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Book Reviews

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BOOK REVIEWS

The United States and the Politicization of the World Bank: Issues of International Law and Policy

By Bartram S. Brown. London and New York: Kegan Paul International, 1992, pp. xvii, 295, \$89.90.

Studies of the actual operation of international organizations, particularly the specialized agencies of the U.N., are modest in number and revelation. Welcome, therefore, to Professor Brown's study of how the operation of the World Bank has been affected by the influence of the United States as its chief shareholder and as the most powerful economic, monetary, and financial power in the world! His study is especially timely now that the organizations on which international agreement was reached at the Bretton Woods Conference of July 1944 will soon have achieved the maturity of their first half-century.

The broad ambition of the planners of the world that would follow the catastrophe of the Second World War was that a general international organization would resolve international problems of a "political" character that threatened peace, prosperity, and other forms of wellbeing, and thus would shelter the agencies with specialized (sometimes called "technical") objectives from the need to deal with political disturbance or risk. Therefore, John Maynard Keynes, the leader of the United Kingdom delegation at Bretton Woods, and a planner of genius, could exhort the Boards of Governors of the IMF and the Bank at their inaugural meeting at Savannah, Georgia, on March 9, 1946, to be aware that:

If these institutions are to win the full confidence of the suspicious world, it must not

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only be, but appear, that their approach to every problem is absolutely objective and ecumenical, without prejudice or favour.

Carabosse (the wicked fairy of Tchaikovsky's ballet "The Sleeping Beauty") should be deprived of the opportunity to pronounce the curse:

You two brats shall grow up politicians; your every thought and act shall have an *arrière-pensée*; everything you determine shall not be for its own sake or on its own merits but because of something else.

The effort was made to forestall this curse by including two provisions in the Bank's Articles. Article I sets forth the purposes of the Bank and ends with the sentence: "The Bank shall be guided in all its decisions by the purposes set forth above." Article IV, section 10 is headed "Political Activity Prohibited" and provides that

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

The author concludes that these provisions must be respected not only by the Bank but also by members and executive directors, who collectively constitute an organ that takes decisions of the Bank.

The author's main theme is the question whether the U.S. has acted in accordance with the mandates of these provisions, and in particular Article IV, section 10, in view of the numerous legislative measures adopted by the U.S. Congress to get the Bank to act in accordance with the foreign policy or other interests of the U.S. The legislation requires the executive director appointed by the U.S. to take positions and cast his votes as directed by the legislation when the Executive Directors as an organ are considering their decisions on certain issues. The author dwells also on the question whether the Bank itself has acted improperly either by succumbing to U.S. pressure in defiance of the Articles or by ignoring doctrines of public international law not drawn from the Articles.

As the author's primary investigation is into the conduct of the U.S. rather than that of the Bank, the severe limitations imposed by the practice of secrecy followed by the Bretton Woods organizations in order to maintain, as they allege, the confidence of their membership have not prevented him from pursuing his inquiry. The author complains about this secrecy, but the U.S. publication of statutes and congressional debates of them have enabled him to write an original and useful study.

When Keynes spoke of the "full confidence of the suspicious world" he undoubtedly included in that suspicious world the public and the community of scholars. The archives of the Bretton Woods organizations, however, are locked against scrutiny, although the portals may be opened in response to some requests for a view of documents and minutes on a defined topic, but even then with safeguards. Persons who are or have been on the staff, and who can provide the

information that only insiders can supply as participants in affairs, are subject to official inhibitions. Readers will note that the author's acknowledgements of assistance include no names of present or former Bank officials, although there is a general bow in the direction of many unnamed persons.

An essential problem for the author is the meaning he wishes to attribute to the ugly word "politicization." He attempts to solve this problem as one of both political science and law, but neither discipline leads to a precise definition. He recognizes that an inescapable element in any definition must be that certain decisions or proposed decisions cannot be reconciled with the purposes of the organization, but it is not clear whether other elements enter into the definition, such as intervention in the affairs of the organization by national institutions like the U.S. Congress or other agencies that are considered "political." The circularity of including such an additional element is obvious. It is possible that there are no other intellectually satisfactory elements that can be imported into a definition. The purposes and procedures of an organization like the Bank are multilateral, but they do not truly exclude the pursuit by members of individual advantage. After all, each member joins the organization because of the view that the benefits will outweigh the burdens, which is simply another way of saying that a member seeks individual advantage.

