

CUSTOM IN INTERNATIONAL ECONOMIC LAW

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Pro memoria

The invitation to present a paper at the *Seminar dedicated to the memory of Professor Karol Wolfke (1915-2015) on selected problems of international customary law* is a great honour for me. At the same time, I regard my participation in the Seminar as a token of utmost respect and appreciation for the Professor's academic achievements and his contribution to the community of lawyers specialising in international law. I also consider the Seminar, given its subject, as a serious challenge facing the authors of the papers. Namely, custom in the international law lay at the heart of Professor Wolfke's academic interests and in studying it, he left a lasting contribution to the development of the science of international law.¹ Each attempt to continue his academic thought raises the question: do I really have anything to add? I accept the challenge in the hope to extend the study to a new context.²

INTRODUCTION

In conceiving the title of the Seminar, the organisers expressed a number of initial beliefs having the nature of assumptions. According to them:

- international customary law as a subject of legal thought is an actual and always relevant research problem;
- it is impossible to cover the entire range of the subject matter and exhaust the topic in one study (even conducted by a team);

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¹ K Wolfke's monograph, *Custom in present international law* (1964) is a durable and always relevant part of the subject's theoretical development, which is further evidenced by the fact that it was cited in the International Law Commission's (ILC) *First report on formation and evidence of customary international law* by Special Rapporteur M Wood (A/CN.4/663).

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- the sum of individual studies will both broaden the knowledge and create synergy.

Therefore, we have to deal with assumptions in the area of research methodology that do not have a character and are external in relation to the methods applied in the study of law. This does not imply, however, that these assumptions should not or, even more so, may not be verified.

The truth of the first assumption seems the easiest to accept; nevertheless, the International Law Commission's (ILC) practice and opinions of the countries also provide evidence to challenge this thesis.³ International customary law is a subject of ILC work, as the UN member states decided.⁴ The ILC is composed of prominent lawyers. States express their opinions as to the subject of the ILC's work based on legal analyses (needless to say, not exclusively). Hence, if the ILC and the states decided that international customary law was a matter that should be subject to legal analysis (and subsequently – if necessary – codification including elements of law development), it is indeed the case.

Two further assumptions are of non-legal nature. They express a manner of pursuing professional activity, including academic thought, which is predominant in society. The empirically verified belief that mankind owes the abundance of goods to Henry Ford's assembly line and the advantages derived from teamwork, resulted in such appreciation of soft skills that it started to be applied to all fields of professional activity including the intellectual one. I am convinced that Grotius, if he lived in the 21st century, would be required to organise and lead a team instead of pursuing individual research.

I. SUBJECT OF DISCUSSION

It seems that the theory has provided an answer to the question about the essence of statutory law⁵ which is adequate to the needs, as has been proved by judicial practice⁶. If it were not known what customary law is, it

³ Namely, the ILC's works at times also focused on less significant issues. As such, I regard the unfinished work on the *Status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier*, in particular with regard to its second part, i.e. *Status of ... the diplomatic bag not accompanied by the diplomatic courier*.

The theoretical reflections also led to eclectic conclusions. Without questioning either the significance of the fragmentation of the international law or the need to take up theoretical reflection on the subject, it should be noted that the authors were not able to organise the terms they were using. Referring this remark to both international texts, ie Hafner's Report (G Hafner and others *Risks ensuing from fragmentation of International Law*, <<http://untreaty.un.org/ilc/reports/2000/repfra.htm>>) and the paper by the Study Group on the Fragmentation of International Law 'Difficulties arising from the Diversification and Expansion of International Law' (2006) II-2 Yearbook of the International Law Commission.

⁴ The ILC made this decision in 2012 including in its working agenda *Formation and evidence of customary international law* (title amended to *Identification of customary international law* in 2013).

⁵ M Wood, 'First report on formation and evidence of customary international law' (GA ILC 2013) [44-45] 19 (A/CN.4/663).

⁶ Classic components of 'custom' have been indicated by the ICJ in *North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands) (Federal Republic of Germany/Denmark)*, [1969] ICJ Rep 3, 44 [77].

would not be possible to settle disputes on its basis (as it is practised by both national and international courts). It may, therefore, be feared that, firstly, the in-depth studies of *clara* by the ILC will not lead to a greater clarity (for *clara non sunt interpretanda*), but rather to doubts and controversies. Secondly, the ILC work on formation and evidence of customary international law, which formally should lead to the codification (and the possible development) of regulations with regard to custom, even if successful i.e. resulting in drafting a UN Convention (or, more probably, 'Draft Articles on...') will only delay the necessary – from the perspective of the international community – norms regulating the creation of international law by means of custom.

