

TRANSNATIONAL CORPORATIONS, INTERNATIONAL LAW, AND THE NEW INTERNATIONAL ECONOMIC ORDER

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I. INTRODUCTION

The purpose of this article is to sketch in a rather cursory manner first, the most fundamental and basic claims underlying the current efforts to establish a New International Economic Order (NIEO), second, the critical role of transnational corporations in the global wealth process which is perceived as either directly or indirectly affecting the realization of those claims, and third, to point out the subtle but pervasive influence of legal concepts, doctrines, and the practice of classical international law, viewed by the claimants as contributing to the status quo, and consequently a major impediment to the realization of those claims. This article does not purport to examine systematically, or even analyze any of these three interrelated topics, but only to indicate the problems involved and the magnitude of the task confronting the international community called upon to establish appropriate global economic policies. Such a broad canvass is necessary for a proper appraisal of the many important and striking observations in the recent international arbitral award, *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Libyan Arab Republic*,¹ the first international decision purporting to examine the status of the NIEO as evidence of emerging customary international law.

The incessant demands for radical changes in the existing system of world public order is perhaps the most conspicuous feature of contemporary international relations.² Much of that concerted effort channelled through the United Nations—whether it is in the

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1. Award on the Merits in the Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic, *reprinted in* 17 INT'L LEGAL MAT'LS 1 (1978) [hereinafter cited as *Libya-Oil Companies Arbitration*].

2. See R. FALK, *A STUDY OF FUTURE WORLDS* (1975); J. TINBERGEN, *RESHAPING THE INTERNATIONAL ORDER: A REPORT TO THE CLUB OF ROME* (1976). For a persuasive account of the global economic issues pertaining to world public order, see J. BHAGWATI, *ECONOMICS AND WORLD ORDER FROM THE 1970'S TO THE 1990'S* (1974); Falk, *The World Order Models Project and Its Critics: A Reply*, 32 INT'L ORGANIZATION 531 (1978).

area of human rights, economic development, or international peace and security—is aimed at achieving changes through peaceful means. No perceptive observer of the contemporary international scene can fail to notice how, within a short period of three decades, perspectives of authority and control conditioning the global order have been dramatically altered in many areas of international concern. Decolonization, detente, and development have become, during these three decades, the benchmarks of history and consequently remained the major preoccupation of the United Nations.

These developments have their impact on the substantive content of international law as well. Despite growing awareness of the tremendous interdependencies conditioning the choices available to people everywhere, the global community, still operating on the basis of the outmoded nation-state system and suddenly exposed to the task of facing problems that have defied effective management on such a basis, presently is confronted with a challenge to devise new structures for collaboration and new inclusive policies for cooperation, which are capable of nurturing perceived interdependencies.³ The present efforts to establish a NIEO deserve to be appraised from this general global perspective.

The call for a new international order, an order that is more responsive to the global needs and human dignity, particularly to the needs of development, has in many ways begun to affect the foundations of international law on which existing international order has traditionally found its authority.⁴ The traditional premises of state sovereignty by reference to which the normative processes at the international level are usually explained were thus suddenly exposed to the emerging patterns of interdependence, and to the felt needs for cooperation based on criteria other than those

3. E. LUARD, INTERNATIONAL AGENCIES: THE EMERGING FRAMEWORK OF INTERDEPENDENCE 189-90 (1977); Macdonald, Johnston, & Morris, *The International Law of Human Welfare: Concept, Experience, and Priorities in THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 3-79 (R. Macdonald, D. Johnston, & G. Morris ed. 1978); Falk, *The Domains of Law and Justice*, 31 INT'L J. 1 (1976). In this respect attention should be drawn to the larger and more fundamental issues linking the minimum standards of treatment for aliens with the emerging international human rights prescriptions. For further discussion, see McDougal, Lasswell, & Chen, *The Protection of Aliens From Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432 (1976).

4. O. SCHACHTER, SHARING THE WORLD'S RESOURCES 53-55 (1977); Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976). Cf. R. TUCKER, THE INEQUALITY OF NATIONS (1977); Johnston, *The Foundations of Justice in International Law*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 111 (R. Macdonald, D. Johnston, & G. Morris ed. 1978); Rothstein, *Inequality, Exploitation, and Justice in the International System: Reconciling Divergent Expectations*, 21 INT'L STUD. Q. 319 (1977).

narrow individualistic notions of absolute sovereignty.⁵ International lawyers, accustomed to using conceptions of law as legitimizing factors only after changes are well in place, may find it difficult to rationalize and clarify the purport of the new claims, such as those designed to establish a NIEO, and rush to the conclusion that such claims are in violation of the substantive doctrines of international law. Consequently, it comes as no surprise that some of the most vocal, and admittedly conservative, objections to the formulated objectives of the NIEO, are made in the name of international law.⁶

5. See E. HAAS, *BEYOND THE NATION STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATIONS* (1964); Falk, *The Interplay of Westphalia and Charter Conceptions of the International Legal Order*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 32 (R. Falk & R. Black ed. 1969); Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231 (1964); Falk, *Historical Tendencies Modernizing and Revolutionary Nations, and the International Legal Order*, 8 HOU. L.J. 128 (1962).

6. For discussion and identification of the basic issues, see J. SINGH, *A NEW INTERNATIONAL ECONOMIC ORDER: TOWARD A FAIR REDISTRIBUTION OF THE WORLD'S RESOURCES* (1977); *THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER* (E. Laszlo, R. Baker, E. Eisenberg, & V. Raman ed. 1978); *THE NEW INTERNATIONAL ECONOMIC ORDER: CONFRONTATION OR CO-OPERATION BETWEEN NORTH AND SOUTH?* (K. Sauvart & H. Hasenpflug ed. 1977).

For a useful historical account of the emergence of the NIEO debates in the United Nations, see Asante, *International Transactions and National Development Goals*, 4 GHANA CIV. SERVICE J. 1 (1977); Gosovic & Ruggie, *On the Creation of a New International Economic Order: Issue Linkage and the Seventh Special Session of the U.N. General Assembly*, 30 INT'L ORGANIZATION 309 (1976); Rozenthal, *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 16 VA. J. INT'L L. 309 (1976); Tiewal, *The U.N. Charter of Economic Rights and Duties of States*, 10 J. INT'L L. & ECON. 645 (1975).

For discussion by some of the most incessant advocates of the view that the NIEO has changed the relevant principles of international law, see Adede, *International Law and the Property of Aliens: The Old Order Changeth*, 19 MALAYA L. REV. 175 (1977); Shihata, *Arab Oil Policies and the New International Economic Order*, 16 VA. J. INT'L L. 261 (1976). For critical and negative discussion of the NIEO, see ISSUES AND PROSPECTS FOR THE NEW INTERNATIONAL ECONOMIC ORDER (W. Tyler ed. 1977); Hirsch, *Is There a New International Economic Order?*, 30 INT'L ORGANIZATION 521 (1976); Petersmann, *International Economic Law and the Third World*, [1976] ZEITSCHRIFT FÜR AUSLÄNDISCHE VOLKERRECHT 492.

For discussion of Western capital exporting nations' objections to the NIEO, see Brower & Tepe, *Charter of Economic Rights and Duties of States—A Reflection or Rejection of International Law?*, 9 INT'L LAW. 295 (1975); Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L LAW. 591 (1975); White, *A New International Economic Order*, 24 INT'L COMP. L.Q. 542 (1975); Note, *Charter on Economic Rights and Duties of States: A Solution to the Development Aid Problem?*, 4 GA. J. INT'L & COMP. L. 441 (1974).

It is submitted that these three broadly defined perspectives, which are identified in the cited materials above, proceed from a deterministic point of view with little evidence of the awareness of the interdependencies that characteristically sustain and call for a global wealth process. See Hagen, *How Economic Growth Begins: A Theory of Social Change*, in *ENTREPRENEURSHIP AND ECONOMIC DEVELOPMENT* (P. Kilby ed. 1971).

If shared perspectives of authority offered by international law have generally served to promote stability and world public order, international trade and commerce have historically served to mobilize international relations and to create enduring contacts across national frontiers.⁷ The underlying policy has been eloquently stated by Fred Bergsten:

For at least 150 years, international economic policies have rested on the fundamental concept that the objective of all such policies is to maximize the level and growth of international economic transactions by relying on market forces and minimizing barriers to them, because this maximizes economic welfare and minimizes political conflict.⁸

For a critical review of the NIEO approach and the principles of international law involved, see Petersmann, *The New International Economic Order—Principles, Politics, and International Law*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 449 (R. Macdonald, D. Johnston, & G. Morris ed. 1978).

7. See C. SCHMITHOFF, *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 70 (1964); Darja, *The Role of Law and Economic Inequalities Among Nations*, 2 *INDIAN J. INT'L L.* 276 (1961); Friedmann, *Corporate Power, Government by Private Groups and the Law*, 57 *COLUM. L. REV.* 155 (1957); Schwarzenberger, *Equality and Discrimination in International Economic Law*, [1971] *Y.B. WORLD AFF.* 163; Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 *RECUEIL DES COURS* 1 (1966). Cf. Lasswell, *The Interplay of Economic, Political and Social Criteria in Legal Policy*, 14 *VAND. L. REV.* 451 (1961). For a comprehensive discussion of the global processes of action, see McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (R. Falk & R. Black ed. 1969).

8. C. BERGSTEN, *THE FUTURE OF THE INTERNATIONAL ECONOMIC ORDER: AN AGENDA FOR RESEARCH* 11 (1973). The critical issue for consideration has been formulated as follows: Can a private firm, if it expends time and resources to develop a foreign export market, rely upon the stability of the international rules so that its investment will pay satisfactory returns? Could foreign governments quickly change the rules of international trade to prevent a firm's export sales to take advantage of its advertising and goodwill efforts?

J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* xxi (1977). For a traditional approach to the legal aspects of foreign trade, see Mann, *State Contracts and State Responsibility*, 54 *AM. J. INT'L L.* 572 (1960), *reprinted in* F. MANN, *STUDIES IN INTERNATIONAL LAW* 302 (1973).

The concept of "good faith" is a critical tool facilitating the process of foreign trade. [F]reedom of contract is an essential legal mechanism in the operation of a system of production based upon *laissez-faire* capitalism. It denotes a system of economic organisation within which the degree of direct state interference in economic matters is minimal.

Martin & Osberg, *Producer Cartels*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 506-07 (R. Macdonald, D. Johnston, & G. Morris ed. 1978). Such a view is, however, seen compatible with the assumption that where the contract is subject to national law, the state's authority to intervene is not affected by the mere existence of a contract or treaty.