The study is not confined to the analysis of actions inconsistent with the Bank's Articles. It examines also economic actions that are harmful to other states, and here the problem is to determine whether such actions are illegitimate because they are inconsistent with established doctrines of international law even when they are not violations of the treaty. A national prohibition by a state of lending by entities subject to its jurisdiction to another state and entities subject to its jurisdiction is an example of such cases. National prohibitions may be the result, however, of resolutions of a multilateral organization like the U.N. A related problem considered by the author is whether the Bank should consider itself bound to comply with a resolution of this character addressed to it specifically or to states and international organizations in general. The problem is a troublesome one because the Bretton Woods institutions are steadfast in the assertion of their independence and on their right to interpret their own Articles with finality. Yet, it is difficult for them to ignore the attitude of their membership on matters involving international order as expressed in decisions of U.N. organs.

An outstanding merit of the book is its indication of numerous legal questions raised by efforts of the U.S. Congress to influence the Bank by instructing the U.S.-appointed executive director on the positions he is to take and propagate and how he must cast his votes on specified issues. The author ventures to provide answers to the legal questions he has discerned, but these answers are not always persuasive.

For example, he recognizes that executive directors and not members take the decisions of the Bank, but the dilemma then is the legal basis for holding members accountable for decisions or proposals inconsistent with the Articles. He attempts

to solve this problem by describing executive directors as the "representatives" of members, even though he acknowledges that in taking their decisions executive directors must be aware of the interests of the organization and not simply the interests of members they "represent." Much, therefore, depends on what is meant by "representation," because the word can have various different meanings, but he does not define his choice.

One possible meaning is that an executive director casts the votes of the member or members that appoint or elect him and not votes that appertain to him as an executive director. The Articles, it should be noted, do not describe him as casting the votes of a member, do not refer to him in any context as a representative, and say nothing about whether he is subject to instruction or guidance by members. The Articles make the careful statement that he casts "the number of votes" allotted to the appointing or electing member or members, which is not the same as saying that he casts their votes.

The author finds support for his view that executive directors are "representatives" in the provision that a member not entitled to appoint an executive director may send a "representative" to attend any meeting of the Executive Directors when a request by the member, or a matter particularly affecting it, is under consideration. This provision is not evidence for the author's conclusion that, therefore, all executive directors are "representatives." The word may imply a difference in the status of executive directors in the sense that although they should take account of the interests of the organization and not solely the members that joined in electing him, the representative is exclusively an advocate for the member that sent him to the meeting of the Executive Directors.

The procedure for interpretation is, of course, necessarily relevant to the topic of Professor Brown's book. The statement that the provisions of the Bank's and the IMF's charters are largely parallel is a demonstrable error. They were parallel originally, but the First Amendment of the IMF's Articles on July 28, 1969, introduced a substantial departure for the IMF from the original provisions. The statement that the Bank does not publish its interpretative decisions must now be qualified, because it has recently begun to publish its authoritative interpretations, but it remains true that it does not publish a compendium of authoritative and informal interpretative decisions. The relative size of the two categories of decisions can be gauged from the fact that the Bank's publication is at present 23 pages in length while the IMF's latest issue (the 18th) runs to 644 pages. A useful topic for research would be differences between the law and practice of the two Bretton Woods institutions under their original and their present Articles.

The author concludes that the U.S. has been notoriously unsuccessful in enlisting the support of other members for the negative positions or abstentions it takes on loans to target states, although there is no way to determine the effect of U.S. efforts behind the scenes before a proposal to lend is placed on the agenda of the Executive Directors. In his opinion, in only three cases can a *prima facie* case be made that the Bank has taken decisions to withhold loans for political

reasons under an initiative of the U.S. or Bank officials. The conduct of the U.S. that may be questionable has not necessarily been inspired by unadmirable motives, but it is well known that the road to a certain unwelcome destination is often paved with good intentions. The author laments the fact that the conduct of the U.S. has sometimes shown a disrespect for constitutionalism that it would not tolerate on issues of national law. He recognizes, however, that the positions taken by the U.S. have done little harm because they have normally been ineffective, while at the same time helping to placate domestic pressure groups.