Nonetheless, the positive answer to the question about the need for, and the meaning of, studies on international customary law is surprising, insofar as the actual controversies with respect to international customary law are not of general nature, i.e. the answer as to the general question about the meaning of international customary law lies in the realm of the basic legal knowledge. Legal and lawyers' controversies (in connection with the political ones) are related to the matter *in concreto*. They regard, namely, the answer to the questions as to whether a norm with a specific content binds certain subjects and as to what is its content. The actual challenge lies in answering both questions. For, indisputably, even the evidence consisting in a positive practice, i.e. a situation where the subjects act according to the norm, does not imply that the norm is classified within a certain normative system. The reason is that subjects may conform to a certain norm (*practis*)⁷ without recognising their legal obligation to do so or regarding such conduct as legally required (*opinio iuris*)⁸.

The necessity to conduct a legal classification and describe the characteristics of the previous decisions from the perspective of formal sources of law occurs undoubtedly, not only in international, but also (perhaps even more frequently) in national law. The 'doctrine of binding precedent' (*stare decisis*) responds to actual questions and needs. Summing up, it is my belief that the general problems of international customary law are of a non-legal character.⁹

1. Challenges

The simultaneous difficulty and ease with respect to the norm of international law in the form of a treaty, consists in the fact that it is difficult to create but easy to apply. The difficulty of establishing an agreement derives primarily from the non-legal factors¹⁰. Namely, the relationships

⁷ Practice precedes law as in Martens Clause.

⁸ This issue was the subject of the ICJ judgement *Nicaragua v United States of America*, [1986] ICJ Rep., which should be regarded as a direct reference to the resolutions GA UN 95(I) and 96(I), where GA recognised – *opinio iuris* – the binding character of Nuremberg Principles and the regulations concerning the crime of genocide.

⁹ This state of affairs does not question the general opinion of Monaco that the study of legal sources should be conducted continually (R Monaco 'Réflexions sur la théorie des sources du droit international' in *Theory of international law at the threshold of the 21 century: essays in honour of Krzysztof Skubiszewski* (1996) 528.

¹⁰ On the significance of the intent of states for law-making see also O Schachter, 'International Law in the Theory and Practice. General Course in Public International Law' (1982-V) *Recueil des Cours de l'Académie de Droit International* 33.

between the potential subjects that are to conclude an agreement must not be so bad that the subject would *a priori* reject the possibility of accepting mutual legal commitments and establishing formal contacts on the international arena. Also their internal and/or international situation must not constitute an obstacle in making international commitments either in general (e.g. an internal political crisis undermining the legitimisation-legitimacy of the authority, sub-regional, regional, or global instability or international crisis would constitute such obstacles), or in a specific matter (e.g. civil protest in the EU member states against international legal regulations with regard to fighting 'piracy' - the case of ACTA - would be such an obstacle), or also with respect to a specific partner (the relatively constant 'hateful twins', e.g. Iran-Israel or Turkey-Armenia). Moreover, the subjects need to be willing and able to make (at the specific moment) binding and legal declarations of intent. Summing up, the answer to the question as to why conclude a *treaty* if it is so difficult to conclude is the following: the clarity of a written norm is the price worth paying for its creation in order not to be forced to reconstruct it based on practice. Of essence is also the specific certainty that subjects of international law respect their international legal commitments - pursuant to *pacta sunt servanda* - due to, among other things, the cost of not observing the legal commitments. If they have the choice, the parties of international relations based on safety-security, i.e. the *treaty* wins the competition with *practice*. This is confirmed by the not very representative case of the EU, where, contrary to the literal content of Article 288 of the Treaty on the Functioning of the European Union¹¹, the only legal formula of implementing a directive which is regarded as appropriate, is the national statute (and not the practice of administrative bodies, which is seen as not sufficiently stable¹²). The EU case is, however, cited here as evidence for the difference between the trust in the law and to the practice even in the EU, where the (security) community exists with a remarkably high level of mutual trust (incomparably higher than in the international global community). The ease of applying the treaty norms follows from the obviousness of both the binding force of the international text and its content (other cases, although possible, are so rare that they may be legitimately ignored in our discussion).

