

BOOK REVIEWS

Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law*, Cambridge, Cambridge University Press, 2003, 531 pp., ISBN 0521819490, £65.00.

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Empires have risen and fallen over the centuries. Generally they have controlled regions, or parts of regions, of the world, usually through a combination of military, political, and economic power. It is only in more recent centuries that there could be considered to be a state that had some global power or control. With the end of the Cold War, there appears to have been a rapid acceptance by many scholars, and the general populace, that there is one superpower in the world – the United States – that dominates and controls almost all aspects of international (and even national) relations and law.

This edited book examines the extent to which this dominance – or hegemony – is leading to foundational changes in the international legal system. The focus of the book is on key areas or concepts rather than the whole international legal system. The six areas chosen are international community, sovereign equality, the use of force, customary international law, the law of treaties, and compliance, though no clear conceptual rationale is given as to why these six were chosen. The method adopted to explore the impact of US hegemony on the international legal system is to have two chapters on each area written by a ‘relatively young’ (p. xv) international law or international relations scholar and then brief commentaries on these chapters and/or on the area by three other ‘more senior’ (p. xvi) international law and international relations scholars, with an introduction and a conclusion by the two editors. The choice of contributors is interesting, as Georg Nolte acknowledges: ‘Questions have . . . been asked concerning the contributors to this book [including by some contributors themselves] . . . [but] it was our intention to have a group of mainly European scholars discuss our topic in the presence and with the active participation of scholars from the United States and beyond’ (pp. 493–4). This is a helpful answer, although it does not fully explain why there is only one scholar who can be considered to come from a developing state (although he has worked for very many years in United Nations agencies) or why there are only two women out of the 32 contributors.

The two main contributors on ‘international community’ are Edward Kwakwa and Andreas Paulus. They offer valuable insights into the various attempts to define ‘international community’, with Paulus noting that ‘Every concept of international law is based on an understanding of the social structure to which international

law applies. Accordingly, every theory of international law involves, explicitly or implicitly, a concept of international community or society' (p. 60). They agree that this term cannot be limited to being 'an international community of states' but must include non-state actors especially, because, as Kwakwa is aware, 'In large measure, interdependence and globalization, however defined, are processes that are shaped more by markets than by governments' (p. 35). The commentators on these chapters offer good insights, such as the problem of exclusion from 'the international community' and whether that term is really too elusive to be able to be used with any confidence, although it is surprising that they all seem to accept that the idea of an international community has always been foundational to the international legal system, rather than being relatively recent.

Michel Cosnard and Nico Krisch are the two main contributors to the section on sovereign equality and their focus is on the interaction between states in the development of international law. Cosnard supports the traditional view of consent as a foundational principle, with consent by other states to the United States' position usually occurring due to the 'victory of the values of the Western world', which other states do not wish to oppose (p. 131), although finding consent to 'values' is not an easy task. In contrast, Krisch is concerned about a hierarchy of sovereignty, where 'some states are more equal than others' (quoting Orwell, p. 174). He shows how the United States continues to act outside those international institutions where it does not have a superior status (such as the UN General Assembly), uses incompatible reservations to any treaty it does sign, refuses to sign or ratify other treaties, and 'has turned to unilateral means, and notably to its domestic law [and its courts], as a tool of foreign policy' (p. 136), such as using its national laws to function as global rules for world trade and investment. The commentators are resistant to Krisch's argument, since they seem to prefer the security of the fiction of sovereign equality as it 'is a constituent fiction that requires acceptance if the whole edifice of the international legal system is not to be called into question' (Dupuy, p. 179), or prefer a more comforting idea that the United States is not alone in, for example, 'aggressively promoting democracy as the preferred form of government' (Fox, p. 192). It is disappointing that this section does not really consider to any significant extent the interaction between the international community and the sovereignty of states, as this is a matter of considerable importance for the international legal system.

There is also not enough connection between these two sections and the section on customary international law. This is particularly surprising, as Stephen Toope makes the strong statement that 'customary law is now created in part through processes that do not require the unanimous and continuing consent of all states, even those most directly interested in a given norm' (p. 290), due to shared expectations or perceptions of legitimacy, with no real role any more for the persistent objector rule. This argument that states do not control completely the process of customary international law creation is shared by the other main contributor to this section, Achilles Skordas, who uses the idea of *opinio necessitatis* to include considerations of non-state actors in creating and developing customary international law. These are intriguing arguments based on considerations of the reality of the international legal system and not legal fictions, though the commentators in this section are

less willing to accept them. Interestingly, commentators in later sections, such as Vaughan Lowe, do seem to accept the real legal effects of non-state actors within the international legal system.

