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*NOTES CRITIQUES * CRITICAL NOTES*

Jerzy Makarczyk, *Zasady Nowego Międzynarodowego Ładu Gospodarczego. Studium prawnomiędzynarodowe [Principles* of *the New International Economic Order. A Study in International Law],* Ossolineum 1988, 394 pp.

The attractiveness and immediate interest of the New International Economic Order result from a coincidence of a variety of circumstances including above all the following :

a) predominance in the modern international community of the developing countries whose state and possibilities in the economic sphere result largely from the colonial economic structure, the confrontation of their economy with the economy of the developed countries leading either to their advancing degradation in that field, or to the economy of the developing countries being dominated by the capital of "supranational" corporations ;

b) an unprecedented development of organizations, institutions, plans, programmes, etc., with tasks or aims outlined on the international scale, which adopted the economic development of the developing countries as their programmatic issue ; the leading role in this respect is played by the UN with its expanded system of organizations, in which there is an increasing predominance of the newly-originating states most of which have the status of a developing country ;

c) controversies as to the position of international law in the regulation of economic matters ; the state of the doctrine of international law, the practice of international relations, and the arrangement of power in the international economic relations inherited from the period that immediately preceded the initiation of the UN, together promote the opinion that the principles of international public law as the law on which relations between states are based do not apply immediately to international economic relations, what prevails in those relations is their being international agreements with the resulting obligations to subjects from foreign countries who are involved in the economic activity, and the general principles of law developed in the community of the so-called civilized countries.

The monograph under review is aimed both at the presentation of the very "Formation of Principles of the New International Economic Order" (Part I, pp. 23—209), and at the examination of one of the basic principles of that order which the author rightly believes to be "A State's Permanent Sovereignty in the

Administration of Its Reserves, Natural Resources, and Economic Activity.. (Part II, pp. 213—379). Although it may seem that two separate studies have thus been provided with a common title, this structure of the book proves highly useful for the presentation of the multifarious and complex subject of the principles of the New International Economic Order (NIEO). That structure made it possible for the author successfully to fulfil two aims : firstly, to present and appraise the consecutive stages of formulation of those principles and their sets, and to conclude about their position in the international legal order ; and secondly, to analyze that of the NIEO principles on whose formulation and observance most of the contemporary issues of the international economic relations depend that are related to the nationalization by the developing countries of their individual economies and to the inflow into those countries of foreign capitals.

The author repeatedly stresses the fact that his study does not tend towards deciding as to the legal nature of principles formulated in the documents believed to be representative of the NIEO. As folows from the whole of the monograph, the author's object is to present the contents of the separate principles that together make up the NIEO principles according to their chief catalogues, and the evolution of approach to the contents and scope of the principles included in those catalogues.

Part I opens with the chapter ("Charter of the United Nations," "Principles of Technical Assistance and Financing of Economic Development," "The First and Second Decade of Development of the United Nations") which, according to the author, shows the legal situation at the initial moment of formation of NIEO. Chapters II—IV have been conceived as a study of the progress and results of the negotiations on the NIEO principles that took place in different international fora before the UN General Assembly adopted the Charter of Economic Rights and Duties of States on December 12, 1974. The author concentrates on negotiations that took place : 1) at non-aligned conferences from Bandung to Lima, 2) at the first three UNCTAD Conferences, and 3) at the UN General Assembly, including particularly its 6th special session in 1974 at which the Declaration of establishment of the NIEO and the Programme of Activities for the establishment of the NIEO were resolved. An appraisal of the results of works on the formulation of the NIEO principles and their positioning in the international legal order has been contained above all in Chapters VIII, IX, and X.

In the first place, J. Makarczyk examines the principles of the Charter of Economic Rights and Duties of States, including also the treatment of that Charter in the further works of the General Assembly or at UNCTAD conferences. An important position in the presentation and appraisal of the present state of formation of the NIEO principles have also been given to the UNITAR study "Progressive Development of the Principles and Norms of International Law Concerning the New International Economic Order" and to the works on the NIEO carried out by the International Law Association (ILA).

Part II opens with a list of legal problems of importance for the modern economic relations and related to the "conflicts between states that export and import capital." Chapter I, "The History and Origins of the Principle of Permanent Sovereignty of the State in the Administration of Its Natural Resources," is composed of two fragments, on licence and capitulation and on the doctrinal controversies of those days. Guided by that principle's formulation in resolutions of the UN General Assembly, the author is of opinion that it "existed and applied wherever the arrangement of power allowed the states to exercise a full control over the foreigners they admitted" (p. 213). Admittedly, such were no doubt the origins of the very fact that

the Latin-American countries put forward the principle of a state's permanent Sovereignty in the administration of its natural resources in mid-20th century. What raises serious doubts, instead, is whether the origins of a broader formulation of the state's position in economic matters should be examined as principles of a state's sovereignty in the administration of its economic activity in the aspect of thus formulated problems. Those doubts are confirmed by the way in which the author refers (p. 229) to Vattel's work of 1758. Vattel devotes a lot of attention to economic matters, taking interest not only in the protection by a state of its own subjects who find themselves in foreign territories (stressed by J. Makarczyk on pp. 228—229), but also, and to a much greater extent at that, in the freedom of the state itself in commercial relations.[1]