With regard to the norm of international law constituting customary law, the ease-difficulty consists in the (relative) simplicity of its creation and difficulty of its application. Subjects jointly creating the norm of international customary law may do so not only in the form of the declaration of intent but also *per facta concludentia*. Such a *modus operandi* allows the avoidance of both the official-formal contact with undesired partner(s) and the declaration of intent. Not surprisingly, in the climax of the cold war (the difficulty was exacerbated by the scandal which arose after the U2 plane flown by Francis G. Powers was shot down by the USSR on the 1st May 1960), the key decision - in relation to the legal status of outer space (excluding it from the airspace after the flight of the first artificial Earth

¹¹ 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

¹² See also *Commission v Germany* (C-361-88) [24-25].

Satellite *Sputnik 1* on the 4th October 1957) - was established as a norm of the international customary law. Also, such a norm allows the delaying of the public announcement of the decision about the commitment, which is of importance in the 21st century. Therefore, creating and applying law, the government may delay the formal notification of this fact to the public, both national and international, or even deny it contrary to the facts.¹³ This is where the advantage of the international customary law as a form of law-making lies.¹⁴ This ease at the stage of law creation occurs at the expense of the difficulty at the stage of its application. For, in case of applying a norm of international customary law, the subjects of a potential legal relationship need to answer two interconnected questions: is a norm with a certain content binding in their mutual relations?; and: what is the normative content of the given norm?

II. RESEARCH PERSPECTIVES

Recognising that a *new* content may be brought to the discussion on international customary law, it is my desire that my contribution consists in extending the context of the legal discussion. Instead of strictly following the literal content of the invitation to the Seminar and discussing a 'selected problem', I take the liberty to deal with 'selected perspectives'.

Which is the appropriate perspective to consider customary law? One may regard it from at least three perspectives:

- the perspective of what international customary law is, taken by Professor G. Grabowska;
- the perspective of deconstruction and reconstruction of norms within the fields of public international law, taken by the remaining participants of the Seminar;
- and the law-making perspective, which I have taken, particularly in connection with the archaic and officially rejected as anachronistic (yet present in specific comments) perception of the characteristics (immaturity) of international law in the light of the missing lawmaker-legislator¹⁵.

The statement: 'Viewed in terms of law-making, international law is a primitive legal system'¹⁶ may not be (as is, undoubtedly, the intention of

¹³ See also BD Lepard, *Customary International Law: a New Theory with practical Applications* (2010) 187-200. With regard to a protest, MacGibbon stated: 'the most evident expression of the will of a state to the effect that it does not acquiesce in a given practice and hence that it does not consent to the formation of a new customary rule' (I MacGibbon, 'Some Observations on the Part of Protest in International Law' (1953) 30 *British Yearbook of International Law* 293). From the theoretical perspective it is equally important that a custom does not have to be accepted by all states as emphasised by Judge Lachs in a dissenting opinion on the '*North Sea Continental Shelf Cases*' citing ICJ Judgement *United Kingdom v Norway* ('*Fisheries Case*').

¹⁴ See also O Schachter, 'New custom: power, opinio juris and contrary practice' in *Theory of international law...* (n 9) 531.

¹⁵ As it is presented in the most popular Polish law books: W Góralczyk, S Sawicki, *Prawo międzynarodowe publiczne w zarysie* (2009) 22; R Bierzanek, J Symonides, *Prawo międzynarodowe publiczne* (2005) 16.

¹⁶ Th Buergenthal, SD Murphy, *Public international law in a nutshell* (2002) 18.

the authors) understood literally. The ‘immaturity of the international community’ and of the ‘international law system’ are in this respect implied by the missing lawmaker-legislator unidimensionally (classically) identified with the legislator-sovereign in the state¹⁷. Through these statements, the authors polemise with, and in fact refer to, Austin's statements (yet considered selectively).¹⁸ Austin, developing the concept of Jeremy Bentham, identified law with command, whose execution was guarded by a sanction, whereas the commander was the sovereign (i.e. he did not submit to any superior commander)¹⁹. The theory of international law, however, more frequently refers to the Blackstone's opinion about law, which was rejected by Bentham: In autocratic states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have, from time to time, been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.²⁰

Austin's statement regarded as the essence of his views is: ‘commands, backed by threat of sanctions, from a sovereign, to whom people have a habit of obedience’. Yet, in fact, this statement made by Austin refers to the political system (and in this context it was contested already by Main), and not to law. And it is subject to fundamental critique – just to mention Hart²¹ – both due to blaming the definition of reductionism and to the lack of differentiation between the command of the state and a gunman²² during a bank robbery.²³ It is, however, significant that Austin himself recognised the existence of law different than command in the form of custom-customary law created spontaneously and not as a result of the sovereign's decision (‘arise from the consent of the governed, and not from the position or establishment of political superior’), and he included this law (similarly to international law and the constitutional obligations of the sovereign to observe the human rights) in the *positive morality*.²⁴ It is

¹⁷ ‘Sovereign is he who decides on the exception’ – this opinion of Schmitt seems to lay the foundation for international law (C Schmitt, *Political Theology* <<https://idepolitik.files.wordpress.com/2010/10/schmitt-political-theology.pdf>> 5).