No rule of international law has become known which would render it an international tort for a State on the level of municipal law to rely on its own legislation. To invoke *pacta sunt servanda* does not help in a case in which by its very nature and

With the advent of decolonization, and the sky-rocketing investments in military expenditures, this liberal *laissez-faire* ethic has given rise to two fundamental questions: (1) *whose* economic welfare is served by that system, and (2) *whose* policies are affecting the economies of the world? In part, because the "market forces" are largely, if not exclusively, controlled by the giant multinational corporations based in a few wealthy industrialized nations, the policies governing international trade and commerce have remained largely the elusive domain of the invisible private corporate structure.⁹

The efforts to establish a NIEO upon existing structures (which are often deeply entrenched) on the basis of present bargaining strengths (avowedly unequal in terms of available capital and skills), without disturbing present unequal resource distributions (cheap raw materials as against the inflated costs of imported manufactures), and fueled by ideological antagonisms ("free" market system vs. publicly planned economics), and other related factors, present formidable obstacles to any rational management of the global wealth process.¹⁰ No single and easy answers are available for resolving all the myriad problems at once, or even the most important among them, in a peaceful manner. During the discussions on the NIEO proposals the contending groups nevertheless rallied around three problem areas: (1) whether the developing countries must be *assisted* to make rapid economic progress; (2) whether the

the law supporting it the *pactum* is liable to become subject to new legislation. Nor is it possible to suggest a proprietary right in the continued existence of legislation rendering the contract immune.

Mann, *The Consequences of an International Wrong in International and Municipal Law*, 48 BRIT. Y.B. INT'L L. 1, 58 n.1 (1976-1977).

It appears that both of these views offer rather narrow conceptions, both of the law of international contracts, and the effect of general principles of international law on the continued performance of such contractual commitments.

9. Transnational Corporations in World Development Re-examined, U.N. Doc. E/C.10/38 (1978); New Directions and New Structures for Trade and Development, UNCTAD Report, U.N. Doc. TD/183/Rev. 1 (1977); Lall, *Developing Countries and Multinational Corporations—Effect on Host Countries' Welfare and the Role of Government Policy*, COMMONWEALTH ECONOMIC PAPER No. 5 (1976); Wells, *The Multinational Business Enterprise: What Kind of International Organization?*, 25 INT'L ORGANIZATION 447 (1971). Cf. Asante, *supra* note 6; Dunning, *Multinational Enterprises, Market Structure, Economic Power and Industrial Policy*, 8 J. WORLD TRADE L. 575 (1974).

10. For discussion identifying the legal problems, see Mikdashi, *Influencing the Environment for Primary Commodities*, 8 J. WORLD TRADE L. 144 (1974); Petersmann, *The New International Economic Order—Principles, Politics, and International Law*, in THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 449 (R. Macdonald, D. Johnston, & G. Morris ed. 1978).

role of transnational enterprises must be *regulated* to enable the developing countries to realize the full value of their wealth; and (3) whether the scope of the norms and concepts of international law as incidents of the recognized right of states to exercise full permanent sovereignty over their natural resources must reflect appropriately the national practice, policies, and the domestic procedures relevant thereunder.¹¹

II. THE CONTEXT OF THE CLAIM TO ESTABLISH A NEW INTERNATIONAL ECONOMIC ORDER

The rapid success of the process of decolonization in the post World War II period has failed to fulfill many of the sanguine expectations it has generated in the newly independent nations of a more equitable international economic order.¹² This is largely because the structures envisaged to bring recovery to the war-ravaged economies of the industrialized countries proved insufficient, and in fact, were unable to cope with the needs and special conditions of the developing countries.¹³ Poverty, underdevelopment, and economic dependence on metropolitan countries presented many urgent issues for the Third World, pointing out the inadequacy of targets set, and the problems in the way of realizing the objectives of the Second United Nations Development Decade.¹⁴ The developing countries realized

11. These three issues are identified not only because they are germane to the present discussion directly, but they in turn embrace a cluster of other issues treated separately in the NIEO declarations which raise important legal questions. For current NIEO efforts, see *THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER* (E. Laszlo, R. Baker, E. Eisenberg, & V. Raman ed. 1978).

12. R. VON ALBERTINI, *DEKOLONISATION* (1966); Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976). For a discussion of the social consequences of global power changes, see H. CANTRIL, *THE PATTERN OF HUMAN CONCERNS* (1965).

13. See generally J. JACKSON, *WORLD TRADE AND THE LAW OF GATT 1947-1962* (1969); C. SCHMITHOFF, *supra* note 7; Espiell, *GATT: Accommodating Generalized Preferences*, 8 J. WORLD TRADE L. 341 (1974); Stern, *Tariffs and Other Measures of Trade Control—A Survey of Recent Developments*, 11 J. ECON. LITERATURE 857 (1973).

14. G.A. Res. 2626, 25 U.N. GAOR, Supp. (No. 28) 39, U.N. Doc. A/8028 (1970). See United Nations Conference on Trade and Development: Trade and Development Issues in the Context of a New International Economic Order, U.N. Doc. OSG/1041/Rev. 1 (1976), reprinted in *THE NEW INTERNATIONAL ECONOMIC ORDER: CONFRONTATION OR CO-OPERATION BETWEEN NORTH AND SOUTH?* 40-62 (K. Sauvart & H. Hasenpflug ed. 1977); United Nations Conference on Trade and Development: Mid-term Review and Appraisal of the Implementation of the Joint Development Strategy, U.N. Doc. TD/B/535 (1974); Report of the Group of Experts on the Structure of the United Nations System, A New United Nations Structure for Global Economic Co-operation, U.N. Doc. E/AC 62/9 (1975); BARKER, *BREAKTHROUGH TO TOMORROW: THE STORY OF INTERNATIONAL CO-OPERATION FOR DEVELOPMENT THROUGH THE UNITED NATIONS* (U.N. Sales No. E.71:5); R. PREBISCH, *TOWARDS A GLOBAL STRATEGY OF*

that the framework of the existing international economic order would have to be purposefully broadened to embrace "development," and the mechanisms and structures of the existing order appropriately changed to meet the new demands.¹⁵ Thus, in Resolution 3362 (S-VII) adopted by the General Assembly in the autumn of 1975, the purpose of NIEO is stated to cover "political and other implications of the state of world development and international economic co-operation, expanding the dimensions and concepts of economic and developmental co-operation and giving the goal of development its rightful place in the United Nations system and on the international stage."¹⁶

Several years before the adoption of this mandate the developing countries began to identify the central issues calling for concerted action. At the United Conference on Trade and Development held in Mexico in 1972, UNCTAD III, the decision was made to elaborate a Charter of Economic Rights and Duties of States, and a working group was organized under the auspices of UNCTAD that began drafting the Charter.¹⁷ In 1973 the Algiers Conference of Non-Aligned Countries, which was the precursor to the Sixth Special Session of the General Assembly, was held and called for self-reliant action in the area of natural resources.¹⁸ The 1973 economic declaration produced at the Algiers Conference was in turn built upon earlier General Assembly Resolutions on permanent sovereignty, on the 15 principles adopted in 1964 at UNCTAD-I, on the principles agreed upon at the ministerial meetings of the Group of 77 in Algiers

DEVELOPMENT (1967). See also Report of the UNCTAD Secretariat, *Manufacturers and Semi-Manufacturers—The Dimensions of the Required Restructuring of World Manufacturing Output and Trade in Order to Reach the Lima Target*, U.N. Doc. TD/185/Supp. 1 (1976).

15. See Report by the Secretary-General, *New Directions and New Structures for Trade and Development*, U.N. Doc. TD/183/Rev. 1 (1977); Report by the UNCTAD Secretariat, *Economic Co-operation Among Developing Countries*, U.N. Doc. TD/192 (1975); R. PREBISCH, *supra* note 14; Amin, *Self-Reliance and the New International Economic Order*, 29 MONTHLY REV. 1 (1977); Wionczek, *What Do the Developing Countries Want?*, 3 INTERECONOMICS 76 (1976).

16. G.A. Res. 3362, Seventh Special Sess., U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/10301 (1975).

17. UNCTAD Res. 45 (III), UNCTAD Proceedings, Third Sess., U.N. Doc. TD/180, at 58 (1972). For a discussion of the history of the drafting and adoption of the Charter, see Brower & Tepe, *supra* note 6, at 296-300.

18. Fourth Conference of Heads of State or Government of Non-Aligned Countries, (Algiers, Sept. 5-9, 1973) Economic Declaration, at 10, 11, *quoted in* Haight, *supra* note 6, at 591. See also Report of the Ministerial Meeting of the Bureau of Non-Aligned Countries, U.N. Doc. A/32/74 (1977); The Manila Declaration and Programme of Action, U.N. Doc. TD/195 (1976); Fifth Conference of Heads of State or Government of Non-Aligned Countries, U.N. Doc. NAC/Conf. 5/S./3 (1976).

in 1967, in Lima in 1971, and on the resolutions of UNCTAD-II.¹⁹ The call for a NIEO was identified with the larger needs of the developing countries to regain the right to the exercise of permanent sovereignty over natural resources as well as to establish their national control over private foreign investment.²⁰

It is in the backdrop of all this activity, and based on a variety of principles and measures elaborated in UNCTAD in previous years, that the Sixth Special Session of the General Assembly was convened. Initially, the General Assembly intended to address itself only to raw materials and development, but ultimately, it produced a comprehensive Declaration²¹ and Programme of Action on the Establishment of a New International Economic Order.²²

No other major issue in contemporary international relations has produced so much acrimonious debate. None of the demands contained in the resolutions and proposals adopted by consensus during the Sixth Special Session presented really *new* issues; what was new was their tone and the terms in which they were presented. Nevertheless, four key issues emerged as the major bone of contention between the Group of 77 and the developed group of countries comprising the Organization for Economic Co-operation and Development (OECD): (1) the scope and meaning of the concept of permanent sovereignty, including the anticipated necessity of nationalization whose validity is to be judged only in accordance with the national legislation;²³ (2) the mechanisms for regulating international trade including the formation of "producer associations";²⁴

19. See Gosovic & Ruggie, *supra* note 6; Note, *The United Nations Seventh Special Session: Proposals for a New World Economic Order*, 9 VAND. J. TRANSNAT'L L. 601, 610 (1976).

