at the national level for safeguarding the national interest in trade liberalization against protectionist pressures from »rent-seeking« interest groups.<sup>11</sup>

Second, the economic functions, effects and rationale of most rules and institutions of IEL cannot be ascertained without taking into account economic theory. For example, the economic theory of »optimal intervention« has demonstrated that trade restrictions almost never constitute »first best policies« for promoting full employment, monetary stability or industrialization, and that government interventions in the economy can be made more efficiently by internal measures without foregoing the gains from trade. Hence, GATT admits non-discriminatory internal regulations (Art. III) and production subsidies (Art. XVI) but proscribes non-tariff barriers to trade (Art. XI) and market-distorting export subsidies (Art. XVI) which are only in very exceptional situations a means to maximize a country's economic welfare. The function of international trade rules such as those of GATT is therefore less to reconcile conflicting national interests but to enable and induce governments to pursue economically efficient trade policies in their own economic self-interest. Likewise, the problems of antitrust law or of the legal regulation of other »market imperfections« (external effects, public goods) cannot be fully understood without economic theory. The interpretation and evaluation of legal principles and rules based on considerations of »substantive equality« or »solidarity«, or the appraisal of demands for stabilizing »just commodity prices« by means of inter-governmental commodity agreements, are influenced by perceptions of »social justice« which, in the economic field, necessarily depend on conceptions of the economic

11 On »Protectionism as a structural and legal problem« see: *E. U. Petersmann*, *Protektionismus als Ordnungsproblem und Rechtsproblem*, in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1983, pp. 478–501 (with an English summary). On »The Political Economy of the Rent-Seeking Society« and trade protectionism as a form of distribution of »protection rents« by state authorities see also: *A. O. Krueger*, *The Political Economy of the Rent-Seeking Society*, in: *The American Economic Review*, Vol. 64 (1974), pp. 291 ff.



efficiency and distributional equity of market mechanisms and of governments' capacity for deliberate steering and control of economic processes.<sup>12</sup>

VerLoren van Themaat's main argument for the narrow definition of »IEL« and for its separation from national economic law – that the contents of the norms of public national economic law are mainly determined by the objectives of national economic policy and their interpretation must primarily take place within the context of national concepts of law (p. 11) – does not appear compelling. States are increasingly aware that a well-functioning IEO has become a necessary prerequisite for the maintenance of their national economic order and that their national economic policy objectives can often not be achieved without their active participation in international organizations. Governments usually conclude international trade and economic agreements because they are perceived to be in the interest of the national economy as a whole. The economic and legal success and efficacy of GATT, for example, reside precisely in this coincidence of law and national interest: Since modern international trade theory and practice have amply shown that trade policy measures of the type proscribed by GATT are no suitable means for maximizing a country's economic welfare, acceptance of the GATT by states must be presumed to reflect an autonomous legal definition of their »national interest«. International trade rules influence national trade law and national decision-making about trade in many ways: they lay down rules ensuring the consistency between national trade policy and other governmental policies such as agricultural policy (e. g. Art. XI:2 GATT), monetary policy (Arts. XII–XV), development policy (Arts. XVIII, XXXVI–XXXVIII), »public policy« exceptions (Art. XX) or foreign policy (Art. XXI); they protect governments not only from economic power politics by other states but also from domestic protectionist pressures by enabling governments to invoke their international obligations, as well as the national interest in adhering to them, as grounds for

12 The many LDC-claims for international »social justice« by means of »just commodity prices« or by greater equality in results (e. g. increase in LDC's share in the world production of manufactured products up to 25 % by the year 2000) logically presuppose a belief in the possibility of social engineering and of governmental steering of the world economy, which most liberal economists consider unrealistic. Liberal economic theory views the relation between governments and private economic actors rather as one of a game-theoretical nature, in which private decision-makers influence and react to government policies in manifold and often unexpected ways. The formation and effects of economic policies are therefore considered rather as »invisible hand process« (Nozick) which generates also numerous unintended results. This applies in particular to the IEO in view of its decentralized economic and legal structures and the imperfect information processing system of intergovernmental coordination of national economic policies. Another basic assumption of claims for redistributive »international social justice« so as to ensure greater »substantive equality« in results – namely that »in the world as in nations, economic forces left entirely to themselves tend to produce growing inequality« (North-South, A Program for Survival, The Brandt Commission Report, 1980, p. 32) – is likewise rejected by modern liberal economic theory, according to which market competition and liberal trade generate an increasingly more equal distribution of income (see, e. g., the Stolper-Samuelson »factor-price equalization theorem«). From this it is often followed that liberal economic policies produce more economic growth and more equally distributed welfare than many redistributive governmental policies in the name of »social justice« which inhibit economic growth and often engender unintended or arbitrary distributive effects. For a discussion of this »freiwirtschaftlichen Grundannahme, daß der Markt grundsätzlich das sozialste Instrument der Güterverteilung ist«, from a legal point of view see, for example: *W. Fikentscher, Wirtschaftsrecht Band I – Weltwirtschaftsrecht und Europäisches Recht*, 1983, p. 6.