There are two sections of the edited book that deal with specific applications of international law: the use of force and the law of treaties. These sections – by Marcelo Kohen and Brad Roth, and Pierre Klein and Catherine Redgwell respectively – offer clear and well-supported arguments that the hegemony of the United States has not yet fundamentally changed these areas of the international legal system, although, as Redgwell notes, there have already been some negative effects on specific areas such as international human rights law. The final section, being on compliance, has as its main contributors Shirley Scott and Peter-Tobias Stoll. They each look at a series of examples of US actions across a range of areas, and conclude that there are some actions that confirm international law and others that seem to deny it. Once again, their comments reflect the position that the United States has to persuade others to give way to it and also that if it does not get its own way it will move from one international forum to another where it can use its power to attain its ends with fewer international legal controls.

Throughout this book there is a running theme that the hegemonic position of the United States has not yet changed some of the fundamental areas of the international legal system. For example, Roth cautions that ‘far too little time has passed in the unipolar era, and far too little practice adduced, to substantiate so sweeping a change in the premises of the international system. It is characteristic of legal orders that the statuses and rights they confer reflect long-term power and interest accommodations’ (p. 261), so that they can withstand short-term changes in the relative power of international actors. Scott puts it another way: ‘international law is more than simply a blank slate onto which the most powerful can translate their policy desires’ (pp. 449–50). The only disappointment is that there is no real pulling together of the different sections by the commentators and so some cross-currents are lost.

This book offers a valuable insight into how the international legal system is developed and influenced by a hegemonic power. This is an important project because, as Scott notes, ‘It was not that the dominant power [in each epoch] controlled every development within the system during that epoch but that the dominant power was the one against whose ideas regarding the system of international law all others debated’ (pp. 450–1). While the general view in the book is that the United States has not yet changed fundamental aspects of this system, there are clear warnings that the United States has the power to act in ways that can undermine the usual international interactions and institutions. These warnings proved very apt after the book was completed, as the United States and the United Kingdom – a new and an old empire – acted contrary to international law and outside the relevant international institutions to institute armed conflict in Iraq. This book puts this action in context. I recommend it very highly.

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Andreas F. Lowenfeld, *International Economic Law*, Oxford, Oxford University Press, 2002, ISBN 0198256671, 820 pp., £80.00.

M. Matsushita, T. J. Schoenbaum, and P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, Oxford, Oxford University Press, 2003, ISBN 0198764723, 770 pp., £110.00.

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I.

Few would question today that the burgeoning and increasingly complex areas of law regulating international economic relations, once the exclusive domain of trade-technocrats and specialist diplomats, are in fact organically tied to public international law. Indeed, it may even be said that public international law is at its most vibrant and dynamic in these areas – primarily in the law of international trade, but also in international investment law, international monetary law, and other related fields with a developed and intensive, though highly specialized, practice. The details of what appears to be a *lex generalis*–*lex specialis* relationship between general public international law and its substantively economic expressions are still controversial – particularly the extent to which public international law may, or must, be referred to in the context of international trade, but there is little doubt that international economic law, to expand on the opinion of the Appellate Body of the World Trade Organization (WTO), should not be read in ‘clinical isolation from public international law’.¹ The WTO judiciary, as a leading manifestation of the legalization of international economic relations, has yet to apply directly substantive public international law that is not expressly incorporated in the WTO legal system,² but non-economic international norms, both treaty-based and customary, constantly leach into the trading system through questions of interpretation and application, making the bond between the different legal systems a concrete and indeed irreversible one.

At the most fundamental level of legal scholarship and practice, this normative osmosis may be expected to work in two directions, with international economic law both influenced by and impacting on the development of public international law.³ It would undoubtedly be of mutual benefit if more public international lawyers

1. *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. (1996) WT/DS2/AB/R (Appellate Body Report), at 17.

2. The Appellate Body (AB) has made extensive reference to non-WTO international legal sources, such as the United Nations Convention on the Law of the Sea (UNCLOS) done at Montego Bay, 10 Dec. 1982, UN Doc. A/CONF62/122; 21 ILM 1261; the Convention on Biological Diversity, done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 ILM 818; and the Convention on International Trade in Endangered Species of Flora and Fauna (CITES), done at Washington, 3 March 1973, 993 UNTS 243, 12 ILM 1085, e.g. in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, (1998) WT/DS58/AB/R (Appellate Body Report). Moreover, it has referred to these sources for the purpose of interpreting WTO law, not as independently applicable substantive sources of law imposing obligations upon WTO members.