20. See Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974); UNCTAD Resolution on Permanent Sovereignty, U.N. Doc. TD/B/421 (1972); Conference of Developing Countries on Raw Materials, *reprinted in* 14 INT'L LEGAL MAT'LS 534 (1975).

21. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974).

22. G.A. Res. 3202, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 5, U.N. Doc. A/9559 (1974).

23. See Adede, *supra* note 6.

24. For discussion of the role of cartels and commodity agreements, see E. HEXNER, INTERNATIONAL CARTELS (1945); Fawcett, *The Function of Law in Commodity Agreements*, 44 BRIT. Y.B. INT'L L. 157 (1970); Walker, *The International Law of Commodity Agreements*, 28 LAW & CONTEMP. PROB. 392 (1963). For a useful analysis of the producer associations concept and how it differs from the classic "cartel" mechanism, see Martin & Osberg, *Producer Cartels: Trade Unions of the Third World*, in THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 501 (R. Macdonald, D. Johnston, & G. Morris ed. 1978). For a discussion

(3) the criteria for setting commodity prices by establishing a linkage with the prices of imported manufactured goods, known as "indexation";²⁵ and (4) mechanisms for regulating the practices of transnational corporations (TNC).²⁶

During later international conferences, such as the Second United Nations Industrial Development Organization (UNIDO) Session held in Lima in 1975, and UNCTAD IV held in Nairobi in 1976, the concepts of development aid, technical cooperation among the developing countries, "redeployment" of industries, and technology transfer began to be spelled out in detail.²⁷ A long-term programme concerning raw materials and other primary commodities began to be shaped at the Dakar Conference held during February 1975.²⁸ During the Twenty-ninth Session, the General Assembly by a vote of 120 in favour to 6 against, with 10 abstentions, adopted the Charter of Economic Rights and Duties of States.²⁹ The two sides remained sharply divided by the time the General Assembly met for the Seventh Special Session.³⁰

The catalytic effect of the OPEC oil decisions underscored the political dimension of the development issues and the motives underlying the solidarity of the developing countries with the oil ex-

of the legal implications of cartel policies, see Metzger, *Cartels, Combines, Commodity Agreements and International Law*, 11 *TEX. INT'L L.J.* 527 (1976).

25. See United Nations Conference on Trade and Development: An Integrated Programme for Commodities and Indexation of Prices, U.N. Doc. TD/183 (1976), reprinted in *THE NEW INTERNATIONAL ECONOMIC ORDER: CONFRONTATION OR CO-OPERATION BETWEEN NORTH AND SOUTH?* (K. Sauvart & H. Hasenpflug ed. 1977); Report by the Secretary-General, The Indexation of Prices, U.N. Doc. TD/B/503 (1974). The OPEC oil price increase has been justified by one commentator on the basis of prices existing in agricultural and manufacturing sectors. Amin, *The Oil Crisis—An Arab Point of View*, 65 *L'EGYPTE CONTEMPORAINE* 291, 296 (1974).

26. See, e.g., *Transnational Corporations: Texts Relevant to an Annotated Outline Suggested by the Chairman of the Intergovernmental Working Group on the Code of Conduct*, U.N. Doc. E/C.10/AC. 2/3 (1978); Annual Reports of the Commission on Transnational Corporations, U.N. Doc. E/5782 (1977), U.N. Doc. E/C.10/31 (1977), U.N. Doc. E/5986 (1977); *Transnational Corporations: Issues Involved in the Formation of a Code of Conduct*, U.N. Doc. E/C.10/17 (1977), U.N. Doc. E/C.10/16 (1976); Report of the Group of Eminent Persons, the Impact of Multinational Corporations on Development and on International Relations, 61 U.N. Doc. E/5500/Rev. 1 (ST/ESA/6) (1974); Van Dam, *Marketing in the New International Economic Order*, 41 *J. MARKETING* 19-24 (1977).

27. UNCTAD Resolution 96, U.N. Doc. TD/217 (1976); United Nations Industrial Development Organisation: Lima Declaration and Plan of Action on Industrial Development and Co-operation, U.N. Doc. TD/B/155/Add.1, reprinted in 14 *INT'L LEGAL MAT'LS* 826 (1975).

28. Conference of Developing Countries on Raw Materials, reprinted in 14 *INT'L LEGAL MAT'LS* 534 (1975).

29. G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974). See Brower & Tepe, *supra* note 6.

30. See Gosovic & Ruggie, *supra* note 6.

porting nations.³¹ The concerted character of the debate and the considerable degree of consensus obtained during the Seventh Special Session are largely due to the fact that the agenda did not include the controversial items which have plagued the earlier discussions. International trade, monetary and financial issues, and technology matters became the subject of intensive negotiations during working committees. The issue of restructuring of the United Nations' economic bodies was entrusted to an ad hoc committee.

III. THE MAJOR OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER

The major task of restructuring the global economic system has not been quite so haphazard or dissociated as the varied types of conferences convened for that purpose both within and without the United Nations might initially appear to suggest. It is true that the vast number of the developing countries, over 117, and referred to as the Group of 77, voiced their concerns initially through the Dakar, Algiers, and other Non-Aligned Conferences, UNCTAD, ECOSOC, the Commonwealth meetings, and in the three Special Sessions of the General Assembly specifically arranged for that purpose, in a somewhat declaratory manner. The communications emanating from those conferences are often couched in terms of demands for imperative action without any systematic formulation of the principles balancing the wide range of rights and duties which such an action might entail.

It must be admitted that, to some extent, this deficiency persisted even when the formulating sessions had the benefit of participation of competent international lawyers, as was the case with the Charter of Economic Rights and Duties of States. But perhaps in line with the activity and pronouncements of the United Nations in other fields such as human rights, self-determination, and peace and security, the "practice of the United Nations" in the NIEO area also carries with it legal authority and significance on the basis of its relationship to the provisions of the Charter of the United Nations, a document that is "legally binding" on every Member State.³² Moreover, international practice, that omnibus source of all

31. See Alnasrawi, *The Petrodollar Energy Crisis: An Overview and Interpretation*, 3 SYR. J. INT'L L. & COM. 369 (1975); Franko, *Multinational Enterprises in the Middle East*, 10 J. WORLD TRADE L. 307 (1976); Mirvahabi, *Claims to the Oil Resources in the Persian Gulf—Will the World Economy be Controlled by the Gulf in the Future?*, 11 TEX. INT'L L.J. 75 (1976); Shihata, *supra* note 6.

32. For such an interpretation of the Charter provisions conferring "initial competence"

international law, is not in any sense limited merely to United Nations Resolutions, but includes the actual conduct or the specific actions of and agreements made by all those states, the developed and the developing, which connote the evolving pattern of global economic activity.

Consequently, in the investigation of the key NIEO issues outlined below, the relevant question to be asked is *not* whether, or to what extent, the emerging international law is relevant to each of them or plays an important role for achieving the stated objectives. Obviously, the legal technique is an indispensable component of any international effort for achieving agreement, no matter in what specific form or modality it is evidenced. Rather, my concern is with the question of what facilitative opportunities, or functionally relevant impediments, of an international law character which could possibly have some effect on the realization of the whole NIEO package can be identified, whether they be *lex lata*, even if not specified in these documents, or indicated here as goals to be realized *de lege ferenda*, even if they remain purely recommendatory in character. The specific issue areas examined from this perspective may be outlined briefly.³³

on the organization to promote law-making efforts, even if the latter take the form of "recommendations," see Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 57. That the probative value of such pronouncements will be higher when they originate from a body having constitutional competence appears also implicit in the dissenting opinion of Judge Fitzmaurice. *Id.* at 284.

There is also concern expressed on the other aspect of this activity, namely, constant repetition of the NIEO claims and the impact this may have on perspectives of authority. Thus, Gillian White, after stating that "[i]f a proposition lacks normative character, neither carelessness by some commentators nor deliberate application of legal terminology by others who support the proposition will be likely to confer a normative character on the Charter," made the following observation:

Certainly, the phrase "new international economic order" is becoming commonplace, and in so far as its repetition, together with other related resolutions, programs of action, and declarations, is capable of affecting the perceptions and opinions of those concerned with some aspect of international economic relationships, one may infer that a new order is in the process of creation.

White, *A New International Economic Order?*, 16 VA. J. INT'L L. 323, 324 (1976). There is concerted effort to ensure through discussion and action adequate implementation of the objectives of the NIEO. The Secretary-General recently stated:

The Assembly also has a special responsibility to ensure that the principles and objectives of the New International Economic Order gain increasing acceptance in the general thinking and practice of Governments and in public opinion throughout the world.

U.N. Doc. A/32/PV.109, at 8 (1977).

33. See THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER (E. Laszlo, R. Baker, E. Eisenberg, & V. Raman ed. 1978).

A. *Financial and Monetary Issues: Foreign Aid and Public Debt*

The Programme of Action³⁴ has spelled out ten interrelated objectives of international financial assistance and global liquidity for achieving the NIEO goals. They refer to measures for checking the adverse effects of inflation in the developed countries from being transferred to developing countries; the need to eliminate uncertainty of the exchange rates as it affects trade in commodities, promoting more effective participation of developing countries in the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), and other global financial institutions, and increasing international liquidity to assist the needs of the developing countries. However, because the Official Development Assistance (ODA) target of 0.7% of the GNP set by the Second United Nations Development Decade,³⁵ remained for all practical purposes unfulfilled, the developing countries advanced a number of specific proposals concerning foreign aid, foreign investment, and debt relief, which bear special connotation to the norms of international law applicable for determining the scope and content of the doctrine of international responsibility of states.³⁶

It is to these latter provisions in the NIEO proposals that attention should be drawn. More specifically, these provisions refer to exemption of the developing countries from all import and capital outflow controls imposed by the developed countries, promotion of public and private foreign investment in accordance with the needs and in the sectors of the economies of the developing countries as determined by the recipient states, measures to ease the burden of external debt contracted on hard terms, and debt renegotiation, both as a general concept and on a case-by-case basis, with a view to concluding agreements on debt cancellation, moratorium, rescheduling, or interest subsidization.³⁷

34. Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 5, U.N. Doc. A/9559, reprinted in 13 INT'L LEGAL MAT'LS 720 (1974).