¹⁸ LF Damrosch, L Henkin, SD Murphy, H Smit, *International Law. Cases and Materials* (2001) 2.

¹⁹ J Austin, *Lectures on Jurisprudence or the Philosophy of Law* (revised and edited by R Cambell, London 1869), Lecture 1, particularly 99 ff. <<http://archive.org/stream/lecturesonjuris03campgoog#page/n5/mode/2upa>>.

²⁰ 5 Bl Comm <http://avalon.law.yale.edu/18th_century/blackstone_bk4ch5.asp> accessed 13 July 2012.

²¹ HLA Hart, *The Concept of Law* (1994), Chap. 2.

²² However, importantly, Austin believed that the command must have the nature of an abstract and general norm to be law.

²³ In this context, one must not forget the ‘Radbruch formula’; G Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’ *Süddeutsche Juristenzeitung* 1946, 107

²⁴ J Austin, *The Providence of Jurisprudence Determined* (London 1832), Lecture 1, particularly 27-30

difficult to grasp the sense of extrapolating these opinions (referring to the state-society) to the international community, and even more so of citing them in the context of discussing the essence of law. It is not the case that, if no commander-sovereign is present in the international community, there is not a legislator, either. In fact, the legislator is – even in the understanding of the Austin's era - the international community composed of the states (and nowadays with an even broader range of subjects, which also include entities other than states). These subjects create law through, among other things, international agreements. Therefore, a law-making practice is in place, which means that a functional legislator exists. Only, there is no structurally established institutional legislator. Sometimes, even prominent representatives of the theory of international law, pointing to the immaturity of international law (?) - international community (?), claim that 'there is no parliament' and then, as if defending the law-community against their own charge, they call the UN General Assembly the world quasi-parliament. Following this course of thinking, if the General Assembly was not a quasi-parliament and the international community was not a quasi-society but a real community, international law would also not be quasi-law but real law. By implication, in the desired (mature) law-making model, the law is created by the parliament. On the contrary, in the immature model (in case of immature structures of the society), law-making takes place via customary law. I fundamentally disagree with this implicit statement. Besides, it seems that leading the argumentation *ad absurdum* results in a situation where nobody is willing to identify with these opinions. I would rather claim that the potential desire to modernise international law – the law of the international community - through the appointment of the legislator (even if possible) would prove to be arrogance bordering on stupidity. In conclusion, the selectively cited view of Austin may not give rise to generalised views on international law.

Undoubtedly, the only definition of law which is adequate for the study of the functioning of international law understood as a normative tool of restricting mutual relations in the international community is the one stating that 'The one set of rules are in the strictest sense "laws," since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the Common Law) are enforced by the Courts; these rules constitute "constitutional law" in the proper sense of that term, and may, for the sake of distinction, be called collectively "the law of the constitution". The other set of rules consists of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all, since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution", or constitutional morality'.²⁵

<<http://archive.org/stream/provincejurispr02austgoog#page/n5/mode/2up>>.

²⁵

AV Dicey, *Introduction to the Study of the Law of the Constitution* (1915) 21.

III. PERSPECTIVE: INTERNATIONAL LAW CREATION

The law-maker assumes two components:

- First – of the forecast nature. The assumption made by the legislator that creates law based on prohibition²⁶ is relatively simple. Namely, he assumes that, if the target group of his prohibition refrains from a certain action, it 'will be good'. This *a priori* statement is subject to auto-verification. He who imposed the prohibition will be satisfied with prohibitions, whereas he will always consider a breach of prohibition as evil, due to his specific system of values, which allows him to judge and forecast in such manner.

At the same time, dealing with a command or even consent, we deal with a double forecast. Firstly, we assume not only that the target of the norm will take the action which was the subject of the consent or command but also that it will yield the desired result. In this case, paradoxically, the safest situation from the perspective of the collective interest is (very often) one where the initial assumption is not fulfilled, i.e. the target does not use the consent and, consequently, does not submit to the command.

