Part II

1.

When discussing the achievements of Professor Gilas and discussing his views, I do not cover up any "conflict of interest". Gilas's publications have inspired me in my scientific work, and I have repeatedly benefited from his direct assistance (advice and comments) in my research. Bearing full and personal responsibility for any weakness in my publications, I make no secret of the fact that I owe much of their merit to Professor Gilas's assistance. Nonetheless, I feel entitled to make the following remarks, since Gilas's achievements can be exposed with the curtain raised and he needs no claqueurs.

Studies of the international legal status of the River Oder and environmental law occupy an important place in Gilas's *oeuvre*. In both cases, Gilas not only published his research results, but also organised research and built teams, and inspired young lawyers by pointing out research problems to them.

Gilas's achievements in building scientific teams cannot be overstated; without his inspiration and mentoring, the contributions of Polish specialists in international law would be considerably poorer. The work on the monographs discussed below involved both well-established and strong (already at the time) scientific professors such as Gwidon Rysiak, Jan Kolasa, and Jerzy Tyranowski, as well as the (then) young Iwona Rummel-Bulska, Janina Ciechanowicz, Stanisław Wajda and Jerzy Menkes. They came from different scientific centres in Poland, and it was Gilas's work that combined the scientific interests of one and inspired the other. Evaluating the results years later, I find that both publications have remained relevant and the research directions, research methods, and cooperation have been maintained.

Many factors determined that for many years the community of international law specialists in Poland was not integrated that there were no scientific disputes and no joint research conducted out of this perspective, the more positively I perceive Gilas's achievement in institutionalising cooperation.

Concerning none of these strands of research indicated above, I am unable (in a few pages) to synthesise Gilas's achievement in such a way as not to impoverish its content, not to introduce – in an unauthorised way – a hierarchy of publication values. So, instead of a synthesis, I decided to select and discuss two publications; one from each of these strands. I chose

publications that I considered representative of Gilas's scholarly output and his second role as an organiser of a team of scholars and mentor of young lawyers.

2.

In his study of the international legal status of rivers, Gilas continued the work of Judge Winiarski. Under Gilas's editorship, the monograph *International Legal Status of the Oder River* was published by the Silesian Institute in Opole 1982. Gilas is the author of a chapter entitled *Legal Basis for Regulating the Status of the Oder River* and the subsection *The Issue of Establishing a Tripartite Oder International Commission*. Gilas critically analysed the bilateral agreements regulating the status of the River Oder through the prism of the change in the river's status after World War II. In his analysis, he points to the limited subject matter of the agreements and looks for a legal framework external (to the agreements) that broadens the scope of the agreements' regulation. He sees them in the general norms that make up the good neighbour regime. Gilas wants to see specific agreements as implementing norms in relation to general norms, he treats them as *traités contrats*, in relation to non-existent, *traités-lois*. In analysing agreements, he does not limit himself to normative analysis; he seeks in law an instrument for the realisation of the state's interest in conjunction with the general interest (of the international community and of mankind). Gilas wants to see the Oder not as a border river, a river separating states but as a bridge connecting states and societies. Gilas calls for the establishment of an international commission for the River Oder and advocates the *de facto* internationalisation of the river. He postulates modelling the Oder Commission on the commissions, of other, international rivers. Gilas's ideas were revolutionary in Poland because he argued-rejected not only Winiarski's views but, more broadly, Poland's perception of sovereignty as a tool to limit interdependence. In Gilas's conception of the Oder regime, sovereignty was not the antithesis of interdependence but one of the instruments for realising common interest.

The whole picture of this political demand (internationalization of the management of the River Oder) well within the current institutional liberalism, which is strongly represented in the international debate - only reveals the context. This context determines the place and time. The place is Poland - part of the "Eastern Bloc", under the rule of the Communist

Party which took over the language of nationalists and incorporated them into the nomenklatura system. The time is years (after the eruption of nationalism and anti-Semitism in 1968) in which demands the primacy of interdependence over sovereignty were judged both anti-socialist and anti-Polish. The Oder River was wanted to be seen as a border separating Poland from Germany, rather than as a bridge connecting states and nations. This determines the peculiarity of Gilas' postulate, the fact that one cannot apply to it the merely scientific measure one would apply to the same postulate made by a law professor in the "West". Pragmatic scholars in Poland would either avoid dangerous topics or speak in the Aesopian language. Gilas spoke differently, even though he was aware of the context. Both when he advocated the internationalization of the River Oder management and when he supported the demands of the NIEO he was faithful to the principle *amicus Plato, sed magis amica veritas* this truth for him being his convictions, both scientific and political.

3.