3. See J. Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, (2001) 95 AJIL 535. One might add that just as the WTO Appellate Body employs the international customary rule of interpretation established by the International Court of Justice in *Namibia (Legal Consequences) Advisory Opinion*, (1971) ICJ Rep., at 31, and the *Aegean Sea Continental Shelf Case*, (1978) ICJ Rep., at 3, whereby treaty terms are ‘evolutionary’ rather than ‘static’, and so must be interpreted taking into account developments in law

were to shed any inhibitions they may have with regard to economic law and take a greater and more active interest in it, deriving significant lessons that may be applied in other areas of international law, and at the same time making meaningful legal contributions to the international economic legal sphere.

At a second, perhaps more elevated level of analysis and interaction, international economic law may be understood as lying at the forefront of 'international governance', a non-diminutive microcosm of global relations in which the central problems and dilemmas that exist in the general international and legal political systems – albeit in muted, less anxious, expressions – are both encapsulated and considerably amplified: tensions between sovereign authority and supranational regulation; between the developing world and developed countries; between the traditional interstate system and the influence of non-state actors, individuals, and non-governmental organizations; between economic and non-economic values; and between diplomatic–political power and international judicial control. Ultimately, the balance struck between these elements bears directly on the legitimacy, authority, and effectiveness of the evolving instruments of international economic governance. Furthermore, an understanding of the way in which international economic law – and especially the law of the WTO – has been developing in the shadow of these tensions is a profound source of inspiration, experience, and knowledge towards the broaching of these issues in the general international legal sphere.

2.

In this context, the publication of two books surveying international economic law in a virtually unprecedented comprehensive manner,⁴ each written by eminent authorities in the field, is a welcome event. Be it said at the outset that both of the volumes reviewed here, each with its own distinct scope, method, and style, are of the highest scholarly quality and the authors discharge the burden of covering their broad mandate in a manner that is nothing short of heroic,⁵ given the immensity of the task. There is no question that either of these books would do well in fulfilling the goals of educating the uninitiated as well as providing convenient reference resources even to seasoned lawyers in the field, therefore contributing greatly to

subsequent to their drafting, so international public law must be interpreted in a manner that accommodates the developments in international economic law.

4. But see also M. J. Trebilcock and R. Howse, *The Regulation of International Trade* (1999 and forthcoming 2004); and J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1997).
5. It would appear incumbent on the reviewer of works such as these to identify at least one indisputable mistake, beyond the odd typographical error (e.g. with respect to the burden of proof in cases related to the WTO Agreement on Technical Barriers to Trade (TBT) (Agreement Establishing the World Trade Organization, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *Legal Instruments – Results of the Uruguay Round*, 33 ILM 1140 *et seq.* (hereafter 'WTO Agreement')), *The World Trade Organization: Law, Policy, and Procedure* (at p. 512) states that in *European Communities – Trade Description of Sardines*, WTO Doc. (2002) WT/DS231/AB/R (Appellate Body Report) 'Peru, the complaining member, was found to have the burden of showing that the Codex standard was ineffective or inappropriate', when in fact the burden found was to demonstrate the opposite). The virtual non-existence of such errors in both books is a remarkable achievement.

the integration of economic law with public international law – at the first level of analysis mentioned above. Each book has, nevertheless, its own content and style, its advantages, and drawbacks.

The World Trade Organization: Law, Practice, and Policy is a collaborative work penned by three distinguished academics who have also gained considerable practical experience (including one founding (former) member of the WTO Appellate Body, Mitsuo Matsushita), each representing the most respected WTO scholarship of their home jurisdictions (Japan, the United States, and the European Union). The book covers the history and organization of the WTO, its dispute settlement system, legal sources, and remedies, the relationship of WTO law with domestic law, and every important aspect of substantive WTO law, from the basic principles of tariff reduction, the Most-Favoured-Nation and National Treatment principles, and regional trade agreements, through trade in services, trade remedies, and developing countries, to intellectual property, environmental protection, competition, investment, and technical barriers and standards. The book follows the style of traditional law textbooks, so that the tone is definitive, concise, and focused, mostly descriptive and mostly non-critical. The advantage of this is that the reader will easily find at least basic answers to virtually any question asked about existing WTO law as a starting point for deeper investigation, making the book a superb, concordance-like research resource; the inevitable shortcoming is that in many cases the answers will be of a cursory, almost perfunctory nature that under-represents the extent to which broad agreement is absent on many trade issues.⁶ Furthermore, where the authors do venture to make normative proposals for reform – all prudent and interesting – it is at times difficult to see how their conclusions necessarily follow from the presentation of the law that precedes them,⁷ rather than simply from the authors' experiential knowledge and opinions. While prefacing with the observation that the WTO is 'one of the most controversial institutions of our time' (p. v), the authors seem to steer clear of controversy, and at many points one feels as if one is reading an 'official' account of affairs, of the kind one finds on the WTO website,⁸ giving no more than a nod to whatever contentions exist.⁹ They appear to take the validity

6. Examples as well as exceptions abound, but I will note only one: the chapter on the subject of sources of law in the WTO well represents the relatively cautious opinions of the Appellate Body on the issue, but does not acknowledge the voices arguing for broader application of public international law in the WTO. At minimum, one would have expected some reference to Pauwelyn, *supra* note 3.