In Chapters II and III, J. Makarczyk analyzes the interpretation of the principle of a state's sovereignty in the administration of its natural resources and the attitude of states towards that principle against the background of the resolutions of the UN General Assembly, the UNITAR study, and the ILA declaration. The great variety of interpretations of that principle indicates (as the author expertly shows) that it is in the field of that very principle that the greatest concentration can be found of contradictory interests of the developing vs. the developed countries. The former treat it as an inalienable component of their sovereignty (self-determination), basing on it the whole of their rights in the field of nationalization and control over the foreign capital (see the interpretation of that principle in Art. 2 of the Charter of Economic Rights and Duties of States), while the latter interpret it in the context of both the consideration to rights acquired by foreign subjects in the territory of a given state, and the conception of exploitation of own natural resources with consideration to the interests of the entire international community. We deal here, in fact, with a controversy between a standpoint according to which the economic matters are essentially among questions regulated by internal law on the one hand, and an opinion that the norms in force in that sphere are norms of the international public law, particularly those concerning the principles of responsibility for nationalization and the treatment of the obligations undertaken by states in contracts with foreign investors.

Judging from the opinions expressed in the book, the author himself is for the "intervention of the international community in the way and principles of exploitation by the individual states of the world's natural resources" (p. 245), and disagrees with the conclusion resulting from the interpretation of Art. 2 according to which "in the light of the Charter, the exercise of sovereignty in the administration of natural resources seems to escape all norms of international law" (p. 258). Meanwhile, as shown by the interpretation of the discussed principle in the UNITAR study, its normative contents "resolve themselves into a confirmation of the state's freedom in the pursuit of any economic activity, and a ban for others on interfering with that pursuit" (p. 267). To J. Makarczyk, such an interpretation is tantamount to admitting that "in the sphere of a state's sovereignty in the administration of its natural resources and in economic activity, the principles of international law are of a secondary importance, their application or rejection in definite controversies depending mostly on the balance of powers" (p. 267).

One can hardly agree with that statement since the UNITAR interpretation reflects a principle, descending from Vattel among others, according to which "on

[1] See the statement of E. Vattel, *Prawo narodów [The Law of Nations]*, Warsaw 1958, Vol. I, p. 140 :".... it is self - evident that the decision whether or not to trade with others depends on the will of each separate nation."

the grounds of its natural freedom, each nation has the right to trade with those other nations that agree to it ; thus whoever tries to interfere with that nation's exercise of that right, commits a wrongful act against it."[2] The author seems to have a higher opinion on the way of interpretation of the discussed principle in the ILA declaration. Stressing both the fact that that approach gives consideration primarily to the investors' interests, and its adherence to the traditional Western doctrine, he treats it as an "attempt at elaborating the norms of international law which would concern the fulfilment and functioning of that principle in the practice of international relations" (p. 276).

Within the scope of treaty law (Chapter IV), the author analyzes bilateral international agreements of which a large number is negotiated with the aim to protect foreign investments. They have a large practical importance as regards among other things the way of treatment of foreign investments and the principles related to nationalization and indemnity for nationalization. He points to the fact that the development and contents of such agreements proceed independently of the formation of the NIEO principles, and stresses the trend that can be noticed in such agreements towards extending the guaranties given to foreign investors as their position in the light of economic rights and duties of the state, which together make up the NIEO, grows less stable. Next, the author discusses the evolution of the doctrine (Chapter IV), pointing to a tendency that consists in departure from the classic formula of an "immediate, adequate, and effective" indemnity, and the replacement of that formula with the notion of a "just" indemnity (p. 286). He also stresses that there can be no doubts today that a violation by a state of a contract negotiated with a foreign legal person is not tantamount to infringement of international law (p. 287).

The monograph contains also a most valuable study of the decisions of the Hague Tribunals and the international arbitration (Chpters V and VI). As follows from that study, little has been contributed by the international courts in the sphere of problems related to the principle of a state's sovereignty in the administration of its natural resources, property, and economic activity. The Hague Tribunals either tended to be conservative and strongly emphasized the theory of acquired rights, or altogether avoided discussing the merits and practical application of that principle. Instead, a large number of interesting and constructive conclusions seem to follow from the consistent and relevant analysis of decisions of the international arbitration. In his examination of those decisions, the author gives evidence of a high degree of pragmaticism in his way of settling questions related to the discussed analysis.

Most of the analyzed cases concern violations of licence obligations as a result of nationalization. The author expresses the opinion that the hitherto experiences of arbitration create a "realistic chance of progress in the formulation of a principle of economic sovereignty in international law which would be acceptable for all members of the international community" (p. 386). Personally, I share that opinion to a large extent ; I believe, however, that the question in this case should be first of all that of application to all disputes settled by arbitration proceedings of the "principle of deciding according to the criteria of rightness" which is particularly characteristic of the international commercial arbitration.