Gilas is among the pioneers of environmental law research. He combines a general reflection with analyses of specific issues in his publications. It is precise as a legal reflection and a direction for others that I see in the monograph edited by him: *Legal International Environmental Protection*. PISM. Warsaw 1991. Gilas is the author of a chapter in it: *From Issues of Liability for Environmental Damage in International Law*. This way of studying the right to the environment was, relatively speaking, strong among specialists in international law in Poland. Gilas, together with Professor Karol Wolfke and Professor Kazimierz Kocot, set up this research framework. In the referenced article, Gilas derived liability for environmental damage from the human right to the environment. He based the publication on a broad, critical analysis of international law doctrine. He sought to combine the instruments of public international law with those of private international law. Gilas, a specialist in international law, expressed disbelief in the effectiveness of international law instruments and administrative measures for ensuring environmental protection with the instrument of liability for damage. Many years after the promulgation of the text and years of lack of progress in the work of the International Law Commission on the regulation of "liability" and in view of the continuing threat to the survival of the planet of life, Gilas's proposal remains relevant.

4.

This paper has several goals. The first is to synthesise the research views of Professor Janusz Gilas on international economic law.[11] Another goal is to set Gilas's views/ideas in a context consisting of the basic competing concepts of regulating international economic relations, that is, the International Liberal Order and the New International Economic Order (NIEO). Finally, the third goal of the paper is to initiate a discussion on the principles of international economic law. A discussion is necessary for Poland because the transformation of the Polish political system was not preceded by a discussion and the development of a social consensus. Therefore, the values and principles of the political system (including those relating to economic relations) were not internalised. This omission has co-created conditions in which social conflict has reached a level where society is so deeply divided that it calls into question the possibility of communication, a prerequisite for cooperation. By putting Gilas's views on the axiological foundations of international economic law under critical analysis, I hope to start this much-needed discussion.

The choice of subject matter is determined equally by the place of the study of international economic law in the Professor's juristic output and his contribution to the doctrine of international economic law. Professor Gilas built the foundation for the study of international economic law in Poland, and at the same time, he is among the pioneers who combined the optics of specialists in public international law and civil law in the studies of economic law carried out in the world. By performing systematic research on the concept of the NIEO, he wished to contribute to the reconstruction of international economic relations, to base them on the principles of the NIEO.

His belief in the need and possibility of making the international economic order of justness – the removal of inequality – places him among the continuators of the "utopia" of equality. However, belief in utopias and the pursuit of them is an only – rational – resilience in response to the challenges of breaking societies, and breaking cohesion in response to inequality.

11 I use Gilas's term; it is not the only term used in Polish jurisprudence to describe this area of international law.

The textbook, monographs, studies, and articles on international economic law make up one of Professor Gilas's main research streams. However, even though it is "only" one of the strands, it is not adequate to use the term "first among equals" when referring to this strand of his research. Gilas's position in the body of work of Polish international law specialists researching international economic law as well as Gilas's achievements in the field of international economic law in his scholarly output, is special.

First, Gilas is the only Polish specialist in international law who consistently provides systematic research of international economic law in its broad, subject area. Other lawyers limit their research to selected specific issues or undertake them incidentally. This disparity is due, in part, to the Polish tradition according to which it is expected that a candidate for the degree of *doctor habilitatus* or the title of *professor* ("tenure") does not concentrate on one area of international law. The requirement of a diverse body of work reflected the understanding in the Polish academic environment of the right to *veni legendi* – namely, an aspiring professor at a law faculty on "public international law" was expected to demonstrate scholarly competence in the entire area of public international law (and not a slice of this branch of law). However, Gilas is the author of numerous monographs in various areas, while many of the others were limited to single publications. Only some lawyers from the middle and young generation of Polish international law specialists specialise in one branch of public international law and some of them concentrate their research on international economic law. However, they, interested in "law in action", do not undertake a general theoretical reflection on international economic law. Gilas also inspired his students, especially Professor J. Białocerkiewicz, and Professor M. Kałduński, to research international economic law; their publications provide a mirror in which Gilas's views are reflected. Gilas created his school of international economic law, and even when its adepts – in part – revised their attitude to the views of their Teacher, they retained much of his research methods.

However, what determines the distinctiveness of Gilas's research in the field of international economic law concerning his other research is the fact that he formulated the author's positive conception of international economic law. Respecting the existing law, Gilas selects and interprets norms in such a way as to formulate the postulate of a "good law" i.e., one that regulates/shapes economic relations by the system of values represented by Gilas. Concisely speaking, according to Gilas, the norms of international economic law are in force because they are good, and if they are not (yet) in force, then good norms should be in force. Such perceptions of the basis

for the validity of the law and the formulation of *de lege ferenda* postulates on this basis (it is in force/should be in force because "it is good") differ from the research approach Gilas represented in publications in other areas of public international law. In these other cases, Gilas treats jurisprudence as a normative science, examines the norms that are in force, and – in principle – demonstrates the following approach to law: legal norms are good because they are in force.