7. See, e.g., the discussion of dumping described in note 9 *infra*.

8. See online at www.wto.org.

9. For example, in discussing the concept of dumping and the law of anti-dumping in international trade (ch. 13), the authors do mention that 'there is a view that "dumping" is merely legitimate price competition' (p. 303), that 'whether antidumping is a good policy is a controversial matter', and that some argue that anti-dumping measures are 'often used to protect domestic industries from competition and are themselves unfair' (pp. 306–7). Moreover, neither the detrimental welfare effects, both domestic and international, of anti-dumping measures, nor the well-established critiques thereof, are sufficiently brought to the reader's attention. The authors do present a number of proposals for the reform of anti-dumping, with scarce basis in the preceding descriptive review, but maintain a general loyalty to the maintenance of economically inefficient anti-dumping rules, couched in terms of political pragmatism ('Politically, the constituency for antidumping is different from that for competition law. Accordingly, a proposal that anti-dumping be abolished is probably not possible' (p. 337)). It is not clear why such an orthodox, near-dogmatic, approach is pursued. Another example: in dealing with the WTO AB decision in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/ARB (Appellate Body Report) (hereafter

of classical trade theory for granted, with no exposition, no provision of doctrinal underpinnings for the law they explain, and little attention to the reservations and qualifications that have been raised with regard to it.¹⁰ They briefly acknowledge the existence of allegations that the WTO is anti-poor, anti-democratic, and harmful to important non-trade concerns such as the environment and social welfare, but these are hardly confronted beyond stating that ‘the authors largely disagree’ with these accusations (pp. ci–cii). This is not to say that the work entirely lacks criticism or normative opinion – the first chapter concludes with a number of ‘suggestions for improving the WTO’, the final chapter directly addresses the ‘future challenges’, and many chapters include specific proposals for reform. One senses, however, that the need for collegiality and consensus¹¹ among the three co-authors, as well as the demand for brevity and the ‘textbook’ nature of the work, have prevented most expressions of in-depth exploratory analysis. The self-proclaimed aim of the treatise, to provide an accessible ‘snapshot’ of existing WTO law (p. ci), has, however, been duly satisfied.

International Economic Law is the work of another distinguished expert, Andreas Lowenfeld of New York University. It is more ambitious and opinionated (although certainly very well grounded in existing law and scholarship) than *The World Trade Organization: Law, Practice, and Policy*. In scope, it includes not only WTO law, but also detailed discussions of the regulation of international investment (pp. 391–493), the international monetary system (pp. 495–693; 200 full pages are devoted to this subject, constituting more than a quarter of the volume and presenting one of the most comprehensive contributions to the field in legal literature, a veritable ‘book-within-a-book’), and the law of economic sanctions (pp. 695–764). Only the law of regional economic integration, as a general subject of importance, has, perhaps, not been granted enough attention. More a treatise than a textbook, the style is informative yet inquisitive, authoritative yet demanding, usually offering much more than a mere description of current law, highlighting both dilemmas which are posed to the law and problems it poses (constantly demonstrating the possible implications of legal design with reference to examples from the hypothetical trade relations between ‘Xandia’ and ‘Patria’).¹² The book ‘seeks to teach, not to preach’ (p. vii), reflecting the belief that ‘the answers cannot be understood without the question, and that abstract statement cannot be comprehended without awareness of the underlying facts and the continuing controversies’ (p. 765). A critical elucidation of the economic theory of international trade, along with its ‘complications’, is provided

‘Bananas case’), 1999, at para. 132, whereby ‘legal interest’ is not a condition for standing in WTO disputes, it is noted that ‘the liberal approach to standing is quite new and controversial; there was no tradition of such complaints under the GATT’ (p. 26), but there is no discussion, however, of the effects of this approach, or of the controversy, or reference to supporting or dissenting views.

10. Compare note 17 *infra*; and Trebilcock and Howse, *supra* note 4, ch. 1, particularly at 7–15.

11. Collegiality among members is one of the principles guiding the work of the Appellate Body (see Art. 4, WTO Appellate Body, Working Procedures for Appellate Review, WTO Doc. WT/WP/4 (2002); while consensus is of course still the most sacred principle of WTO decision-making (see Art. IX(1), WTO Agreement, *supra* note 5).