One may cite cases in which legal prohibitions of at least dubious effectiveness, in relation to the social behaviours that they were intended to prevent, caused significant (negative) consequences in other areas - a specific 'butterfly effect' occurred. The introduction of the 18th Amendment to the US Constitution and the Volstead Act of 1920 prohibiting the sale, manufacture and transportation of alcohol (the Prohibition) was the victory of social and religious movements that called for teetotalism (in the face of the indisputable pathology of alcoholism, drug abuse, gambling, etc.), a victory in the battle for public health and morality. An unintentional effect of the application of the Act was a rise in crime (in particular organised crime). The scale of such crime may be illustrated by the seven fatalities of the Saint Valentine's Day Massacre (Chicago, 1929). The dubious effect of the Act, despite its goals, included its impact on morality²⁷ although, in fact, both alcohol consumption over the entire period of prohibition and the prevalence of diseases resulting from alcohol abuse decreased. The doubts related to the effects of the Prohibition were concisely expressed by J. D. Rockefeller Jr.:

'When Prohibition was introduced, I hoped that it would be widely supported by public opinion and the day would soon come when the evil effects of alcohol would be recognized. I have slowly and reluctantly come to believe that this has not been the result. Instead, drinking has generally increased; the speakeasy has replaced the saloon; a vast army of lawbreakers has appeared; many of our best citizens have openly ignored Prohibition; respect for the law has been greatly lessened; and crime has increased to a level never seen before.'

Prohibition was repealed in 1933 (during the presidency of Franklin Delano Roosevelt) by the 21st Amendment to the US Constitution; however, society has struggled with its indirect consequences in the form of the

²⁶ Referring to Austin's theory of command, Hart stated that, principally, command exists exclusively in the realm of criminal law.

²⁷ Quotation from D Okrent, *Great Fortune: The Epic of Rockefeller Center* (2003) 246.

‘Mafia’ to this day, whereas the ‘disease’ has spread beyond the United States.

Oblivious of these experiences, President Nixon declared the war on drugs on 18th June 1971, recognizing drug abuse as the ‘public enemy number one’. Financial expenditure on the war waged for 45 years amounted to USD 51 billion. The policy is continued with the only modification consisting in renouncing the term ‘war’ by President Obama, as it proved counter-productive. At the same time, the policy has been facing increasingly severe criticism. The 2011 report of the Global Commission on Drug Policy stated that

‘The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs, and years after President Nixon launched the US government's war on drugs, fundamental reforms in national and global drug control policies are urgently needed²⁸’.

As in the case of the Prohibition, while a reduction in drug consumption as a result of the war on drugs is rather questionable, the negative consequences of criminalisation and methods of implementing the regulations are indisputable. The population of those sentenced to prison under anti-drug regulations has drastically increased in all countries (among these inmates there is an underclass of people who were deprived of education opportunities or jobs due to their sentences for drug crimes). The war on drugs led not only to an (unprecedented) development of the Mafia in the countries of the transatlantic region but also to the formation of the ‘de facto drug countries (enclaves)’ as a result of overthrowing the state authorities by criminal gangs (Mexico and Columbia may be seen as both symbols and the actual setting of this phenomenon).

Nonetheless, I do not analyse either as being a case in which the creation of law did not occur because the ‘general consent-intent’ of creating law was only apparent. The only real consensus between the actors of the law-making process was the one regarding the lack of consent as to the content of the prospective regulation. In case of the above-mentioned Anti-Counterfeiting Trade Agreement (ACTA), whose aim was to establish a regime of fighting against the violation of intellectual property, the agreement was supported by its initiators: Japan, US, Canada, EU, and Switzerland. Besides them, it was signed by Australia and South Korea. The agreement was rejected by the European Parliament in the face of concerns that it would jeopardise the freedom of speech and the development of open-source software and reduce the accessibility of generic drugs. The actual value of protection against the breach of property rights has yielded to the defence against potential threats.

Despite demands made by numerous actors (mostly beyond the circle of states and transnational corporations), neither the *Draft U.N. Code of Conduct on Transnational Corporations*²⁹ nor *The OECD Guidelines for Multinational Enterprises*³⁰ drafted by the OECD were adopted. The

²⁸ The Global Commission on Drug Policy, *War on Drugs* (2011) 24.

²⁹ UN Commission on Transnational Corporations, UN Doc E/C.10/1982/6 (5 June 1982), Annex.