Professor Gilas included the core of his views on international economic law in his textbook: *Międzynarodowe prawo gospodarcze* (International Economic Law) published in Bydgoszcz 1998 and the monographs: *Prawne problemy rynku międzynarodowego. Zarys problematyki prawa publicznego* (Legal Problems of the International Market. Outline of Public Law Problems) published in Warsaw 1975 as well as *Sprawiedliwość międzynarodowa gospodarcza* (International Economic Justice) published in Toruń 1991. The basis of these publications were studies and articles that were in the initial stage of research or relevant but containing marginal (to the main publications) content.

I will precede the synthesis of Gilas's views with a necessary deconstruction, a synthesis of that which Gilas did not expressly state in the published texts, but what is present in these texts, what shines through them and without which understanding Gilas's views is impossible. Professor Gilas is the only specialist in public international law in Poland using the Marxist methodology for the study of international economic law. This is undoubtedly a paradox in a country that was part of the Eastern Bloc for more than 50 years, where law and legal studies categorised as part of the "ideological superstructure of the state" were subjected to political control. However, lawyers specialising in legal dogmatics did not use the Marxist method in the jurisprudence. Some by choice – they presented dogmatic normativism in the study of international law, others out of ignorance of the method (while the overseers of science were satisfied with loyal tributes, the use of the Marxist methodology was not required because they did not know it either).[12] Gilas's position presented in the study of international economic law was unique in Poland and created an opportunity for juristic dispute, an opportunity that unfortunately the juristic community did not take advantage of. At the same time, this

12 Even in works whose authors often referred to both Stalin and Lenin in their content or titles, the lawyers did not apply the Marxist methodology.

approach exclusively characterised Professor Gilas's research in international economic law.

An element of Gilas's *oeuvre* that enriches the doctrine of international economic law is the recognition that it is a "mixed branch of law" in which public and private law norms are combined. This synthesis determined that the subject of Gilas's interest was the norms based on which it was possible to resolve a dispute before a national court. By all proportions, Gilas's approach to international economic law was closer to the American understanding of international law than to the European/continental one.

In turn that which distinguished Gilas's approach from that of civil law specialists was the (premature) declaration of the death of economic liberalism in international economic relations and (his indicated) principles of international economic law. Gilas recognised that liberalism in international economic relations had collapsed under the pressure of protectionism, protectionism that he praised as a tool for establishing economic justice. He rejected the facts, that is, on the one hand, the fact of the functioning of the Liberal International Economic Order[13] in relations in the Western hemisphere (the hemisphere of the market economy) and, on the other hand, the fact of the existence of protectionism in the economic relations of countries with non-market economies and in economic relations between countries from different hemispheres. States with non-market economies systematically and systemically applied protectionism, which resulted from their "belief" in the ability to influence reality with political (non-market economy) instruments. This is because the essence of the non-market economy was and is the belief in the causal power of will. In turn, in the relations of countries with different economic systems, when one (non-market) used instruments of protectionism to reap unilateral benefits, the other resorted to protectionism to defend itself from the effects of such action.

Gilas based his entire vision of international economic law on the recognition as binding the principles of the NIEO. He attributed to them the force of law – even though they were contained only in non-binding resolutions of international organisations (mainly the UN General Assembly

13 This is a necessary simplification of the economic relations in the Western hemisphere. Most importantly, this does not mean that instruments of protectionism have not been and are not being used in relations between them. However, they were abolished/liberalised much earlier in the spirit of the benefits of multilateral liberalisation.

and the bodies of the UN System) and he considered that the international order founded on them would be good.

Of course, Gilas does not forget – for the sake of being right – the decalogue of an honest lawyer and does not ascribe binding force to UNGA resolutions. However, knowing that it is unrealistic to give the NIEO regulations the status of an international agreement, he believes that these norms can obtain the status of legally binding norms through practice. He considers these norms *de lege ferenda* demands. He inscribes himself with this belief and publications in the programme of changes in international relations, and has attempted to transfer to the Polish ground the reflections and actions initiated in the international space by Raúl Prebisch.