12. For example, and contrasting with the approach followed by *The World Trade Organization: Law, Practice, and Policy* as described in footnote above, *International Economic Law* includes a lucid explanation of ‘pros and cons’ of the economic arguments relating to anti-dumping (pp. 245–8).

upfront, back-to-back with an explanation of international monetary dynamics (pp. 3–8); indeed, an effort is made throughout the book to tie issues of trade and money in an impressively consistent manner. The price paid, however, for this more enthralling, professorial, reflective approach is that some topics are necessarily dealt with less thoroughly than others: the chapter on dispute settlement in the WTO is particularly lean, although illuminating;¹³ the parallel parts of *The World Trade Organization: Law, Practice, and Policy*, for example give a more comprehensive coverage of this specific field. Those areas in which Lowenfeld lingers are, however, of classic quality.

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With these general, yet significant, differences in mind, and returning to the second level of analysis mentioned above, it is interesting to take note of the way in which each of the books approaches some of the more sensitive legal, social, and political tensions of the international economic system. The balance between national and supranational authority in international trade and economics, although not dealt with explicitly in either book, is an inevitable background element of international economic law, a field that is a mixture of both domestic and international regulation, so that the reader will find much to study in both books, albeit without the benefit of theoretical underpinning. Similarly, the interaction between economic law and non-economic values and issue areas enjoys significant coverage in both books,¹⁴ although lacking a holistic framework for analysis in either (of special note are the excellent chapters on trade and competition offered in both books).¹⁵ *International Economic Law* largely ignores the development dimension of international economic law, even in its chapters on the international monetary system,¹⁶ while *The World Trade Organization: Law, Practice, and Policy* devotes a special chapter to the status of developing countries in the WTO (ch. 15), including reference to the problem of defining development status (p. 374), and some analysis of the relevant GATT/WTO provisions, but this chapter is particularly non-critical, belying the sensitivity and importance of the relationship that is so important for the future of the multilateral trading system; there is, for example, no mention of the low level of legal obligation to development targets in the WTO, even in the brief section that highlights the treatment of developing countries as one of the crises afflicting the WTO (pp. 594–5). The judicial–political relationship in the WTO is discussed in *The World Trade Organization: Law, Practice, and Policy*, if only cursorily (pp. 43–4, 590–2), offering

13. The question of standing before the WTO dispute settlement system, for example, as raised in the *Bananas* case (*supra* note 9) is simply not mentioned in *International Economic Law*, although the compliance stages of the same case are granted considerable attention (pp. 188–94).

14. *The World Trade Organization: Law, Policy, and Procedure* devotes separate chapters to intellectual property; environmental protection and trade; technical barriers, standards, trade, and health; and trade and investment. *International Economic Law* includes an in-depth chapter on the environment and international economic law, and an extensive part on international investment.

15. Ch. 20 in *The World Trade Organization: Law, Policy, and Procedure*; ch. 12 in *International Economic Law*, which was actually written by a leading expert on trade and competition, Eleanor M. Fox.

16. There is some discussion of dispute settlement and developing countries on pp. 174–5.

little insight and reference to criticisms that have been raised in this regard;¹⁷ this is a significant omission, given that the judicial activism in the WTO has been the focal point of substantial disapproval, however unjustified. *International Economic Law* generally disregards the issue even more blatantly.

It is particularly striking how little attention is paid by the authors of both volumes to the role of private economic operators and other non-governmental actors in the WTO and in international economic law. Trade and other economic activity is regulated by governments, but it is originally generated and 'conducted most often and increasingly by private operators',¹⁸ commercial enterprises, and individuals. Similarly, international economic law usually¹⁹ establishes the rights and obligations of states among themselves, but the intended beneficiaries of this legal system are the individuals who compose the market and are most affected by it. Indeed, the multilateral trading system has as one of its central aims the provision and maintenance of security and predictability that are conditions for welfare-promoting economic activity.²⁰ Not only traders are affected by international trade law, but rather an extremely broad range of private actors, down to the most basic level of the individual consumer and family unit; and as economic and trade issues increasingly affect non-trade interests such as the environment or health, the spectrum of 'stakeholders' in international economic issues has broadened to include the dynamic non-governmental representation of these interests.²¹ The gaps between government workings, private interests, and civil society interest-advocacy contribute greatly to the tensions in the environment in which international economic law is developing. It is the role of private actors that places international economic law (alongside human rights) at the frontier of international public law in general, pushing and indeed transforming the Westphalian envelope.