35. G.A. Res. 2626, 25 U.N. GAOR, Supp. (No. 28) 39, U.N. Doc. A/8028 (1970).

36. Money and Finance and Transfer of Real Resources for Development, International Financial Co-operation for Development, Report by the UNCTAD Secretariat [UNCTAD IV] (May 5, 1976) (mimeo only) 16-19, U.N. Doc. TD/188 (1975). See A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS (1962); R. POZEN, LEGAL CHOICES FOR STATE ENTERPRISES IN THE THIRD WORLD (1976); FOREIGN DEVELOPMENT LENDING (S. Rubin ed. 1971); Hyde, *Economic Development Agreements*, 105 RECUEIL DES COURS 267 (1962). For two contrasting perspectives on the role of private financial agencies, compare Dawson, *The Role of the Private Banker in the New International Economic Order*, 16 VA. J. INT'L L. 297 (1976) with Asante, *supra* note 6.

37. Adede, *Loan Agreements Between Developing Countries and Foreign Commercial*

Underlying many of these specific demands and other efforts in the financial area is the emerging conception of foreign aid and aid preferences based on need. Is this entitlement to aid beginning to be recognized as an aspect of international responsibility on the part of the affluent members of the international society?³⁸ Such a notion appears, whether expressly or implicitly, to be influencing the entire range of international decisions pertaining to economic development. Referring to the policies followed by OPEC countries in the matter of financial assistance to the developing countries adversely affected by the increase in OPEC oil prices, Dr. Shihata of Kuwait went on record to admit a legal obligation to grant aid as an evolving principle of customary international law.³⁹

As a broad consideration of development policy, the recognition on the part of the capital-exporting states of a concept of international entitlement of aid is bound to be an important factor in the

Banks—Reflections on Some Legal and Economic Issues, 5 SYR. J. INT'L L. & COM. 235 (1978); Asante, *supra* note 6 (discussing, in detail, the experience of Ghana with debt rescheduling efforts). See also International Monetary Fund: Executive Director's Decision and Instrument to Establish a Trust Fund for Balance of Payments Assistance, reprinted in 15 INT'L LEGAL MAT'Ls 953 (1976). For a criticism of the financial aspects of the NIEO, see Kreinin & Finger, *A Critical Survey of the New International Economic Order*, 10 J. WORLD TRADE L. 493 (1976).

At a meeting of the Intergovernmental Committee of UNCTAD during October, 1978, it was agreed to set up a multilateral framework within which debt problems could be dealt with more expeditiously. Among the four objectives of international action identified is that debt reorganization should enhance the development prospects of the debtor country, bearing in mind its socio-economic priorities and developmental objectives. The other criteria agreed upon by the Conference are that debt rescheduling should be expeditious and timely; it should aim at restoring the debtor country's capacity to serve its debt over both the short and the long run and reinforce the developing country's own efforts to strengthen its balance of payments position; and it should project the interests of debtors and creditors equitably in the context of international economic cooperation. "It was the first time, however, that an intergovernmental group had been able to agree that enhancing development prospects of a debtor country was a key consideration in debt reorganization." U.N. MONTHLY CHRONICLE, Nov.-Dec., 1978, at 171.

38. Schachter, *supra* note 4, at 9-13.

39. From a legal point of view, the impressive aid record of Arab oil-exporting countries has two important implications. The first is that the conduct of these States contributes to the evolution of new legal rules in the sphere of international economic cooperation. For even though contemporary international law does not create a legal obligation upon richer states to provide assistance to the less fortunate countries, a moral obligation to this effect is gradually hardening into a binding international custom. Present aid efforts of Arab oil producing States are accelerating the establishment of this custom Elements of the *opinio juris*, necessary in the conventional theory for completing the custom-making process, may thus be discerned in the oil producers' behaviour even at this stage on account of recent Arab practices . . . customary international law has already established an obligation of aid-giving in favour of poorer countries.

Shihata, *supra* note 6, at 278-79 (footnotes omitted).

evolution of the international law of development. The evidence for this comes not only from the collective decisions of international financial organizations, but more importantly from the specific actions of the rich countries granting assistance and preferences to those severely affected developing countries. As Oscar Schachter pointed out:

This is . . . the central feature of the contemporary international law of development. When we reflect on it, it may seem extraordinary how we have come to accept it and how far-reaching its implications may extend. Can we reconcile need as a basis of entitlement with other fundamental legal principles such as equality among states or their established rights? How can need fit into the still prevailing conception of a world market economy based on principles of comparative advantage and nondiscriminatory trade?⁴⁰

Indeed, the policies underlying the decisions in recent years to write-off large amounts of public debt of some of the developing countries, when examined closely, also appear to apply to the arguments of the developing countries that calculations of "appropriate compensation" in the event of nationalization must rest on the needs and the abilities of the host state to pay the full market value demanded by the concerned foreign corporations.

Although the present rationale for extending international economic assistance is somewhat similar to the notions of the modern welfare state, the entitlement of the developing countries to foreign aid does not appear to be affected by the fact that the recipient's needs arose in part because the specific economic policies which it has opted to pursue have been vigorously objected to by the aid donating countries. Even before the NIEO Declaration,⁴¹ countries such as Ghana, have invoked debt moratorium as an option in respect to their contractual obligations.⁴² The scope of this principle

40. Schachter, *supra* note 4, at 10.

41. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974).

42. Asante, *supra* note 6, at 7-9. It has been reported that during 1972 a loan request from India to the International Development Association resulted in "the first U.S. vote ever cast against an IDA or IBRD loan." The United States' objection was based on the ground that the loan to buy tankers was meant to provide for the transport of crude oil from Iraqi oil fields, nationalized without adequate compensation being paid to the British companies involved. The loan was approved in spite of the United States' opposition on this point. "No other [IDA] member country voted against the tankers loan; only New Zealand abstained." Moulton, *On Concealed Dimensions of Third World Involvement in International Economic Organizations*, 32 INT'L ORGANIZATION 1019, 1024 (1978).

is further examined by the International Law Commission in its draft reports on "State Responsibility."⁴³

B. Problems of International Trade, Industrialization, and Appropriate Economic Returns for Achieving Progress by Developing Countries

In the area of international trade generally, and raw materials and commodity markets in particular, the divergence of views between the developed and the developing countries has been quite striking. The post-war Bretton Woods arrangement, popularly known as the General Agreement on Tariffs and Trade (GATT) system has, by the time of the NIEO proposals, already been eroded to the point that it can be said to have failed, leaving trade restrictions, monopolies, and market control to the individual initiatives and exigencies in the few developed countries.⁴⁴ The large in-flow of external capital into Europe through the Marshall Plan and other arrangements was able to sustain individual economies from any adverse consequences resulting from the freemarket mechanisms, and the attendant policies governing protection of foreign investments and observance of contractual commitments, because of their industrial base, technological capabilities, and a common dependence of the metropolis on imported raw materials.

The GATT system was envisaged to regulate international trade which at that time was carried on largely by private corporate structures. With the introduction of state trading, the GATT regulations, in so far as they concern TNC's role in international trade, proved inadequate. Moreover, the double digit inflation within the developed countries, coupled with depleting foreign reserves and liquid assets of the developing countries, began to erode seriously the latter's ability to meet their minimum basic economic development projects. It was at this time that the obvious market manipulations of the "seven sisters" in the petroleum market led to the OPEC oil pricing decisions.⁴⁵ The measures to promote stable ex-

43. United Nations International Law Commission: Report on Draft Articles Adopted at the Twenty-Ninth Session (May 9-July 29, 1977), Draft Articles on State Responsibility, U.N. Doc. A/32/183, reprinted in 16 INT'L LEGAL MAT'LS 1249 (1977). See Seventh Report on State Responsibility, U.N. Doc. A/CN.4/307 (1978); Report of the International Law Commission on the Work of its 29th Session, 32 U.N. GAOR, Supp. (No. 10), U.N. Doc. A/32/10 (1977). Note the strong language in which the International Law Commission's proposals are attacked by Mr. Robert Rosenstock, the United States Representative to the Sixth Committee. Report of the Commission, U.S. Mission Press Release, USUN-112 (Nov. 11, 1977).

44. See note 13 *supra*.

45. Shihata, *supra* note 6, at 267-68; Shihata, *Destination Embargo of Arab Oil: Its*

change rates and to maintain the real value of reserve currencies led to the whole issue of indexation; the concept of "just price" for raw materials exported by the developing countries is perceived to fall within the concerns of international law as well.⁴⁶

A second major category of issues raised by the NIEO, which may also be categorized broadly as international trade questions, involve making appropriate adjustments to facilitate the expansion and diversification of Third World exports. Although realization of this goal is seen as requiring cooperation at the intergovernmental level, for lower tariffs and for the removal of non-tariff barriers on the exports of manufactured goods originating from the Third World, major impediments can be found in the restrictive business practices of TNCs, their manipulation of the market structure, intracorporate policies, and their influence upon the labour and trade union sectors in the industrialized countries. The whole area of transportation, insurance, and banking arrangements, referred to as "invisible trade," is very much controlled by the TNCs, and the Third World demands a role in those sectors as well.⁴⁷

Fundamental to the NIEO is a broadly agreed scheme of indexation of Third World export prices in a manner that would tie them to the rising prices of the manufactured goods and capital exported by the developed countries. Indexation has been shunned and criticized in the international context, although that concept, or its functional equivalents, has been freely accepted in certain areas by the developed countries. Closely related to indexation is the idea of adopting an integrated approach to price supports for an entire group of Third World commodity exports.

It is argued that international trade under such a scheme would benefit from the creation of buffer stocks for which "producer associations" are seen as a practical vehicle. Consequently, a right of association for primary producers is demanded, and the developed countries are not only required not to prevent in policy or practice the organization of such trading centres, they are called upon to finance through a "common fund" the creation of buffer stocks for achieving stability in prices. We need only recall here that the abortive attempts under the Havana Charter in 1948 to establish an International Trade Organization have failed on the very same issue

Legality Under International Law, 68 AM. J. INT'L L. 591, 608-21 (1974).

46. See Schachter, *Just Prices in World Markets: Proposals De Lege Ferenda*, 69 AM. J. INT'L L. 101 (1975). See note 24 *supra*.

47. See Dawson, *supra* note 36; Ripoll, *UNCTAD and Insurance*, 8 J. WORLD TRADE L. 75 (1974).

of primary commodity policies and the role of cartels.⁴⁸ In its place commodity prices are attempted to be regulated through international commodity agreements between producer and consumer countries. The basic philosophy for such agreements is also reflected in Part IV of GATT, adopted in 1966, two years after the first UNCTAD meeting.