Even leaving aside the issue of Gilas's recognition that material inequalities between state societies are derived solely from the wrongs that these state societies suffered in the past – a view that is not borne out by reality – the key issue is the attribution of a fundamental character to the justice identified in economic relations with compensatory justice. In Gilas's conception, there is a close connection between the view that current wealth has its origins in wicked acts in the past and the recognition of the obligation to realise distributive justice, which, according to this logic, he calls "compensatory justice". Gilas's concept is coherent, with significant convergence, with the NIEO's concept, does not limit itself to examining the "law on the books" and formulating *de lege ferenda* postulates, but reflects a search for a confirmation of views in law in action.

Personally, like Gilas, I believe that extreme economic inequality is morally wrong. I also believe that the lack of social cohesion that is associated with inequality threatens the stability of society and threatens to "explode into anger". However, I do not think it is possible to duplicate the mechanisms for realising compensatory justice implemented in the domestic space of the state in the international space. This is determined, among other things, by the lack of a universal regime for the implementation of compensatory justice. In practice, the effect of implementing the NIEO and many similar measures is to transfer money from the pockets of moderately wealthy citizens of rich countries to the pockets of extremely wealthy citizens of poor countries. The NIEO and many other concepts stopped change – under the slogan of defending the sovereignty of the state and its right to choose its socio-economic system – at the borders of the state. In forums of the UN System (especially UNGA and UNCTAD), there was no honest discussion of programmes competing with the NIEO. Programmes were aimed at only changing social relations in poor (Third World) countries of the individuals

in those countries, for example, programmes such as the World Bank's *Basic Needs*. Transfers implemented under the *Basic Needs* formula offered an opportunity for poor citizens of poor countries to get out of the closed cycle of poverty and benefit from assistance, offered a "fish" at first and then a "fishing rod" and "knowledge on how to use the fishing rod" instead of permanent dependence on being given a "fish".

However, this does not mean that Gilas does not analyse the law selectively. His discussion of international trade (the international market) lacks an in-depth study of free trade through the lens of *fair trade*. A significant manifestation of this is the perception of dumping. On the one hand, Gilas accepts the function of anti-dumping tariffs, recognising them as, under international law, retorsion. He sees them as an instrument to force an end to discriminatory practices (because he considers dumping to be discrimination). Of course, he stipulates that the prerequisite for recognising the legality of anti-dumping duties is proportionality.[14] This line of thought I entirely share. On the other hand, in the magnum opus that is, without a doubt, his textbook, Gilas ties dumping and antidumping to countervailing justice. He starts from the assumption that there are two types of prices, namely "just" prices and "fair" prices (determined by adding up the "value of the goods" and allowed profit, which should not be higher than 10% of the value of the goods). From the whole argument comes the recognition that the price is not determined by the market, that it is detached from the market. In addition, Gilas recognises as a desirable state the constancy and stability of prices and their detachment from economic fluctuations. For these considerations, Gilas places more importance on the will to change reality than on the reality and the possibility of changing it. Continuing this line of thought, he arrives at a soft acquiescence to dumping, a recognition that dumping can be a tool for establishing justice, a compensation for inequality.[15] These views of Gilas I do not share, not because I would not like to live in a world where there is equality but because I am afraid of the methods of bringing about equality. Gilas's life experience and mine show that those who promise to bring equality by administrative methods never deliver on this promise, instead they are eager to use methods that are supposed to change the world – to adapt reality (not only economic reality) to their vision. As a result, unfulfilled promises of equality are, in reality, a barrage of lawlessness and injustice.

14 See J. Gilas, *Prawne problemy rynku międzynarodowego. Zarys problematyki prawa publicznego*, Warsaw 1975, 109-112.

15 See J. Gilas, *Międzynarodowe prawo gospodarcze*, Bydgoszcz, 1998, 170-183.

Much more dangerous, however, is the moral justification of dumping; dumping violates the law but raises the level of realisation of justice – it reduces unlawfulness. Gilas is inclined to justify dumping by seeing it as an instrument for establishing (compensatory) justice, disregarding the fact that trade that is not fair is not – by its very nature – free. He links this perception of dumping to view that without the existence of injury there is no basis for claiming responsibility for dumping. He does not consider as a sufficient basis for responsibility the fact that dumping is a prohibited act. In addition – and this is a paradox – he ignores the harm resulting from dumping to the economy of the dumping country. Experience shows that the dumping state violates the law and swindles its partner – the other party to the (buy-sell) transaction, but at the same time, and perhaps above all, shoots at its heel. Gilas pointing to the relationship between law and morality (deliberately) ignores Weber's entire reflection.[16]