³⁰ <<http://www.oecd.org/daf/inv/mne/48004323.pdf>>.

compromise proved out of reach due to dramatic differences in expectations as to the imposing of obligations on corporations. As a result, there has been no ban imposed on the existence of transnational corporations and there is no effective regime of their operation. In fact, we know neither how transnational corporations should behave nor how to impose regulations on them in poorer and weaker countries than the 'western' ones. We do not know what to do to make the alter-globalists happy or what to do in order for states and the international community to recognise that transnational corporations do not disturb the social order. Even a success in the royal path of creating legal regulations i.e. an international agreement - a code of conduct (accepted by corporations and not overthrown by NGOs) does not guarantee that the effect of the implementation of norms will fulfil the expectations.

Nonetheless, one may point to contrary examples where a fulfilled forecast turned out to be the biggest misfortune. An example of a norm representing the broadly understood new order is the NIEO (New International Economic Order)³¹. These norms, forecasting a happy community and unilateral transfers from the developed countries and some international organisations (one of them was to be the International Seabed Authority) were addressed at developing countries. The mostly direct and unconditional transfers were to contribute to development and better living conditions for the people. The desired development was meant to simultaneously change the social model in the developing states (which were to be the participants of the Non-Aligned Movement at the same time). The NIEO was to bring international and domestic social cohesion. The expected outcome of creating the legal regulations was great. And how is it, actually, after the implementation of the legal regulations? Has the development aid eliminated social inequalities and stratification? Has it abolished (or even reduced) poverty? Has it prevented violent conflicts? Has the decolonisation and development aid resulted in society-state building or, on the contrary, increased the number of the failed states? Thus, have the arbitrarily created regulations of the International Economic Law (an UNCTAD programme), with regard to the policy of international economics, not become simply catalysts for negative processes? And, further, has the immediate implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by the UN General Assembly resolution 1514, become a source of happiness or – on the contrary – contributed to the situation we may observe in many regions of the world?³² Formal decolonisation (within the limits of colonial government) has not resulted in the realisation of the peoples' right to self-determination, whereas the protection of territorial integrity means violent responses to the self-determination efforts. Many new countries neither protect fundamental human rights and freedoms nor contribute to the development of their own societies. Perhaps, years after formulating the UNCTAD-NIEO proposals, one should demand less confidence in the

³¹ See also J Menkes, *Nowy Międzynarodowy Ład Ekonomiczny. Studium prawnomiędzynarodowe* (1988).

³² The immaturity of the newly formed countries as a source of economic problem was indicated by I. Seidl-Hohenfeldern, 'International Economic Soft Law', (1979-II) 163 *Recueil des Cours de l'Academie de Droit International* 173.

possibility of a (good) change in social relations through a (good) law, less arrogance shown by the project authors, and more drawing conclusions from practice. And, indeed, such results of the (selective and inconsistent) implementation of the NIEO did not surprise either the Western countries' politicians or specialists. With regard to the NIEO (faith in the progress as a result of unconditional transfers compensating, among others, the damages inflicted by colonialism), the concept of conditional aid has been formulated, i.e. transfers aimed at reaching attainable goals using proven methods, where the use of funds would be subject to control: of the donor, recipient and international institutions. Such an alternative to the NIEO was the 'Basic Needs' Programme (initiated by the ILO and World Bank) which proposed the general restructuring of the world economy³³. The NIEO raised demands to change the external development conditions of developing countries – indicated what the donors should give and proposed harmonious changes in both external and internal (within the developing countries) development conditions. In addition, it suggested what the recipients of the aid should be given and how they should use it.

In general terms, it may be stated that Brazil, India, China and South Africa (the BRICS countries) do not owe their development to development aid, while the origin of the problems of Portugal, Italy, Greece and Spain (the so-called PIGS) may be, among other things, attributed to the transfers and the EU-euro umbrella over the countries and their economies.

There is yet another way of creating regulations in the area of the international economic law, i.e. by establishing conditions for international cooperation. In this way, the international law is, on the one hand, a tool of a 'fair judge' who ensures the rule of law in the 'market' (he ensures that the market is subjected to legal regulations – the WTO regime). At the same time, the necessary condition for conducting business is defined by the protection of property. These possibilities are illustrated by the evolution of the regime of investment disputes settlement (from SSDS to ISDS to New Mechanism Investment Disputes Settlement in TTIP). Within this regime e.g. the BIT models were created and modified and, at times, a certain BIT model became widely adopted. Needless to say, further questions are being asked also in this field and the answers provided thus far are not final. The system of settling international disputes has evolved. Similarly, the subject of protection has changed along with the distribution of forces between the state and the investor. The expectations have also changed and the question of whether it is only property, or also the public interest that should be protected (is jeopardised), tends to be heard increasingly louder. The evolution of the legal regime allows the establishing of a balance between the values competing in the common interest. Undoubtedly, foreign investment enhances the development of the host country. Also beyond doubt, foreign investment is a source of profits for the owners of the capital in the country of origin. Undoubtedly, the value of foreign investment has been rising. The law-making dilemma is also the dilemma of the proper

³³ A complex presentation of the programme may be found in *Declaration of Principles and Programme of Action adopted by the Tripartite World Conference on Employment, Income Distribution and Social Progress and the International Division of the Labour* (Geneva, 4-17 June 1976, E/5857).

reaction time; the law must respond to the challenges (be flexible) but also give the sense of certainty/predictability (be stable).