The specific policies of international trade demanded by the developing countries, such as those mentioned above which appear to have an immediate bearing on the emerging principles of international law, also include the granting of preferential trade opportunities. The Generalized System of Preferences operate within a global context. For example, through Most Favoured Nation (MFN) clauses in treaty practice, states may agree to bind themselves to accord beneficial trade treatment on terms not less favourable than the terms accorded to any third state. The example of the Lomé Convention, and the ACP-EEC relations in this respect, suggests the feasibility of implementing trade preferences on a multilateral basis.⁴⁹ The International Law Commission, in its draft proposals on the MFN treaty practice,⁵⁰ advanced the concept of "Most-Favoured *Developing* Nation" treatment.⁵¹ In the petroleum industry, for example, the MFN treatment has been claimed by the developing countries and conceded by the TNCs, for purposes of upward revision of the prices of petroleum resources, and such adjustments are periodically made reflecting changes in the contracts entered between them.⁵²

C. *Industrialization and Redeployment*

Although the Programme of Action included some general con-

48. See Martin & Osberg, *Trade Unions of the Third World*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 501 (R. Macdonald, D. Johnston, & G. Morris ed. 1978).

49. Lomé Convention, 19 O.J. EUR. COMM. (No. L 25) 1 (1976). See Dolan, *The Lomé Convention and Europe's Relationship with the Third World*, in 1 *REVUE D'INTEGRATION EUROPEENE* 369 (1978); Gensar, *Lomé and Beyond*, in *THE LOMÉ CONVENTION AND A NEW INTERNATIONAL ECONOMIC ORDER* 188-92 (F. Gensar ed. 1977); Gruhn, *The Lomé Convention—Inching Towards Interdependence*, 30 *INT'L ORGANIZATION* 241 (1976).

50. United Nations International Law Commission: Final Draft Articles on Most-Favored-Nation Clauses in Treaties Between States, U.N. Doc. A/33/192, reprinted in 17 *INT'L LEGAL MAT'LS* 1518 (1978).

51. See Comments on Proposed Article 21 of the International Law Commission Draft, U.N. Doc. A/CN.4/308 (1978); Report of the International Law Commission, U.N. Doc. A/CN.4/309 (1978) (includes N. Ushakov's First Report on Most-Favored Nation Clause); Ustov, *International Law Commission: The Most-Favored Nation Clause*, 11 *J. WORLD TRADE L.* 462 (1977).

52. See Asante, *supra* note 6.

cepts which require the developed countries and international financial institutions to promote rapid industrialization of the developing countries by establishing export oriented industries and projects in the developing countries, it is the recommendation made during the Second UNIDO Conference in Lima that gave concrete expression to those policies. The proposal that "the developed countries should encourage investors to finance industrial production projects, particularly export-oriented production, in developing countries, in agreement with the latter and within the context of their laws and regulations,"⁵³ has implications for transnational corporations in so far as the terms governing the transfer of capital, technology, and international trade in manufactured goods are concerned.⁵⁴

Direct foreign investment policies implementing the objectives of redeployment need to be negotiated, and the terms and conditions of such contractual obligations need to be spelled out in sufficient detail, with the full awareness that such contracts carry with them the prospect of complete absorption of the contractual structure into the local laws and policies of the recipient state. To give an example, the same Programme of Action calls for an effort "to adapt commercial practices governing transfer of technology to the requirements of the developing countries and to prevent abuse of the rights of sellers."⁵⁵ Technology, patented or not, is property, not in the hands of governments, but owned by private corporate enterprises. Consequently, any commitment in this respect remains purely an ideal unless the transnational corporations owning the technology agree to its transfer, to its appropriate adaptation to the needs of the recipient state, and to its continuous development to meet the evolving needs of the new industrial project.⁵⁶

The appropriate framework for achieving the above stated

53. Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 5, 12, U.N. Doc. A/9559, reprinted in 13 INT'L LEGAL MAT'LS 720, 725 (1974).

54. United Nations Industrial Development Organization: Lima Declaration and Plan of Action on Industrial Development and Co-operation, U.N. Doc. ID/B/155/Add., reprinted in 14 INT'L LEGAL MAT'LS 826 (1975); *Negotiating the Redeployment of Industrial Productive Capacity to Developing Countries*, in THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER 120-24 (E. Laszlo, R. Baker, E. Eisenberg, & V. Raman ed. 1978).

55. G.A. Res. 3202, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 5, 13, U.N. Doc. A/9559, reprinted in 13 INT'L LEGAL MAT'LS 720, 728 (1974).

56. See United Nations Conference on Trade and Development: Draft Texts Submitted to the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology, U.N. Doc. TD/AC.1/11 (1977), reprinted in 17 INT'L LEGAL MAT'LS 453 (1978); Gold, *The International Transfer and Promotion of Technology*, in THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 549 (R. Macdonald, D. Johnston, & G. Morris ed. 1978).

objective must be developed in collaboration with the corporations, even if financial aid is forthcoming for such a project from public governmental sources in the industrialized countries. It is true considerable effort is made, especially under the auspices of UNCTAD, to develop a code of conduct for transfer of technology.⁵⁷ Even if we assume that such a code will have a mandatory character, its acceptance at the governmental level may not be sufficient to interpret the scope of the obligations contracted by the government of a developing country with a transnational corporation.

Finally, the whole notion of trade liberalization is intimately connected with the developing countries' claims for the elimination of the tariff and non-tariff measures of the industrialized countries. The developing countries seek "redeployment" of some labour-intensive, low-technology industries from industrialized countries into their countries. While agreement may be reached in some sectors of the industry on this subject, the TNCs regard the claim as indistinguishable from any of the other practices in restraint of trade.⁵⁸ A global industrialization policy, as UNIDO has pointed out, must come to terms sooner or later with the need for redeployment, not because the poorer countries need it for a start, but because the affluent regions will benefit from it in the long run.

Consider for example the developing country exports—such as textiles and leather goods—which are unlikely to cause serious negative effect on the overall employment in the developed countries. As Robert MacNamara pointed out, the developing countries' exports of manufactured goods today constitute less than 2% of the manufactured goods consumed by the developed nations.⁵⁹ Added to that, these very same industries are today heavily subsidized in the industrialized countries to compete with exports. By abandoning excessive protectionism, the number of workers likely to be displaced

57. *Id.*

58. It has been reported, for example, that Canada is willing, in principle, to relocate an important segment of one consumer sector of its bauxite industry processing units in a developing country. See Report of the Commonwealth Heads of State or Government Conference, Kingston, Jamaica (1977). During a seminar held in Mexico City in 1979, an expert from Rumania stated his country's willingness to transfer manufacturing of certain sectors of its glass industry to developing countries. See also Walter, *A Sound Case for Relocation*, 12 *INTERECONOMICS* 366-68 (1975).

59. Joint Annual Meeting of the World Bank and the International Monetary Fund, reprinted in 6 *DEVELOPMENT FORUM* No. 9 (Oct. 1978) (statement of R. McNamara). For a discussion of some of the problems encountered in the redeployment of labour-intensive, low-technology industries, see Taake & Weiss, *The World Textile Arrangement: The Exporter's Viewpoint*, 8 *J. WORLD TRADE L.* 624 (1974).

will only be a tiny fraction of those displaced by shifts in technology and demand in the industrialized countries themselves. "The protectionist view overlooked the fact that the loss of jobs due to imports from the developing countries was outweighed by the increase in jobs due to the growing volume of exports to those countries made possible by the foreign exchange the developing countries are thereby able to raise."⁶⁰

Similarly, cooperative efforts involving redeployment of industries are sought in order to shift production from some industrialized countries facing congestion and unacceptable levels of pollution damaging the environment, thus having the beneficial effect of industrializing the developing countries. The objection that such a policy will leave the developed consumer countries with mere "servicing industries" appears shortsighted. Clearly in these matters intergovernmental cooperation alone cannot yield mutually beneficial outcomes unless private banking institutions, multinational marketing agencies, and technology supplying TNCs also see that it is to their advantage as well. The developing countries in return must make sustained efforts to infuse confidence and offer reliable guarantees necessary to attract major foreign investments.

D. Regulation and Control of the Activities of Transnational Corporations: Restrictive Business Practices

In addition to the specific proposals for a NIEO mentioned above, which affect in one form or another the operations of TNCs, the Programme of Action has also focussed attention on the need "to formulate, adopt and implement an international code of conduct for transnational corporations,"⁶¹ and to eliminate restrictive business practices in whatever form present which adversely affect international trade, especially that of the developing countries. There is virtual unanimity on the overall objective of negotiating a set of equitable principles and rules in this regard. Both the UNCTAD proposals and the OECD guidelines on this subject emphasize that certain TNC practices in restraint of trade should be eliminated, although their respective reasons for doing this do not always appear to be identical.⁶² The practices the OECD countries are interested

60. 6 DEVELOPMENT FORUM No. 9 (Oct. 1978).

61. G.A. Res. 3202, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 5, 13, U.N. Doc. A/9559, reprinted in 13 INT'L LEGAL MAT'LS 720, 728 (1974).

62. Organisation for Economic Co-operation and Development: Council Recommendation Concerning Action Against Restrictive Business Practices, OECD Doc. C(78) 133 (Final)

in controlling are all related to maintaining a free competitive market system. The type of activities the developing countries are concerned with include also intracorporate transactions, transfer pricing arrangements, and market monopolies. In other words, while one side is emphasizing *competition*, the other side is advocating *development*; while the OECD countries prefer the promotion of a voluntary code, the Group of 77 is demanding a legally binding multilateral convention.

The specific practices of the TNCs sought to be eliminated vary considerably from one industry to another. The developed countries find it difficult to support a mandatory code prohibiting all types of intracorporate transactions, not just those which restrain free competition as impermissible intervention with the market mechanisms of international trade. The exemptions for cartels originating in developing countries and the preferential treatments sought for their domestic enterprises make, according to this view, the whole subject of any international regulation of cartels difficult. From the point of view of the developing countries, the idea of establishing "producer associations" is to achieve stable and equitable return for their resources, and as such, is distinguishable from both the technical antitrust objectives and the cartel-type of activities coming within the prohibitions of the Sherman Act⁶³ of the United States.

The discussions on the subject of restrictive business practices in UNCTAD and, in the Intergovernmental Committee of the United Nations Commission on Transnational Corporations⁶⁴ illuminate the magnitude and complexity of the problems requiring international regulation. On the one hand, the developing countries are dependent upon the capital, technology, and market information supplied by the transnational corporations. On the other hand, their own experience has been that many of the largest corporations trading in their territory, being subsidiaries of large transnational enterprises, control the buying and selling policies of such subsidiaries. Investment-related decisions, including access to the capital of

(Aug. 9, 1978), reprinted in 17 INT'L LEGAL MAT'LS 1527 (1978); Control of Restrictive Business Practices in the European Economic Community, U.N. Doc. TD/B/608 (1977); Restrictive Business Practices, U.N. Doc. TD/B/390 (1973); United Nations Conference on Trade and Development: Restrictive Business Practices—The Operations of Multinational United States Enterprises in Developing Countries, Their Role in Trade and Development, U.N. Doc. TD/B/399 (1972).