In his analysis of tariff barriers to international trade, Gilas expresses a statist view. In this view, he treats the right to impose customs duties on imports as a derivative power of state's sovereignty. He recognises that the state has the right to shape prices, distort the operation of the market concerning the formation of tariffs, and has the freedom to exercise this power, so it has discretionary authority. However, this descriptor does not refer to the necessary rationales for tariffs. One cannot justify the imposition of tariffs by arguing – taking Gilas's view – that they improve the terms of trade of the country imposing the tariffs; this view is considered simplistic (and, in fact, mistaken) by economists (in fact – only large country, in certain circumstances may benefit from imposing a tariff). Studies by economists unequivocally show that establishing tariffs on imports reduces "world welfare", as opposed to free trade maximising world welfare.[17] International economists distinguish between small and large countries. According to them, a small nation is one that does not affect world prices of the goods imported (they are "price takers"), while large nations are large enough to influence world prices (they are "price makers"). This distinction is crucial in understanding the effects tariffs have on welfare. Small countries introducing tariffs always suffer from protection costs: there is a redistribution of incomes from consumers to domestic producers which is not offset by fiscal revenues. Large countries, on the contrary, may (under some circumstances)

16 See M. Weber, *The Protestant Ethic and the "Spirit" of Capitalism*. Unwin Hyman, Londom & Boston, 1930.

17 D. Salvatore, *Introduction to International Economics*, Wiley&Sons, 2005, 132.

benefit from imposing a tariff. This is because some costs of tariffs fall on foreign producers who decrease the price of the exported good), therefore the terms of trade of the importing country improves. In such a situation, if the terms of trade effect are larger than the protection costs, the welfare of a large country will increase, at least temporarily. Other countries, especially large ones, affected by such a policy, referred to as a "beggar-thy-neighbour" policy, would soon retaliate.

The state imposing a tariff barrier should not stop with the formula: if I can (do it), I do it. The establishment of customs duties – if the state decides to do it – should be justified. Some of the justifications include the argument of *infant industry* protection, and the other one to defend the market from distortion.[18] Recognising the power, and the task of the state to hold an umbrella over the infant industry, the argument against tariffs is the possibility of using production subsidies, which are more efficient and do not disrupt trade in the same extent as tariffs.

In summary, I would say that although Gilas's concept of international economic law, like that of the NIEO, is another utopia that has been forgotten by the protagonists, the fact that it has been shelved in the library on the "utopia shelf" does not detract from the value of Gilas's research (one of the few conducted in the study of the NIEO that has remained relevant).

What is dangerous yet appealing about Gilas's views is: (i) the belief that at the root of our current shortcomings (in every sphere) lie the wrongs of the past (or even if not wrongs then the fact that those who are better off were born with a silver spoon in their mouths); (ii) the belief that (compensatory) justice requires that the rich be forced to make transfers to the poor; and finally, (iii) the belief that these transfers will usher in lasting equality.

Unfortunately, studies of the past do not confirm the absolute trueness of the narrative about the sources of wealth while numerous examples prove that transfers more often improve the well-being of the rich than (permanently) remove inequality.

However, I am convinced that Gilas's publications are a must-read for anyone specialising in international economic law and that it is worth arguing about his views. Professor Gilas's research has been an inspiration and a point of reference for me, his comments on my work and discussions have allowed me to improve published texts. Differences of opinion and

18 This is what anti-dumping duties serve.

scientific criticism – derived from my liberalism concerning every sphere of life (both the economy and society) – do not lower the assessment of his works.

Jerzy Menkes

Interview by the Editorial Board with Professor Dr. Janusz Gilas

How do you assess the importance of international law in the contemporary world, especially in the context of the conflict in Ukraine, to what extent can it be considered an important regulatory factor in the international community?

International law is the most important of all normative systems operating in the modern world. Medium-sized and small states in particular rely on international law for their actions. However, superpower states are not always guided by international law to the highest degree in their actions; they rely on actions that give expression to their own interests. The Russian Federation has violated international legal norms on the limitation of medium-range strategic nuclear weapons and the OSCE standards on the limitation of troops in their control in Europe, thereby contributing to the intensification of the arms race. Ultimately, the Russian Federation committed acts of aggression against Georgia and then twice against Ukraine. States are helping Ukraine in its response to the aggression against it by the Russian Federation on the principle of collective self-defence, assuming that the restoration of peace will result in the responsibility of the aggressor and compensation for the violation of the rules of armed conflict.

How do you assess the domination of the international by normativism?

In Poland, international legal research was dominated by positivism based on the assumption, for many, many years of research in Poland, that the only subject of international law is the state, and that research consists of studying the sources of international law in terms of the ICJ Statute and assessing the actions of states in light of them. However, the situation has changed under the influence of realities in the life of the international community, international organisations of an inter-state character have been