A good example of the evolution path in the development of law is the fact that the polluter pays principle has been recognised as a binding norm in international environmental law. The failure of the faith in the power of law to impose new norms is illustrated by the (failed) attempt of the Vienna Convention on Consular Relations to extend consular functions (the change was subject to desuetude). The states, through consular conventions, returned to the situation before the Convention, i.e. to a narrow scope of functions (with regard to diplomatic relations).

Creating the international economic law by the establishment of the customary law norms allows the willing yet careful players to test the regime. The careful may enjoy silence and reflection. Law-making experiences of the society indicate advantages of creating law in the responsive model that consists in the dialogue between stakeholders. Any other way (repressive law) in international relations does not guarantee not only the establishment of the desired state of affairs but also the creation of norms.

The way of thinking about the measures of exercising authority implies treating positive law as its principal instrument. This could result in a study of the content of legislative intervention as a response to undesired practices. Yet, the positive law is a measure of influencing social reality which is always costly and not always effective. The visible stages of law development from repressive to responsive law should also apply to international relations. In case of international economic relations governed by international economic law, it is both difficult to apply coercion and to determine a course of policy, the application of which should be facilitated by coercion (the weakness of repressive law). The dynamics of economic processes implies that the regularity and predictability of law (autonomous law) constitutes its disadvantage. From the perspective of social interest, the desired regulations (norms) are the open ones that may be negotiated and adapted to the quickly changing social and economic conditions. Coercion may and should be replaced by self-restricting commitments. In the creation of international economic law, intervention should be left behind and, at the same time, self-regulation should be used³⁴ (in the EU practice verified in the form of the 'new governance'³⁵). (All) actors of international economic relations are interested in a legal regime that would protect their interests, which rationalises self-regulation.³⁶ This implies a reduction in interventionism and a progress in liberalism (as opposed to the command and control strategy). Self-regulation helps to prevent undesirable phenomena. The costs of law-making are also lower.³⁷ At the same time, self-regulation requires compromise and considering the interests of all players.³⁸ Needless to say, one should not become overly idealistic: a large

³⁴ J Black, 'Constitutionalising Self-Regulation', (1996) 1 *The Modern Law Review* 27.

³⁵ L Senden, 'Soft-law, self-regulation and co-regulation in European law: Where Do They Meet?' (2005) 9 *Electronic Journal of Comparative Law*.

³⁶ J Black (n 34) 27.

³⁷ A Ogus, 'Rethinking Self-Regulation', (1995) 15(1) *Oxford Journal of Legal Studies* 97.

³⁸ N Gunnigham, J Rees, 'Industry Self-Regulation: an Institutional Perspective' (1997) 19(4) *Law and Policy* 390.

number of players - a group where the norms of international economic law could be potentially created - definitely impedes reaching a compromise.

IV. FROM PROHIBITION TO CONSENT-COMMAND, FROM CONSENT-COMMAND TO PROHIBITION

Paradoxically, one of the most important differences between international law and international economic law is the choice of the methods of regulation at individual law-making stages. The paradox may be noted when comparing the identity (from the perspective of the internal links) of the international community whose actors are the recipients of norms whereas the relationships are governed by law on the one hand, and the difference of the regulatory paradigm on the other. In the case of relationships governed by international law, the norms have generally evolved from prohibition (*mare liberum* – the prohibition of taking possession of the seas and the slave trade, the Saint Petersburg Declaration of 1968 Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight); - to the norms of consent (the Convention for the Pacific Settlement of International Disputes of 1899); - to commands (agreements establishing the institutions of international cooperation such as the LN and the UN). This direction of conduct implied the belief that the organised members of the international community (particularly countries) demonstrated a poorly developed cooperative ability. It also implied the simultaneous consensus as to both what the world should be like and which regime could achieve this state of affairs. The regulations were determined by the analysis of possibilities. In the anti-war regime, which was fundamental in international relations, the states gradually shifted from the pursuit of peace through law (the norms of prohibition – the Westphalian order) to peace through institutions (the Vienna order) to peace through cooperation.