The author favors rules for invalidating votes by an executive director in support of positions inconsistent with the Articles. Such a proposal would raise formidable legal difficulties, except perhaps if a decision were taken under Article VI, section 2 to suspend the membership of a member that fails to fulfill any of its obligations to the Bank. Contemplation of such a decision in the case of the U.S. brings to mind a story of the Duke of Wellington, the Iron Duke who defeated Napoleon. The formidable Duke was once addressed by an onlooker on some public occasion as Mr. Smith, thus provoking the response by the Duke "If you believe that, sir, you will believe anything."

The book includes three helpful annexes. Annex A sets forth extracts from the Bank's Articles of Agreement; Annex B is a table of selected U.S. legislation with respect to U.S. policy within the Bank and similar international financial institutions, which runs to no fewer than 29 entries; Annex C is an analytical classification of U.S. legislation. A bibliography provides further aid for additional research. If there are subsequent editions of the book, the author would be well advised to abandon the style, including the solecisms, of the American vernacular.

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Die Liberalisierung des Dienstleistungshandels am Beispiel der Versicherungen. Kernelemente bilateraler und multilateraler Ordnungsrahmen einschliesslich des GATS [The Liberalization of the Trade in Services, Especially Insurance Services. Basic Principles of Bilateral and Multilateral Regulations Including the GATS]

By Christoph Stadler. Berlin, Germany: Duncker & Humblot, 1992, pp. 412, DM 148.00.

Trade in services has become the victim of an easily explainable paradox: To insert services into the GATT framework was among the key motives of the United States headed for the Uruguay Round; today the United States is among the major opponents of strict GATT rules on services. The radical change of attitude has been couched in terms of a rule-oriented versus a power-oriented approach to international trade. This change is the result of several U.S. success stories, be they contractual (like the treaties between the United States on the one hand and Canada or Israel on the other hand) or unilateral (like the section 301 procedures against Korea in the insurance field). Obviously the United States began to feel that its political power was strong enough and that the contractual path was burdensome enough to make it more profitable to maintain unilateral leeway.

This introduction highlights the practical importance of the topic dealt with in the book under review here. The book is an excellent in-depth report on virtually all international activities in the field of foreign insurance trade, imbedded into abundant remarks on international trade law and policy in general.

The value of the book is twofold. The practicing lawyer, especially the insurance lawyer, will use it as a handbook. Besides the GATS negotiations, the reader will find a thorough presentation of other pertinent multilateral, bilateral, and unilateral activities. The book not only covers obvious texts like the prolific EEC law, the Canada-U.S. Free Trade Agreement, or the OECD activities, but also such rarities as the protocol on trade in services to the Australia-New Zealand Closer Economic Relations Agreement of 1988, or the EC-Switzerland Treaty on the Liberalization of Insurance Trade of 1989. The decision to reprint major

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GATS proposals was helpful, since accessing these texts is, to say the least, burdensome.

The scientific value of the book lies in its first 100 pages. Here the author uses the empirical evidence gained from the analysis of the above-mentioned documents, as well as from theoretical literature, to develop a system of trade in services. He investigates in turn: the notion of services; the possibilities of trading them; ways used and purposes sought by the states when impeding international trade in services; and instruments employed by treaty makers to overcome such obstacles. This effort bears double fruit. Part of it is reaped in the book itself. It enables the author to generate a common analytical grid, valuable for all the treaties and proposals reviewed therein. These texts thereby become comparable, despite many apparent differences.

It is a pity that the author leaves the remains of the fruit on the tree. For his grid is not only helpful for descriptive and analytical but also for normative purposes. Whenever a legal order binds foreign trade policy by substantive rules, value judgments must follow the same path. This is striking where proportionality is asked for, as, especially, within the realm of fundamental freedoms and human rights. One has to know the theoretical possibilities of trade in services in order to evaluate whether a given state action interferes with freedoms of providers. The purpose sought and the means employed by the state are the decisive factors in any assessment of proportionality.