Yet *The World Trade Organization: Law, Practice, and Policy* offers only a classical government-to-government depiction of the multilateral trading system and its dispute settlement system, with little elaboration on the critical underlying role of private operators, or the growing involvement of civil society. Trade rules and policies are explained as international legalities, the description of their effects restricted to macroeconomic analysis at most. The social and economic effects that

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17. For example, ch. 14, 'Regional Trade Agreements', makes only passing reference to F. Roessler, 'Are the Judicial Organs of the World Trade Organization Overburdened?', in R. B. Porter *et al.* (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001), at 308, where the author implies that the burden on the dispute settlement system affects the political-judicial balance in the WTO. Throughout the book there are some references to the charges laid in C. E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (2001) (e.g. p. 591), but the influential arguments made there regarding the political-judicial balance are not addressed. For incisive critiques of Barfield's book, see R. E. Hudec, 'Book Review: *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*', (2002) 1 (2) *World Trade Review* 14; and D. P. Steger, 'Book Review: *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*', (2002) 5 *Journal of International Economic Law* 565.
18. See *United States – Sections 301–310 of the Trade Act of 1974*, WTO Doc. (1999) WT/DS152/R (Panel Report) (hereafter 'US – S. 301') at 21.
19. But not exclusively: see, e.g., Ch. 11 of the North American Free Trade Agreement (NAFTA), (1993) 32 ILM 605 (Parts IV–VII, Annexes), establishing, *inter alia*, rights and remedies for private investors against governments of NAFTA members.
20. For the most eloquent exposition of this objective see US – S. 301, *supra* note 18, at 19–25.
21. See G. R. Shell, 'The Trade Stakeholders Model and Participation by Non-State Parties in the World Trade Organization', (1996) 17(1) *University of Pennsylvania Journal of International Economic Law* 359.

rules and policy may have on non-governmental stakeholders are generally not discussed. For example, the chapter on trade in services does not mention or discuss the possible far-reaching implications of the regulation of service supply in 'Mode 4',²² the supply of services through the presence of natural persons – implications for freedom of movement of persons, immigration policy, internal security, and more. Similarly, disputes are drily described as abstract legal confrontations between WTO members, downplaying the layered dynamics of disputes that frequently are actually private commercial campaigns championed by governments.²³ To be sure, the book is a study in law, not in political economy, and yet in the WTO these concepts are constantly intermingled, as the authors themselves acknowledge (p. ci), so that a description of one without the other seems lacking. Moreover, non-state participation has also vigorously entered the most legalized arena of the WTO, its dispute settlement system, with the debate over acceptance of *amicus curiae* briefs from non-members, including non-governmental organizations and individuals. With regard to this highly contentious issue the book offers surprisingly little insight, given the relationship of some of its authors to the events themselves, and the novice reader would not realize the importance of the subject from simply reading the book.²⁴ The status of traders in the legal system is not discussed even when it is an important part of legal cases otherwise dealt with. For example, the *City of Trondheim* case is briefly mentioned (p. 79) in the context of the limited scope for GATT/WTO restitution and reimbursement remedies, but the detrimental effect the law has on traders' expectations and indirect rights in this regard, by not re-allocating tender awards, is not discussed. The *US–Lamb Safeguard* case and its analysis of the scope of the term 'domestic industry' in Article 4(1)(c) of the WTO Agreement on Safeguards has distinct implications for the range of traders whose expectations and interests may be protected in different circumstances, yet the book restricts its discussion (as do the Panel and Appellate Body) to the techno-legal aspects of the dispute.²⁵ Even the far-reaching discussion by the unappealed *United States – Section 301* Panel Report,²⁶ of the 'indirect effect' of WTO law as achieved through improving and maintaining conditions of predictability and security in international trade, is not given any thought. The discontent expressed by civil society towards the WTO is briefly noted as one of the challenges facing it, but the references to the need for increased transparency and participation (p. 593) are so casual that they may be mistaken for lip service only.

International Economic Law is in some respects measurably both less and more indifferent to the role played by non-governmental actors in international economic relations. The perspective of the WTO and other systems remains primarily

22. Art. I(2)(d) General Agreement on Trade in Services (GATS), Agreement Establishing the World Trade Organization, *supra* note 5.

23. See, e.g., the dispute colloquially known as 'Kodak-Fuji', and more formally as *Japan – Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. (1998) WT/DS44/R (Panel Report).

24. There is some discussion at pp. 36, 44.

25. See p. 192, referring to *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat From New Zealand and Australia*, WTO Doc. (2000) WT/DS177/R, WT/DS178/R (Panel Report) and WTO Doc. (2001) WT/DS177/AB/R, WT/DS178/AB/R (Appellate Body Report).