Needless to say, the choice of the methods of regulation within the limits of international law is also significantly determined by the fragmentation of its subjects, which is correlated with the stratification of the international community. In the case of international law governing the internal affairs of the homogeneous Western Hemisphere, consents-commands are used more frequently as normative tools to build and maintain the 'security community'. The international law that governs the relations between the West and 'the rest', as well as within 'the rest' (a heterogeneous community), uses prohibition more frequently. This social framework constitutes the setting where the evolution from 'prohibition' to 'consent-command' – the choice of the methods of regulation has occurred.

In the case of international economic law, the evolution of the methods of regulation has a reversed direction even despite the missing paradigm of *modus operandi*. With regard to the economy, two general viewpoints compete. On the one hand, the followers of Adam Smith's thought (*An Inquiry into the Nature and Causes of the Wealth of Nations*) regard development as a consequence of market forces and expect that the

states refrain from imposing trade barriers (both tariff and non-tariff ones) and protect fair trade. On the other hand, the followers of John Maynard Keynes (*The General Theory of Employment, Interest and Money*) demand that the state ensure income redistribution and enhance the economy, which is seen as the path of development. In general, the states of the Western hemisphere perceive 'free and fair trade' as a source of development and a legal regime that favours sustainable social development. Consequently, they aim at establishing this regime within the Western hemisphere (OECD, EU, NAFTA, CETA, TTIP).³⁹ Meanwhile, in relations between the West and 'the rest of the world', not only do they accept restrictions on the 'free and fair trade', but they also act against 'fair competition'. Such practices are in place when the norms of the international economic law are created by treaties and resolutions of the world intergovernmental organisations. An extreme example is provided by the relationships of the EU and ACP.⁴⁰ The western countries, establishing treaty-based regimes in relations with 'the rest of the world' and not protesting against such regimes within 'the rest', ignore the fact that state interventionism requires the existence of the state (similarly to market economy). In the case of the many actors representing 'the rest', no functioning state or (state) institutions exist that would be able to carry out an interventionist policy. Experience shows that the state and its institutions are the product of 'society' composed of individuals whose rights and freedoms as well as cooperation skills are rooted in market freedoms.⁴¹ In many cases, the treaty-based consent to disturb 'free and fair trade' and 'fair competition' not only doesn't lead to development but also prevents 'state/nation-building'. The consent to disturb the rules of trade and competition that is given by the western countries to 'the rest of the world' is both unconditional and with unlimited duration. In relations with the beneficiaries, the West does not formulate (or use) political-economic conditionality as grounds for the consent to deviate from the rules (including *The Washington consensus*) or granting foreign aid. The West is also convinced that the breach of rules does not lead to development; hence, the consent will not expire with the development (for there will be no development).⁴²

FINAL REMARKS

Summing up, the 'old' source of the international law⁴³ – in the sense of the form of law-making – constituted by 'custom' does not lose its position in the catalogue of international law sources. On the contrary, its significance increases in the realm of international economic law. Moreover,

³⁹ Preamble of the Treaty on the functioning of the European Union [2012] OJ C 326.

⁴⁰ It is illustrated by Stabex (*Système de Stabilisation des Recettes d'Exportation*) introduced by the Lomé I Convention with the aim of remedying the harmful effects of the instability of export revenue from agricultural products) and SYSMIN (similar to Stabex, introduced by the Lomé II Convention with the aim to stabilise revenues from the mining sector).

⁴¹ R Pipes, *Property and Freedom* (1999).

⁴² S Koch, 'A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union' (2015) 75 World Development 97.

⁴³ See also L Oppenheim, *International Law. A Treatise*. H. Lauterpacht (ed) (1948) 25.

‘custom’ is also a vehicle for introducing ‘the new-generation law’, which is responsive and created by self-regulation, into international economic law. The ideal of balancing benefits was expressed by Charles E. Wilson (Secretary of Defence under President Dwight E. Eisenhower) who said: ‘For years I thought that **what was good for our country was good for General Motors, and vice versa**. The difference did not exist. Our company is too big. It goes with the welfare of the country. Our contribution to the nation is considerable’⁴⁴. Law is the vehicle for reaching this ideal.

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⁴⁴ <<http://www.freep.com/article/20080914/BUSINESS01/809140308/GM-s-Engine-Charlie-Wilson-learned-live-misquote>>.

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