The New International Economic Order can be considered as a phenomenon with specific aims related to the need to equalize the economic levels of the developing and the developed countries. It may also be treated as an indication of a progressive

[2] *Ibidem*, pp. 334, 335.

development of the international legal order. Both of those approaches intersect in the analyzed documents and in the standpoints of states or in the doctrine, thus making NIEO a particularly complex problem. J. Makarczyk strongly emphasizes and presents that complexity, fails however to discriminate in a sufficient degree between those two approaches to the examined phenomenon. This results largely from the work's conception as a monograph devoted mainly to the legal and political aspects of the NIEO. The author fully appreciates the economic origins and foundations of that deal, but makes no attempt to define it as an economic phenomenon which renders it difficult and perhaps even impossible to place the NIEO in international relations.

Several conclusions contained in the work are related to the conception of the NIEO as a phenomenon that is bound within definite time-limits. This concerns mainly : a) the placement of the NIEO origins in the period of operation of the League of Nations and in provisions of the Charter of the United Nations, and also in different steps made within the UN system before putting the NIEO in the order of the day ; b) the adoption and justification of the opinion that, within the UN system and the non-aligned movement, the adoption of the Charter of Economic Rights and Duties of States "is a recapitulation of postulates, wishes and claims of the developing countries" rather than "the beginning of a new era" (p. 382) ; c) the tendency to adopt the standpoint that the Charter's "radicalism and neglect to the reality of international relations in their many aspects contributed to a delay rather than a speeding-up of the process of changes," and that "the present evident stagnation or decline in the states' political interest in those problems result from the attempted undue acceleration undertaken by the developing countries in the decade from the UNCTAD I till the passage of the Charter of Rights" (p. 382).

At the same time, however, as manifested by the whole conception of the work under review and by the opinions voiced in it, the author places the whole process of formation of the NIEO in the progressive development of the international legal order. He believes the new order in this interpretation to find itself in the initial stage. His standpoint is best illustrated by the following two statements : "the law of the new order is still in the making only, its evolution being slow and proceeding irregularly, in many directions, and in different fora" ; and "it is an advantageous phenomenon that the debate now concentrates in the circles of doctrine of international law" (p. 383). This is connected with the author's opinion that works on the establishment of conception and contents of the NIEO principles should start from studies such as the UNITAR study and the ILA declaration. This opinion is not tantamount to an unreserved approval of the results contained in both those documents. As regards the declaration which is but a specific stage of works of the ILA, the author states that the chief element of the new deal, that is the principle of a state's permanent sovereignty in the administration of its reserves, natural resources, and economic activity "remains in the scope of the traditional Western doctrine." Instead, as far as the standpoint of the UNITAR towards that principle is concerned, the author believes that it actually means "a negation of the role of international public law in the fulfilment of that principle in practice, and consequently, uselessness of works aimed at defining its norms accurately" (p. 383). The author pronounces for the need for international law's active involvement in the shaping of the principle of a state's sovereignty in the administration of its reserves, natural resources, and economic activity ; in his opinion, the origins of that principle in the UN system indicate that it was, among other things, "to be the guaranty of a proper exploitation of resources and property according to the

will of the peoples" and "one that would meet the needs of the international community" (p. 384).

Quite rightly, the author states that "the present controversy as to the shape and nature of the principle of permanent sovereignty, despite the philosophical and ideological framing that is sometimes given to it, has in fact become a predominantly economic one" (p. 384). Its settlement may only result from "pragmaticism of the parties" since, despite the existence of fundamental differences in the interests of the countries that export and import capital, there is also their concurrence and inseparability to the extent that it proves necessary to reach common solutions. The only instrument that might square those interests with one another "are the norms of international law, formulated and adopted by all parties concerned" (p. 385). According to the author, "such norms have not been formulated so far" (p. 385). His opinion as to the chances of their formulation is none to optimistic ; he believes, however, that some attempts have already been made by the doctrine and international courts to create that law.

What might be considered a specific defect of the monograph is its insufficient use of the doctrine of people's democracies. Also the way in which the Polish literature has been included in the work might arouse certain reservations. One cannot help wondering, for example, why the author failed to include in his discussion of the history and origins of the principle of a state's permanent sovereignty in the administration of its natural resources such works by K. Libera as *Zasady międzynarodowego prawa konsularnego [Principles* of *International Consular Law]* (Warsaw I960), or *Międzynarodowy ruch osobowy [International Personal Traffic]* (Warsaw 1969).

Jerzy Makarczyk has enriched the Polish legal literature with a valuable monograph which recapitulates and appraises the main of the hitherto made attempts at formulating the principles of the New International Economic Order. The variety of documents and views of the doctrine used in the book, as well as their penetrating presentation, make the monograph a valuable source for further studies of the formation of that deal, and at the same time an equally valuable advice as to what should be avoided and how the works should proceed in the sphere of formation and adoption of the NIEO principles.

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