26. *Supra* note 18.

state-bound, centring on the actions of governments and the implications for economies and markets, but implicit notice is given to the individuals who drive them. The chapter on trade in services emphasizes that regulation of services focuses on the providers themselves, and that in many cases the cross-border supply of services requires interaction with immigration laws, and can therefore ‘touch raw nerves’ (p. 114). Part VI (chs. 13–15) of the book, on bilateral investment agreements in general and Chapter 11 of the NAFTA in particular, necessarily dwells on the role of the private investor in the process. Moreover, one might still be left with the (mistaken) impression that trade and economic activity are the domain of governments rather than persons, natural and legal. The *United States – Section 301*²⁷ panel’s pronouncements on the aims of the WTO are not mentioned, although the case is granted the spotlight in the context of unilateral vs. multilateral enforcement (pp. 180–8); indeed, I found no reference to the issue of *amicus curiae* briefs and civil society participation in the trading or greater economic system.

As indicated above, despite these criticisms both books offer excellent, even indispensable, resources for international lawyers interested in economic law. Those seeking insight into the social and political implications of the law may be disappointed, however, and would better regard these books as points of entry into a world that is far more nuanced and complex than they suggest. One can only hope for many updated and revised editions of both in the future.

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J. L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, ISBN 052152928X (pb), 0521821983 (hb), 350 pp., £18.99 (pb), £50.00 (hb).
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The doctrine of humanitarian intervention is ethically, legally, and politically controversial. Does this collection clear some of the fog surrounding it? The book starts rather inauspiciously by immediately referring to ‘*unauthorized* humanitarian intervention’ (Robert Keohane, p. 1, emphasis added), when perhaps the focus should have been on the issue of the source of authority for such action. There is an acceptance that the UN Security Council can authorize humanitarian intervention, but why should the United Nations have such a power and not states? Essentially, those who view the international (legal) system as being composed solely of states as the only complete legal persons would find it difficult to accept that an international organization, with its derivative legal personality, should have a competence that a state does not. On the other hand, those who see organizations as having a separate will capable of regulating member states would claim that it is entirely possible for

27. *Ibid.*

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an organization to possess a legal right or power that is denied a state. Fortunately, though, such issues are not ignored in the ensuing debate.

The introduction does raise a fundamental problem for those advocating humanitarian intervention, namely 'whether humanitarian intervention has become an obsolete topic in the light of the struggle against terrorism being led by the United States' (Robert Keohane, p. 3). Has Kosovo been eclipsed by Afghanistan and Iraq, both of which could have been claimed as humanitarian interventions but were not? Of course, it is always possible to claim retrospectively, as has been done with several instances of use of force in the past, that the action was really one of humanitarian intervention, at least in part. Further, the United States and its allies 'could engage in interventions that are designed both to prevent terrorism and to help save the people of those states from misery and chaos' (Robert Keohane, p. 3), what are later labelled 'impure humanitarian interventions' (Robert Keohane, p. 11). This sounds like a plea to Western states, the predominant users of force at the turn of the century, to build up, from a rather limited store, the level of *opinio juris* in favour of humanitarian intervention. When using force, do not forget to include statements about saving the population from massive human rights abuse! Nevertheless, the high-water mark of Kosovo could be said to be fading in favour of a much less ethically driven approach to foreign affairs, where the terrorist threat is defined so widely as to provide blanket justification for uses of force that were previously agonized over in political debates, characterized by a significant infusion of law and ethics. It may be that humanitarian intervention, which has always sat oddly as a *right* not a *duty*, will be eclipsed by the much more flexible, and avowedly self-interested, *right* of self-defence being claimed by the United States and others. Why get into ethical and legal debates involving the philosophy of just war, when you can simply play the terrorist card?

Nevertheless, the harrowing account of human suffering in Rwanda in 1994 (J. L. Holzgrefe, pp. 15–17) should serve to show the seriousness of the ethical and legal debate. Surely military action should be taken to prevent genocide and other serious human rights abuse. But the point about Rwanda was that there was little state interest in intervening to save the lives of the Tutsis. There is little point, in this case, in separating state inaction from UN inaction, since the United Nations, in taking enforcement action under Chapter VII, is dependent upon states volunteering for the mission. Basically states were unwilling to intervene either with or without UN authority. The most serious loss of life in Rwanda, and in terms of scale far eclipsing the events of September 11, was not deemed worthy of military action (except the limited and flawed effort by France operating under a UN authorization). In Kosovo, where the level of human suffering was by no means as great as in Rwanda, the intervening states mostly relied on specious arguments about UN authority rather than humanitarian intervention. 'If there is presently a right of unauthorized humanitarian intervention, is it a right that dare not speak its name?' (J. L. Holzgrefe, p. 49). How can that be? For an international law to develop, especially one that challenges a peremptory norm of international law (that preventing the non-defensive use of force), there must surely be agreement about the conditions under which humanitarian intervention should be permitted. The fact that such