63. 15 U.S.C. § 1-7 (1976).

64. United Nations Commission on Transnational Corporations: Intergovernmental Working Group Report on the Formulation of a Code of Conduct, U.N. Doc. E/C.10/31, reprinted in 16 INT'L LEGAL MAT'LS 709 (1977).

private banking institutions, the organization and location of a subsidiary, what it should manufacture, to whom it should or should not sell, from where the technology and raw materials may be purchased at prices which are artificially high, and if it concerns extractive industries, the qualitative and quantitative decisions related to the resource exploited, are all matters that cannot be captured fully by proposals restricted to controlling competition. These are obviously matters affecting the international trade and further prospects of economic development of the developing countries.

If the developing countries want to attract direct foreign investment and advanced technology, they must offer the investors incentives to enter into agreements. Fair treatment, economic stability, and an opportunity to realize a fair return on capital invested are naturally the minimum requirements for promoting international cooperation. The critical question is whether in the context of NIEO, it is still possible to realize the objectives of the two sides. The Andean Code⁶⁵ on direct foreign investment formulated by the countries of Latin America is one such example.⁶⁶ The success or failure of such attempts, it is believed, will in large measure depend on how the institution of transnational corporation will adapt itself, both to remain in business, and to be a vehicle for the realization of the aspirations of the vast majority of the sovereign nations in the world.

As already indicated, the NIEO proposals on TNCs cover a number of other matters, such as their political influence in the formation of the host as well as of the home countries' foreign policies, intervention in the internal affairs of the host countries, the obligation to respect the laws and the economic and social objectives of the host countries, and so on.⁶⁷ These are certainly propositions which are least controversial when presented in international forums as desirable objectives, but it is far from clear how they are to be related to specific actions of states, including measures of nationalization or breaches of the good faith observance of contractual commitments. The adoption of a comprehensive code of conduct to regulate the activities of transnational corporations may in fact

65. Decision No. 24, Dec. 31, 1970 as amended by Decisions Nos. 37, June 24, 1971 and 37-A, July 17, 1971, of the Commission of the Cartagena Agreement, Andean Foreign Investment Code, reprinted in 11 INT'L LEGAL MAT'LS 126 (1972).

66. For an analysis of the Andean Code, see Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972).

67. See note 9 *supra*.

serve to promote the ideals of competition cherished by the free market system because, to the extent such ideals reflect the needs of global economic development, they will also be applicable to the corporations established by developing countries, which are generally *not* private enterprises, but are largely state-owned trading companies.

The specific decisions of international judicial and arbitral bodies in the nationalization and expropriation controversies fall short of clarifying the policies most appropriate for the determination of what is an "appropriate compensation."⁶⁸ This is in part attributable to the "mystifying secrecy" that exists and the inability to obtain full information. There is need for appropriate standards of accounting and reporting of the corporate activities, subject to proper safeguards to protect the legitimate areas of confidentiality.

Given the enormous potential of TNCs as "change agents" for development and modernization, it is a pity that the legal structure of the transnational corporations has not been developed to face the tasks challenging them. As William Halal has pointed out, in the post-industrial era, in which the western-developed society is now, the global corporation must shed its veil and come into the open to play a responsible role.⁶⁹ It is unrealistic to advocate an absolute rule of prohibition that a TNC or its subsidiary should not in any way influence the domestic political and economic policies when the enterprise thus concerned is a major, if not the only, source of employment and foreign exchange to the host state. Nor can it be denied that the corporate decisionmaking functions, often restricted to a very small group within the corporate management, determining what products are to be manufactured, how they are to be advertised, at what prices they are to be sold, where they should be marketed, and so on, have tremendous social consequences. Ade-

68. See Kollewijn, *Nationalization Without Compensation and the Transfer of Property*, 6 NEDERLANDS TIJDSCHRIFT VOOR INT'L RECHT 140 (1959); Lapres, *Principles of Compensation for Nationalised Property*, 26 INT'L & COMP. L.Q. 97 (1977); Rood, *Compensation for Takeovers in Africa*, 11 J. INT'L L. & ECON. 521 (1977); Weston, *The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Reflections upon the Contemporary International Law Debate* (unpublished manuscript 1978). See also Weston, "Constructive Takings" under International Law—A Modest Foray into the Problem of "Creeping Expropriation," 16 VA. J. INT'L L. 103 (1975). For a discussion of the suggestion of shifting the burden to where it is most realizable, see Lipson, *The Development of Expropriation Insurance: The Role of Corporate Preferences and State Initiatives*, 32 INT'L ORGANIZATION 351 (1978).

69. Halal, *Alternatives to Growth-II*, reprinted in 6 DEVELOPMENT FORUM (Mar. 1978). See also Gabriel, *Management of Public Interest by the Multinational Corporation*, 11 J. WORLD TRADE L. 15 (1977).

quate realization of the emerging global interdependencies and the onerous responsibility they place on the management justify, it appears, democratization of the corporate decisionmaking structure by including in their boards representatives of consumers, employees, and other groups. The emergence of a representative global private enterprise appropriate to the needs of the post-industrial society, in which the western-developed countries are today, is at once a challenge and an opportunity to promote the common interests of both the developed and the developing nations of the world.

E. The Legal Obligation to Transfer Technology

The normative value of NIEO pronouncements causes considerable speculation when one considers the scope of the rights and obligations of parties in an international undertaking to assist economic development. The overall NIEO objectives in this area noted above find formal enunciation in several specific contexts. For example, Article 13 of the Charter of Economic Rights and Duties of States declares in the following manner, the obligation to transfer technology:

1. Every State has the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development.
2. All States should promote . . . transfer of technology, with proper regard for all legitimate interests including, *inter alia*, the rights and duties of holders, suppliers and recipients of technology. In particular, all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs.⁷⁰

Further developments in this area have reached the point that the international community has begun to articulate the concept of technology availability as if the resource in question is part of the common heritage of mankind.⁷¹ Especially, the proposals concerning

70. G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, 56, U.N. Doc. A/9631, *reprinted in* 14 INT'L LEGAL MAT'LS 251, 257 (1975).

71. The literature on this subject is extensive. See United Nations Conference on Trade and Development: Draft Texts Submitted to the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology, U.N. Doc. TD/AC.1/11 (1977), *reprinted in* 17 INT'L LEGAL MAT'LS 453 (1978); Report of the African Regional Meeting on a Code of Conduct for Transnational Corporations, U.N. Doc. E/CN.14/1674 (Feb. 11, 1977); Organisation for Economic Co-operation and Development: Declaration on International

exploitation of seabed resources in the international area contained in the Informal Composite Negotiating Text⁷² envisage a legal obligation on the part of the owners of technology holding concessions to exploit such resources, to transfer the technology they devise and utilize, to the proposed seabed authority, under appropriate safeguards.⁷³

One such safeguard relevant here, is the provision to refer any disputes arising in respect of transfer of technology to compulsory procedures of third-party settlement, something that is absent in the proposals of the Charter of Economic Rights and Duties of States. But, as will be shown below, it is not so much the absence of any compulsory dispute settlement procedures, as such, that is likely to create difficulties, but the effect of those general policies advocated by the large majority of the United Nations Member States and endorsed in principle by the industrialized states on their respective bargaining positions either at the time of contract negotiation or at the time of the termination of a contract for purposes of computing the "appropriate" amount of compensation.

There are several other proposals in the NIEO declarations such as the establishment of an industrial technological information bank, the relationship between public grants made in support of research and development projects and its bearing on the right of other states to impose countervailing tariffs and other duties on products marketed utilizing such subsidized technology, the need to revise national patent systems and international conventions on patents and trademarks to meet the special needs of the developing countries and the obligations of the developed countries to give free and full access to technologies whose transfer is not subject to private decision, and so on, which do carry considerable weight in any discussions or negotiations concerning transfer of technology.

Investment and Multinational Enterprises, OECD Press Release A (76) 20 (June 21, 1976), reprinted in 15 INT'L LEGAL MAT'LS 967 (1976); United Nations Industrial Development Organization: Lima Declaration and Plan of Action on Industrial Development and Cooperation, U.N. Doc. ID/B/155/Add.1, reprinted in 14 INT'L LEGAL MAT'LS 826 (1975); G. ZAPHIRIOU, INTERNATIONAL CODE OF CONDUCT FOR TRANSFER OF TECHNOLOGY 15 (U.N. Sales No. E.75.VI D 1975).

72. Informal Composite Negotiating Text, 32 U.N. GAOR, Third Conference on the Law of the Sea, U.N. Doc. A/Conf.62/WP.10, reprinted in 16 INT'L LEGAL MAT'LS 1108 (1977).

73. See *id.* annex II, para. 5(j)(iv); Silverstein, *Property Protection for Deepsea Mining Technology in Return for Technology Transfer: New Approach to Sea-bed Controversy*, 2 FLETCHER F. 15 (1978).

F. Cartels, Producer Associations, and International Commodity Agreements

Among the fundamental problems concerning raw materials and primary commodities in international trade, the sharp differences between the two sides are focused on the *mechanisms* envisaged for promoting the interests of the developing countries and on the *principle* establishing a nexus between the prices of raw materials and the prices of imports of manufactured goods in international trade. The mechanisms primarily in issue refer to the attempts of the raw material exporting countries to form "producer associations" designed to enhance their bargaining position *vis à vis* the countries which import them. The latter view such efforts as "cartelization" of trade inhibiting the free competition of the international market mechanism. The link between the prices of exports of the developing countries and the prices of their imports from developed countries, referred to as "indexation," is not only aimed at establishing and maintaining just prices for commodities, which is its major objective, but also to strengthen the ability of the developing countries to properly exercise their permanent sovereignty over natural resources and economic activities related to such resources.⁷⁴ Therefore, global price fluctuations and changing uses of a state's resources to further its economic, social, and political purposes, become legitimate grounds for decisions made in the name of permanent sovereignty over natural resources.