resisting demands by domestic interest groups for the granting of »protection rents«; liberal international trade rules also influence the »political market for protection« by promoting »rule-oriented« trade policies in the national economic self-interest, providing agreed normative standards for the appraisal of the benefits and costs of trade policy, and by discouraging governmental interferences in individual freedoms of trade.<sup>13</sup>

The fact that IEL in the wide sense (comprising private and public national and international economic law) cannot yet be presented as a coherent system resting upon a commonly accepted theoretical basis and that the various legal disciplines related to international economic relations often have different perceptions of the regulative functions of legal rules and institutions in international economic relations, must therefore not necessarily lead to the conclusion drawn by VerLoren van Themaat that »the unity of interpretation is lost if the norms of national and public international law are treated together« (p. 11). It may just as well be argued that the unity of interpretation and a coherent perception of the regulative purposes of economic law can only be achieved if legally binding public IEL is fully taken into account in the interpretation of national economic law and the scientific isolation of the various legal disciplines related to international economics is overcome.

An important consequence of the highly decentralized legal structure of the IEO seems to be that any intensive worldwide economic integration and a corresponding legal theory of IEO must necessarily be based on liberal principles.<sup>14</sup> From a liberal point of view, the principle of »Sovereign equality« of the more than 170 states and the

13 Modern economic and trade theory underline that economic agents can react to changes in economic conditions not only in the economic market (as producers or consumers) but also outside the market through lobbying, voting and other political activity. Politicians and bureaucrats condition these two kinds of responses and react to them. While traditional trade theory has been concerned mainly with the economic market behaviour and with advising governments (often viewed as benevolent and omnipotent dictators) on how to maximize social welfare, modern trade theory also takes into account the lobbying efforts and policy reactions. Starting from the assumption that voters and their elected representatives pursue also their own self-interest in the political marketplace just as they do in economic markets, producers and particular income groups are considered as demanders of protectionism seeking to maximize the income they can obtain by reducing imports; elected politicians are regarded as the suppliers of protection who seek to maximize their chances of election. Particular legal and trade policy problems arise from the various imperfections in this »political market for protectionism« which result in a bias in decision-making about trade in favour of sectional interest groups and to the detriment of the general consumer interests in liberal trade: information costs and other costs of registering general consumer interests in liberal trade through the political process; adjustment costs of import competition are concentrated on a few identifiable producers whereas welfare losses from protecting a particular industry are widely dispersed so that the loss to any one consumer is small; there are therefore much stronger financial incentives for an active role of producer interests in the formation of trade policy than for consumer interests; trade regulations are also one-sidedly directed at examining whether imports »cause or threaten serious injury to domestic producers« (Art. XIX GATT) without weighing the temporary adjustment costs against the much larger benefits that a nation gains from liberal trade; periodically elected governments also often prefer to shift the adjustment costs away from clearly identifiable producers to the general public which bears the protection costs only indirectly and individually less severe; consumers are more difficult to organize into effective liberal-trade pressure groups; protection may reflect broader collective goals such as industrialization or agricultural self-sufficiency.

14 See for this line of reasoning: E. U. Petersmann, *International Economic Theory and International Economic Law – On the tasks of a legal theory of International Economic Order*, in: *Macdonald/Johnston* (eds.), *The Structure and Process of International Law*, 1983, pp. 227, 240 ff.

coexistence of different forms of economic integration and IEOrg.<sup>15</sup> constitute rather an advantage protecting economic freedoms of states and of individuals and promoting competition, experimentation and decentralized information-processing. The assumption of many »NIEO architects« that the more complex a system is, the more planning it calls for, appears to have been refuted by the empirical evidence that the more complex social systems are, the less control governments have usually been able to exercise.<sup>16</sup> The history of economic »government failure«, for example in the steering of international agricultural, commodity or capital markets, bears witness to the liberal insight that international economic coordination through political negotiation cannot process and disseminate the economic informations of the millions of private economic actors as efficiently as decentralized markets continuously do and that private economic actors do not react to government policies in a »Pavlovian manner« but on carefully considered decisions of their own and in an often unexpected way.

Since the international economy will continue to function largely as a »rule-guided invisible hand order« resulting from a myriad of decentralized economic activities and decisions, the »rule-oriented approach« of the study and its focus on agreed principles – which are a prerequisite for the consistency of any social system – are to be welcomed. This applies also to the emphasis on the principles of »substantive equality« and »solidarity« which reflect important legal developments necessary for the maintenance of intensive international economic integration. Rule-oriented solutions to the perennial problems of »substantive equality« and »social justice« can also more easily be agreed upon over time than result-oriented redistributive conceptions of »just prices« or of cartelistic market-sharing agreements. A liberal and politically more realistic alternative to suggestions for new worldwide international organizations or for new universal IEL may consist in a »decentralized trial-and-error approach«, as it is characteristic, for example, of the gradually evolving »GATT-MTN-trading system« in which additional side-agreements on the liberalization of non-tariff trade barriers may first be concluded between a limited number of interested GATT member states willing to accept additional legal disciplines.<sup>17</sup> Since any trade advantage granted must be accorded imme-

15 See for a survey: *E. U. Petersmann*, Economic Organizations and Groups, in: *R. Bernhardt* (ed.), *Encyclopedia of Public International Law*, Instalment 8 (1984).