The book is full of valuable insights. To name only a few: While the agent has to be viewed as part of the provider's business, the broker poses individual problems (p. 44). The concept of national treatment has to be improved by the idea of hidden discrimination, and it is useless where the national market is highly regulated (p. 51). Its force largely depends on whether foreign services are to be treated equally or only in a similar way. The latter term includes many forms of different treatment based on the contention that foreign services are substantially different (p. 82). Market access often must be directly guaranteed in the services sector, since foreign trade law and municipal law cannot be separated with an ease similar to trade in goods (p. 83). For the same reason, dispute settlement, that is, a piecemeal approach, is of outstanding importance (p. 89). Tax law is a powerful tool to prevent international trade in services, for example by reserving tax privileges to national providers (p. 65). The infant industry argument can only be raised where there is the legitimate expectation of a national industry arising within a reasonable time and at a similar quality (p. 76).

All science rests on the shoulders of its predecessors. This book has the potential of providing a shoulder for quite a number of successors.

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Soviet Banking and Finance

By Kathleen Woody. Cambridge, England: Woodhead-Faulkner, Ltd., 1990, pp. 184, \$34.95 (pb).

Scholarly work in the West on the history of Soviet financial transactions and banking is confined to a short list of books.¹ One of the more recent of these is *Soviet Banking and Finance* by Kathleen Woody, an American lawyer and a specialist in Russian affairs. Woody's book, published before the coup, is remarkable in its scope and detail of a Soviet financial system gone awry before we all came to realize this same truth in the aftermath of the coup. Woody's book lays out the financial and banking issues being addressed now that were not readily apparent to most of us in 1990, and her remarkable insight is apparent as many of the concerns addressed in her book have come to fruition, including the contemporary issues of debt repayment by the former Soviet government to the West as well as Western banking concepts as they apply to the former Soviet Union.

For example, she writes about the failure of the socialist credit system to give real value to its currency, the same problem that underscores the Russian economy today:

An enterprise that did not repay its credits within the scheduled repayment period received only the penalty of higher-interest payments to the Gosbank [Russian state bank]. . . . It was not always a matter of the producing enterprise's desire to meet deadlines. It was also the lack of materials delivered to enterprises on time to meet unrealistic state-plan production schedules which caused lateness in production, sale and repayment of the credit extended. Often enterprises found it more convenient and profitable to bear small interest and penalties for defective or late plan assignment production than to produce goods within state-planning schedules. . . . Many times the penalties that they could charge supplying enterprises were greater than the combined interest and penalties the enterprises had to pay their creditor bank and customers. (p. 2)

On the world markets, Soviet Bloc currencies were generally considered soft currencies that could not be readily accepted by market economies since they did not reflect free-market trading values and did not have the three main characteristics of money as it is used to facilitate international trade: (1) ease of transfer, (2) anonymity of payment, and (3) measure of value (p. 75). Before 1990, among the Soviet Bloc countries, the Council of Mutual Economic Assistance (CMEA) operated to facilitate trade. To accomplish this purpose, the CMEA unsuccessfully sought to establish the transferable ruble as a means of payment with a uniform

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1. See, e.g., GEORGE GARVY, *MONEY, FINANCIAL FLOWS, AND CREDIT IN THE SOVIET UNION* (1977); O. KUSHPETA, *THE BANKING AND CREDIT SYSTEM IN THE U.S.S.R.* (1978); OLIMPIAD S. IOFFE & PETER B. MAGGS, *THE SOVIET ECONOMIC SYSTEM: A LEGAL ANALYSIS* (1987).

value among the member countries. Its conversion rate, however, was generally brought about as a matter of self-bargaining. The lack of realistic price structure and currency valuations were the major elements preventing socialist countries from entering world markets and obtaining maximum creditworthiness and bargaining power under Western lending criteria.