G. Protection of the Sovereign Rights of States over their Natural Resources and their Freedom of Action

The most vocal opposition to the NIEO understandably is directed to the provisions in the Programme of Action and the Charter of Economic Rights and Duties of States pertaining to the scope and content of the concept of permanent sovereignty applied to natural resources and to all related economic activities. The issue of compensation to foreign interests nationalized dealt with in Article 2(2)(c) of the Charter, taken separately as the bone of contention, is probably only marginally relevant to all other claims mentioned above for achieving equitable redistribution of the global wealth. It has become, nevertheless, one of the more visible symbols of confrontation between the capital exporting industrial countries (and

74. See Shihata, *supra* note 6. Another important consideration here is the impact of synthetics on the competitiveness of natural resources, such as rubber, textiles, and leather goods.

the TNCs which largely originate from them) and the large majority of the developing nations who have supported the principles as stated in Article 2.

The concept of permanent sovereignty articulated in Article 2 is supported by many other subtle policies in the NIEO declaration which, although not openly challenged, characterize the scope and meaning of the principles of international law advocated for protection in the future of direct foreign investments. For example, the provisions concerning political and economic independence (Articles 1 & 4), non-intervention (Articles 2, 5, 7 & 18), equality (Articles 10, 17 & 32) provide the backdrop or context relevant for answering such claims as whether a country's nationalization measures are "arbitrary," in furtherance of "public purpose," or otherwise "reasonable." Furthermore, the train of resolutions on this subject adopted during 1974, including General Assembly Resolutions 3171,⁷⁵ 3201,⁷⁶ of the Sixth Special Session, and 3281, proclaiming the Charter of Economic Rights and Duties of States,⁷⁷ is regarded by the developed industrialized states as a departure from established international norms in three important aspects. They fail to proscribe *discriminatory* foreign wealth deprivations; they fail to mention the applicability of an international law standard; and they do not recognize obligatory settlement by an international tribunal of disputes concerning issues of compensation.⁷⁸ Their omission is made conspicuous by the fact that an earlier United Nations Declaration on Permanent Sovereignty⁷⁹ accepted by the free-market industrialized states did contain those references.⁸⁰ For

75. Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, 28 U.N. GAOR, Supp. (No. 30) 52, U.N. Doc. A/9030 (1973), reprinted in 13 INT'L LEGAL MAT'LS 238 (1974).

76. Declaration for the Establishment of a New International Economic Order, G.A. Res. 3201, Sixth Special Sess., U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974).

77. G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974).

78. Weston, *The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Reflections Upon the Contemporary International Law Debate* (unpublished manuscript 1978).

79. Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962).

80. There is extensive writing on this subject. See Banerjee, *The Concept of Permanent Sovereignty Over Natural Resources*, 8 INDIAN J. INT'L L. 515 (1968); Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854 (1956); O'Keefe, *The United Nations and Permanent Sovereignty Over Natural Resources*, 8 J. WORLD TRADE L. 239 (1974); Onejeme, *The Law of Natural Resources Development: Agreements Between Developing Countries and Foreign Investors*, 5 SYR. J. INT'L L. & COM. 1 (1977). Reports of the Secretary-General of the United Nations on this subject include: U.N. Doc. E/5986 (1977) (discussing the current contractual practices which have a bearing on the concept of permanent sovereignty); U.N. Doc. A/9716 (1974); Summary of Views Expressed by Governments

these reasons, the arbitrator in the *Libya-Oil Companies Arbitration* concluded that "Article 2 of this Charter must be analyzed as a political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States."⁸¹

Pending a more detailed inquiry of this important international award, it may be stated briefly that the issue whether a developing country, or, for that matter *any* state, has the right to deprive the property and wealth of a foreign investor, especially when such a deprivation is admittedly of an arbitrary nature and discriminatory in effect, pertains, *not* to the economic policies of development, but to the right of a state to apply economic coercion for attaining its objectives.⁸² The assumptions underlying these objections are that in some instances such deprivations may result from nationalization and, therefore, the NIEO should have made provisions to cover such situations; especially that the reference to "all economic activities" in the NIEO provisions on permanent sovereignty is to cover all profits made by a corporation irrespective of the appropriateness of its transfer pricing policies. It also includes reading into the doctrine competence to invoke and apply pricing and production control measures, not as incidents of the contractual arrangement, but as "sovereign rights" related to the ownership of the resource itself. For example, Dr. Shihata has written:

[N]othing in the present system of international law prevents a producing country from selling its primary products at whatever prices it chooses to fix. Indeed, the right of every country freely to dispose of its national wealth is an integral part of the universally acknowledged principle that a State possesses sovereignty over all of its natural resources.⁸³

A second objection, which is of a general nature, made in respect of compensation provisions in Article 2 of the Charter, is that, unless direct foreign investments are legally protected from unjust depriva-

at the 28th Session of the Sixth Special Session of the General Assembly, U.N. Doc. E/5549 (1974).

81. *Libya-Oil Companies Arbitration*, *supra* note 1, at 30.

82. "The use of export controls for political purposes is so widespread that no general rule of international custom could have developed to the contrary." Shihata, *supra* note 6, at 267 (footnote omitted). See Boorman, *Economic Coercion in International Law: The Arab Oil Weapon and the Ensuing Juridical Issues*, 9 J. INT'L L. & ECON. 205 (1974); Lillich, *Economic Coercion and the "New International Economic Order": A Second Look at Some First Impressions*, 16 VA. J. INT'L L. 233 (1976).

83. Shihata, *supra* note 6, at 268 (footnote omitted).

tion, the avowed objectives of NIEO cannot be realized.

Although the NIEO Charter advocates equality of treatment and a national standard and emphasizes the procedures of direct negotiation and other internal remedies as avenues for their settlement, appropriate compensation in conformity with *established* international law standards, are seen as indispensable safeguards by the industrialized states. On the other hand, the developing countries argue that any reference to the established international law standards is a reference to the classical doctrine of prompt, effective, and full compensation, determined in accordance with the market value stipulated by the industrialized countries. This argument tends to place emphasis on the goals of "development," economic conditions and capabilities of the nationalizing states, criteria of "need" alluded to above, and other similar factors, to which the classical doctrine of international law is characteristically indifferent. The argument is that if the developing countries enrich themselves at the expense of direct foreign investments, western technology, research and development, capital, access to markets, and so on, then they should compensate the foreign owners adequately and appropriately. Failure to do so, it is alleged, would result in "unjust enrichment" proscribed by international law. On the key notions of what is "unjust" and how much is "appropriate" compensation, the literature both recounts a rich experience and abounds with sharp controversy.⁸⁴

As a matter of fact, much of this controversy seems quite unnecessary. The practice of states, just before and since the adoption of the NIEO Charter, confirms the preference of a far higher degree of conformity to the legal requirements of justice and appropriate compensation than is sometimes alleged in academic writings.⁸⁵ The experts on this subject, especially in the Western industrialized countries, readily admit that there is no basis either in theory or in practice to the claim that existing international law has established any norms which require that nationalizations should be for a "public purpose" or "nondiscriminatory" as between the national and foreign enterprises. The claim that there exists a customary international law norm of an "international standard" is challenged

84. See note 68 *supra*.

85. See U.N. Doc. E/5986 (1977); U.N. Doc. A/9716, and A/9716/Corr.1 (1974) (reporting over 875 cases involving developing countries during the period of 1960-1974, and the extent of compensation paid in some important instances); Asante, *supra* note 6. For a comprehensive view of recent nationalization cases, see H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 357-522 (2d ed. 1976).

by the showing of Latin American conceptions of international law on the matter.⁸⁶

When we get into specifics, the responses to nationalizations in almost every case require a complex and subtle examination of the issues and factors involved. Oscar Schachter points out the dynamics of compensation negotiations, which appear to answer in part the objections levelled to the NIEO declaration mentioned earlier:

When a controversy arises over expropriation, it is almost certain that issues of fair treatment and "appropriate" compensation will be raised within the negotiating or settlement framework established by the expropriating government. The argument then is not on the issue of national competence but about the specific circumstances and the criteria to be applied. We can reasonably assume that the perception of these issues will be substantially affected by standards developed in other contexts, whether they are stated explicitly or not. This would be so even though the references to governing law are limited to the legislation of the expropriating country.⁸⁷

The fact that in most post-nationalization arrangements the same foreign enterprises continue in a contractual or consultancy arrangement to carry on the transactions may in fact serve to allay claims of any unjust enrichment. This may be due to the fact, as Phillip de Seynes mentioned, that "non-renewable resources acquire value largely through international markets and those resources can be exploited only through most complex technological and logistic operations."⁸⁸ This having been recognized, one wonders why the developing countries were reluctant to employ the phrase "international law" in an appropriate context in the largely descriptive narration of Article 2 of the Charter.

The answer to this question would take us into a much wider

86. See EXPROPRIATION IN THE AMERICAS (A. Lowenfeld ed. 1977); DeWaart, *Permanent Sovereignty Over Natural Resources As a Cornerstone for International Economic Rights and Duties*, in *ESSAYS ON INTERNATIONAL LAW AND RELATIONS IN HONOR OF A.J.P. TAMMES* 304 (H. Meyers & E. Vierdag ed. 1977); Farer, *Economic Development Agreements: A Functional Analysis*, 10 *COLUM. J. TRANSNAT'L L.* 200 (1971); Moran, *Politics of Nationalisation and the Evolution of Concession Agreements*, 1972 *PROC. AM. SOC'Y INT'L L.* 216; Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 *AM. J. INT'L L.* 863 (1961); Schreuer, *Unjustified Enrichment in International Law*, 22 *AM. J. COMP. L.* 281 (1974); Comment, *The Libyan Expropriations: Further Developments on the Remedy of Invalidation of Title*, 11 *HOUS. L. REV.* 924 (1974). See also Menchaca, *Multinational Firms and the Processes of Regional Economic Integration*, 150 *RECUEIL DES COURS* 337 (1977).

87. Schachter, *supra* note 4, at 8.

88. De Seynes, *Transnational Corporations and Development*, 1 *C.T.C. REP.* 1 (1976).

discourse of the various theories of international law, which is beyond the scope of this inquiry; suffice it to say that the vast majority of the developing nations project the NIEO as a demand for change from existing international law. They view the law of international trade as a whole, and the doctrine of State Responsibility in so far as it relates to international trade, as a law of *laissez-faire* favoring the industrially developed states. Often changes in law have been achieved only by a radical departure from it initiated by interested states. Virtually, by hypothesis, any state which seeks to make new law cannot be expected to agree to litigate under old law, for what they proclaim as new law will have to be received as violation of the old. Indeed, much of the debate during the UNCTAD preparatory meetings in the working group drafting the Charter on the issue whether the latter should be binding convention or remain a General Assembly resolution, underscored this difficulty. The developing countries also realize that any attempts to project new law by deviant action is a time-consuming affair, which would be met not with acclaim or acquiescence on the part of the industrialized states, but with protest and resistance. Notwithstanding this, it appears a tactical mistake on the part of the drafters to omit completely any reference to international law in Article 2 of the Charter.