16 For a discussion of this problem see: *Cunningham*, *Liberty and the rule of law*, 1979, p. 294 ff. According to *F. A. v. Hayek*, our »necessary ignorance of most of the particular (facts). . . is the source of the central problem of all social order« (*Hayek*, *Law, Legislation and Liberty*, Vol. I 1973, p. 12). According to *Hayek*, the structure of modern society has become so complex not through a »grand design« and planned organization, but because it evolved as a spontaneous and largely self-generating order, the complexity of which defeats any systematic »constructive rationalist« control other than by general rules. The necessary ignorance and imperfect rationality of governmental economic steering is seen as a justification for decentralized economic freedoms and property rights which induce people to use resources and informations most productively and to bear the risk of losses incurred.

17 The freedom of states to engage in international treaties, including the conclusion of inter-se-agreements among a limited number of contracting parties to multilateral treaties such as GATT, results in a situation similar to a marketplace where international agreements are concluded among interested parties pursuant to offer and demand and successful arrangements may attract an increasing number of acceding states. On the »GATT-MTN-trading system« see: *Jackson*, *The Birth of the GATT-MTN-System: A Constitutional*

diately and unconditionally also to all other GATT contracting parties (Art. I GATT), the limited side-agreements may lead to a general trade liberalization and have induced an increasing number of states to accede to these agreements. For certain problem areas of the IEO, such as international cartels and monopolistic competition, it has been suggested that a »core countries approach« may be a viable alternative (e. g. coordination and extraterritorial enforcement of the antitrust laws of the major OECD states as an alternative means for controlling most international cartels instead of the hardly realizable aim of a worldwide competition law).<sup>18</sup> From a market-economy point of view, a desirable approach would consist in giving priority to improving the necessary economic and legal prerequisites for an economically efficient and politically acceptable international »social market economy« (e. g. protection of economic freedoms and property rights as a legal prerequisite of market competition, competition law as a legal prerequisite for the control of economic power, legal liability for adverse »external effects« as a legal prerequisite for dealing with »market imperfections«, preferential treatment of LDCs and redistributive mechanisms as a precondition for the political acceptability of an international market economy, etc.).<sup>19</sup>

While some of the reasoning and reform proposals of VerLoren van Themaat will not fail to meet with criticism – for example, the lack of a more precise legal definition of the often used term »principle«, the proposed setting-up of a new worldwide International Trade Organization incorporating GATT and UNCTAD, the proposals for »more effective coordination within the UN system . . . by making the specialized agencies partly financially dependent on the UN budget« (p. 253) or »through a right of binding directives given by the UN to the specialized agencies« (p. 374) –, his book contains one of the most thorough and stimulating studies of IEL which have been written by now. The lawyer interested in public IEL and in the legal aspects of a NIEO may therefore be advised (with a quotation from a book review written by G. Lichtenberg in the 18th century): »He who possesses two trousers sell one and buy this book.«

E. U. Petersmann\*

Appraisal, in: *Law and Policy in Int'l Business* 12 (1980), p. 21 ff. On the »GATT Plus Approach« see more generally: *GATT Plus – A Proposal for Trade Reform*, Atlantic Council of the United States, 1976.

18 On the problems of coordinating the national antitrust laws of OECD states see, for example, *J. Tumlin*, *The New Protectionism, Cartels and the International Order*, in: Haberler et alii (eds.), *Challenges to a Liberal International Economic Order*, 1979, pp. 239, 252. A decentralized »trilateral approach«, relying on »piecemeal functionalism« (i.e. promoting international cooperation by keeping the issues separate), »rule-making with decentralization« (i.e. designing international regimes as a framework of rules, standards and procedures with decentralized decision-making and operational management), »flexible participation« (depending on the nature of the problem and the degree of interest in its solution) and on »evolutionary change«, has been advocated in various reports of the »Trilateral Commission«, for example: *Bergsten/Berthoin/Mushakoji*, *The Reform of International Institutions*, 1976, pp. 5–6; *Cooper/Kaiser/Kosaka*, *Towards a Renounced International System*, 1979. For the NIEO, the emphasis on rulemaking and on establishing frameworks of rules, standards and procedures (e.g. for taking or refraining from specific actions or for settling disputes) which – within the rules – leave the implementing decisions and measures to the participating states or to private firms and individuals, seems of particular importance.

19 For such »functional approaches« see: Fikentscher (note 12), p. 40 ff.; *Petersmann* (note 14), p. 240 ff. See also: *Chr. Joerges*, *Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts*, in: *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 43 (1979), p. 6 ff.

\* The author expresses his personal views and not those of the GATT Secretariat.