intervention is being undertaken to prevent the violation of another *jus cogens*, such as that prohibiting genocide, does mean that there is a debate to be had – it is not acceptable simply to hide behind Article 2(4). However, as Tom Farer points out, the problem is that, at least before 11 September, those states that might advocate humanitarian intervention were guilty of ‘that repulsive marriage of noble rhetoric and heroic constraint in the face of evil’ (p. 55). To make a sustainable case for humanitarian intervention there must be a marriage of words and deeds when faced with massive human rights atrocities. Such altruistic interventions are, however, much less likely after 11 September, when the rhetoric, as well as the interventions, have returned to self-interest.

What this volume does is provide a series of stimulating essays that permit the reader to weigh up the arguments for and against humanitarian intervention, and, as importantly, to gauge the current stage of the debate. Are the ethical, political, legal, and empirical (showing the benefits in terms of lives saved – see ch. 2 by J. L. Holzgrefe) arguments so persuasive that the laws that were promulgated in 1945 are shown to be in need of change, or indeed to be so morally bankrupt as to justify their being violated? The conclusion of the House of Commons Foreign Affairs Committee of June 2000 that the Kosovo operation was illegal but morally justified would, if accepted, suggest that either the moral exception is somehow permitted but the law remains as is, or that the law should be changed in order to come into line with morality. One possible compromise is that uses of force that appear to meet the criteria of ‘pure’ humanitarian intervention are still deemed to be unlawful uses of force, but that they do not constitute aggression. They violate Article 2(4), but they are not the most serious violations of that norm. Such a position would mean that neither the states engaged in such operations, nor their political or military leaders, will be deemed to have committed international crimes, something that may be very important politically, but also legally, if the International Criminal Court (ICC) does come to assert jurisdiction over aggression. These are just some thoughts provoked by the introduction and the first two chapters.

The remainder of the book does not necessarily answer all the questions raised at the outset, but it provides the reader with a spectrum of finely argued views. Fernando Teson restates his arguments that humanitarian intervention is morally justified on the basis of the fundamental importance of respect for human rights (ch. 3), and he rightly points to the self-serving nature of governments who do not permit the emergence of a law allowing intervention. Allen Buchanen points out that in these circumstances it may be necessary to break the existing law to make new law; this is, after all, a feature of a system largely based on custom (ch. 4). Michael Byers and Simon Chesterman (ch. 5) doubt, however, whether the traditional conception of how international rules are made will be sufficient ever to allow a humanitarian exception, but they caution against changing the rules about rules ‘in attempts to mould [the] law to accommodate the shifting practices of the powerful’ (p. 203). Thomas Franck (ch. 6) warns us against having too great a reverence for the law; we should instead see ‘a system of norms constantly engaged in a process of challenge, adaptation, and reformulation’ (p. 204), further warning that law ‘does not thrive when its implementation produces *reductio ad absurdum*:

when it grossly offends most persons' moral sense of what is *right* (p. 212, emphasis in original), and counselling that we should look more closely at necessity and mitigation to close the gap between legality and legitimacy. Jane Stromseth (ch. 7) continues the debate by arguing that 'the legal status of humanitarian intervention remains uncertain after Kosovo and... this is a good thing' (p. 233), for it means that there is a strong presumption against intervention, but it also allows for the emergence, incrementally, of a normative consensus over when and how such interventions may be allowed, facilitated by the growing debates that can be found over guidelines. Stromseth also calls for a greater evaluation of the effectiveness of military intervention undertaken for humanitarian purposes (pp. 267–71), an issue taken further to the post-intervention stage by Robert Keohane in chapter 8, where he considers the need to 'unbundle' sovereignty 'in order to establish legitimate authority after intervention' (p. 276), an issue being faced in 'post-conflict' Iraq today. The issue of nation-building is further explored by Michael Ignatieff in chapter 9, where he tellingly argues that the responsibility to protect human rights – the rationale for humanitarian intervention – implies responsibility to stay the course (p.320). The long tail that follows an often rapid and effective military campaign may be the factor that in the future will curtail the current propensity for intervention, although Ignatieff argues that nation-building is essential in order to 'create the stability that turns bad neighborhoods into good ones' (p. 321).

This is an excellent collection of essays that provide essential reading for anyone involved or interested in the continuing debate over humanitarian intervention.

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