The author provides a detailed description of the structure of the Soviet banking system where Gosbank served as its Central Bank with five specialty banks under its governance, including the 1987 banking reforms brought about by *perestroika* that led to the creation of commercial banks. (The author reports that by 1990 there were at least eighty commercial banks in the USSR with assets in the thousands of millions of rubles.) Underscoring the Soviet banking and financial system was the Soviet government's continual struggle to find a way to a convertible currency. At one point in this apparently frustrating exercise, Woody notes, the Soviet government held a national contest for ideas (p. 146).

Woody's book recounts some of the heroes of foresight in the economic woes of the Soviet Union, including the understated insight of Senator Jack Garn whose views stood the test of time in contrast to those of Lenin. For example, in his 1982 opening statement during the Senate hearing on Polish debt, Senator Garn observed the obvious: "[t]he export performance of Soviet Bloc countries is not better than LDC's [Less Developed Countries]." (p. 82) In contrast, Lenin was sure the West would lend to Soviet Bloc countries in order to gain access to fertile markets, preparing for their own suicide (pp. 146-47).

In some respects, the book is dated, particularly in those areas advising Western bankers on how to conduct trade and business with Soviet Bloc countries and the USSR, the latter of which does not even exist today. Nevertheless, Woody gives the reader a detailed awareness of the history of Soviet financial law, the fundamental structure of which is so different from the West where control of money and credit is the main means of government intervention in economic affairs. The reader comes to the understanding that the main function of Soviet banking and finance was simply to reduce the discretion of operating agencies by depriving them of any funds to operate unplanned programs. Banks were used to take deposits, account for figures, and hand out money according to state plans (p. 169).

The book is filled with little nuggets of detailed information. For example: (On Poland's move to modernize its banks:)

There were only a few bank branches even for the largest Polish cities, which caused large lines of customers and long waiting times: for example, some bank branches in Warsaw handled 100,000 accounts. Marion Kenton, President of Bank Polska Kasa Opieki SA, one of Poland's largest banks, noted that it took a month to clear a cheque. (p. 169)

(On the effect of the environment on trade and finance:)

A fifth to a quarter of East German farm produce had to be destroyed because of chemical contamination in the environment. . . . A quarter of Soviet produce and food spoiled before it could be transported to consumers, because of inadequate transportation. (p. 171)

(Comparing Gorbachev's *Perestroika* to Lenin's New Economic Policy:)

Gorbachev implemented measures meant to bring about massive restructuring of the economic system. . . . The changes involved were likened to the USSR's New Economic Policy (NEP) instituted by Lenin in the 1920s . . . instituted to attract Western banking and business-management expertise as well as technology long enough to gain these skills from their Western teachers. Once this purpose was accomplished, state-controlled concessions, licenses and other limited entry to the Soviet Union were cut off. Lenin died while the NEP was in progress. . . . One wonders, whether the NEP would have ended in the dismantling of communism and reintroduction of a modified socialism instead of a rigid centralized planned command economy. (p. 173)

(On the wasted time and effort of a central command economy:)

The hard-line communist system could not deliver the good life to its people without subsidy from the West. Before 1990, 30-50 percent of the work hours in many Soviet Bloc countries were spent preparing production plans and supply plans. Bureaucratic red tape wasted precious time and assets: time and effort was spent ordering from a central authority through official channels even where a factory manufacturing a needed part for a machine was across the street. (p. 174)

The author's sources include the USSR *Foreign Trade* magazine, published by the Ministry of Foreign Economic Relations in six languages, including English, and the *Foreign Broadcast Information Service (FBIS)*, published by the United States Central Intelligence Agency. (During the Cold War period when information was often difficult to obtain, the CIA provided an invaluable service by translating into English available Soviet newspapers and periodicals. *FBIS* was often the earliest document source for English translation of important Soviet laws in their first official legal publication in *Izvestia* and other Soviet newspapers.)

The topics include a description of the 1990 restructuring reforms, the place of money in socialist countries, an analysis of loans to Soviet Bloc countries from Western banks, the new financial environment including country risk analysis, debt repayment to the West, Western banking concepts as they relate to the former Soviet Union, capital adequacy, the movement away from the state currency, and the role of Eastern Europe as well as the former Soviet Union in international banking and finance.

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