From a substantive point of view, this deliberate omission of any reference to international standards must be seen as the result of two kinds of failures on the part of the international community. The failure of international law to develop first-order principles allocating the equitable share of the raw material exporting developing countries in the global economic growth, and the failure of the industrialized, raw material importing developed countries and their TNCs to negotiate agreements for the establishment of institutions and procedures to deal *on a regular continuing basis* with the problems of underdevelopment and inequitable distribution of the benefits in the international distribution of labor. The failure of international law to develop these basic inclusive policies for global wealth process on the one hand, and the insistence with which it applies procedures and concepts borrowed from private national law to explain international trade relationships, on the other hand, appears to some extent to be the reason why the Charter is couched in terms of the demands and expectations only of the developing states.

IV. *SOME FUNDAMENTAL CONCEPTUAL IMPEDIMENTS
BLOCKING AGREEMENT ON WAYS AND MEANS OF
REALIZING THE NIEO OBJECTIVES*

We have noted above the wide range and the specific character of the aspirations of the developing countries for achieving economic progress, and the tremendous interdependence in that respect between the interests of the developed and of the developing countries. The effective realization of some of the stated NIEO objectives is seen dependent upon the creation of a climate of positive goodwill to sustain the affluent segments and to undertake the responsibility to assist the poorer segments of the society (e.g., meeting the ODA targets) and thereby achieve international economic security. The basis for promoting such an "obligation" in the NIEO is recognized to be no different from similar obligations which have been found in other situations, such as in the area of international trusteeship leading to self-determination contained in the Charter of the United Nations. In respect to some other claims, the requirements for making structural changes in the economic process and establishing new modalities of decisionmaking, for example, the operations of the IMF and World Bank, call for meaningful arrangements to promote the effective participation of all segments of the society proportionate to the interests affected by such decisions. This is a fundamental tenet of all constitutive processes seeking to claim authority and respect.⁸⁹

The assumption that a globally integrated economic union cannot be envisaged without the prior establishment of a global political union is belied when one considers that the European Economic Community was not prevented from coming into being without the counterpart of a European political community. But in respect of most other NIEO claims relating to international trade, foreign investment in resources, and achieving economic growth in real terms, the fundamental conflict between the two sides *vis à vis* NIEO remains unresolved. Ernst Petersmann echoes the concern of the developed economies in this manner:

As long as the OECD states consider the NIEO concept as an assault on fundamental principles of existing international economic law (non-discrimination, reciprocity, market economy, freedom of property, and contract), the role of international law as a legal basis for international development aid will remain small (cf. the non-

89. See McDougal, Lasswell & Reisman, *supra* note 7.

binding character of the UNCTAD system of preferences, and the lack of non-contractual legal obligations for development aid) and world economic reforms will continue to be tackled on a *de facto* basis Similarly the success of the . . . Charter . . . will depend on a diminution of the legal and economic divergences between industrial nations and LDC's.⁹⁰

What are the "fundamental principles of international economic law" which stand in the way of a NIEO? How much of the stated NIEO objectives constitute a serious threat to undermine the common interest conveyed by those principles? Assuming that they do, is it not possible to clarify, then, where their common interest precisely is, given a genuinely shared perception of the increasingly obvious interdependence among the developed and the developing states? Three major areas of critical importance for the maintenance of an effective global wealth process may be identified. Although they are interrelated, each have generated a veritable repertory of fundamental legal concepts. These are: (1) the institution of corporate personality; (2) the inviolability of private property; and (3) the binding character of contractual obligations. The arguments in favour of NIEO are seen to suffer from both an inadequate recognition of the fundamental common interests relevant to these matters, and the unexplained premises upon which international economic activity is expected to operate, assuming that all those NIEO demands are acceptable in principle.

Much of the attention in recent years, especially since the call for the establishment of a NIEO, is focussed on the role of transnational corporations in the economic development of the developing countries. Despite their public role as "change agents," effecting global economic, social, and even political developments in many parts of the world, their corporate decisionmaking structure is prob-

90. Petersmann, *The New International Economic Order—Principles, Politics and International Law*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 449, 465 (R. Macdonald, D. Johnston, & G. Morris ed. 1978). In his brilliant analysis of the problems confronting present NIEO claims, Petersmann stated:

The *opinio juris* and legal practice of OECD states seems to be of particular importance as it is to them to whom some of the new obligations are exclusively addressed . . . and on whose co-operation depends the realization of even those obligations postulated for all states. . . . It is recognized in the jurisprudence of the ICJ that universal international law cannot be created against the will of an entire group of states and that the will of the individual states most affected does play a decisive role.

Id. This is obviously true. See note 129 *infra*. The purpose of invoking customary practice, not to mention concepts of *jus cogens*, in the Libya-Oil Companies Arbitration is to manage precisely that agreement, not explicitly and directly, but through uniformity of behavior.

ably the most centralized, inward-looking, and autocratic of any known social organization of comparable scope in the modern world. They generate the necessary skills and technology, they organize and control the market system, and they bring the required private capital essential for the development of resources. Because of the private proprietary character of their basic values—maximum profit being their primary if not the only objective—they have failed to achieve the desired equitable division of labour on the global level. Indeed, the major objections to the NIEO claims have been focussed, precisely for this reason, on the scope and meaning of the permanent sovereignty principles and the related concepts concerning nationalization and the good faith performance of contractual obligations of states.

For the great majority of the newly independent developing countries, genuinely interested in maintaining an equitable and just international economic and commercial relationship, and who are increasingly conscious of the fact that very soon some among them will themselves be exporters of technology and suppliers of foreign investment capital, it is *not* the fundamental juridical notions underlying the concepts of good faith, property protection, and corporate personality that are in issue. What is in issue here is the kind of policies inherited from a colonial context, which continue to be policies projected as immutable principles of international law, that they challenge and desire to change, in the larger interest of achieving an inclusive and integrated global economic and wealth system.

The basic legal concepts alluded to above have been described by Samuel Asante as “the fundamental underpinnings of the old international economic order,”⁹¹ and in a real sense operate as impediments for achieving global economic justice and equity. They are indeed fundamental, because they question the meaning and scope of such notions as “the inviolability of private property,” “the sanctity of the private international contract,” and the international “personality” of corporate enterprises. Unless the underlying legal concepts are appropriately clarified and adapted to fulfill the shared objectives of global economic development, international equity, and tolerable economic equality among the developed and the developing states, international law, it is argued, will remain an object of unnecessary confrontation. Dr. Asante expressed this concern rather forcefully:

91. Asante, *supra* note 6, at 2.

[T]he system which has been the object of much rhetoric at the United Nations and other political fora is supported by a formidable and highly sophisticated armoury of legal and commercial concepts which need a radical revision if the international economic order is to be effectively restructured

. . . First, concepts such as ownership, contract, corporate personality which appear quite innocuous within the context of a municipal legal system may have grave implications when transplanted into the sphere of transnational transactions. Second, it is an established legal tradition in Europe and, to some extent, America, to refer to these legal concepts as the colourless tools of a legal system. Yet any perceptive observer will concede that these concepts connote discrete value systems of a distinct individualistic bias, which are often manifestly inimical to the aspirations and development goals of new nations. They should therefore not be accorded the status of immutable and universal postulates.⁹²

Concepts of private ownership characterized the property controlled by transnational corporations in the extractive industries. Not only the fixed assets and mining structures, in which they had made financial investments, but the natural resources of the host country became, until the expiration of the period stipulated in the concessions (often extending over a few generations!), the property owned by the foreign investor. Such ownership included exclusive control over the production, processing, and marketing of the particular resource. Even after their political independence, because of the nature and scope of the investor ownership tied down to the control over markets and the supply of technology, the developing countries remained, for all practical purposes, only the nominal possessors of their property. Indeed, even after nationalization or similar measures, for the most part the developing countries had to continue to rely upon and consult the same foreign corporations, under some newly devised arrangements, forsaking effective control in order to realize the full range of their economic development programs.

Because natural resources acquire a wealth value only when brought into the market place, the institution of contract remains the major tool governing the relations between the foreign investor and the host state. The sanctity of contract is derived from the basic postulate *pacta sunt servanda*, that agreements should be observed in good faith. The notion that long-term developmental arrangements concerning a basic natural resource of a state (often it may

92. *Id.*

be the only resource it may have to achieve economic progress) are a species of private law of contract defies rational accommodation of the competing objectives of the two sides to the agreement. While the options open to the territorial sovereign appear to be zeroed toward a joint venture or outright nationalization, the compensatory options open to the TNC are in fact quite varied and extensive. Intracorporate pricing practices, restrictions on the availability of technology and its exorbitant costs, and manipulations of the international markets are some of the well-known devices employed.

One unhappy consequence of this phenomenon of inter-affiliate transactions is that sometimes materials and equipment are procured by these overseas affiliates at prices far above the prevailing market prices, while the production of the joint venture is sometimes sold at prices below the prevailing world market level.

. . . All this demonstrates that the mere acquisition of majority equity interest does not extricate African extractive industries from the global network of Western multinational corporations or the incidents of the old economic order. The brutal facts of Western economic power and technical superiority still make the concept of African control of this sector of their economy largely illusory.⁹³

Indeed, the classical Western position of international law on this subject, contained in the oft-quoted declaration of a former Secretary of State for the United States, Cordell Hull, made in protest of the Mexican agrarian expropriations reads as follows: "Under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefor."⁹⁴

The 1962 United Nations declaration on permanent sovereignty⁹⁵ may be interpreted as requiring a nationalization to be non-discriminatory, and for a public purpose with appropriate compensation. Professors Lillich and Weston have written that even the nondiscriminatory character and public purpose requirements are policies which from the national point of view are hard to enforce and easy to be overcome in a great many situations. As a matter of fact, the term "appropriate" in the 1962 Declaration is a significant departure from the classical formulation of "prompt, adequate and effective," while referring to compensation although the General Assembly has not defined what constitutes appropriate compensa-

93. *Id.* at 5.

94. 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 658-59 (1942).

95. Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962).

tion. Consequently, it becomes important to appraise whether the NIEO objectives directly or indirectly affect the meaning and scope of this requirement. The recent arbitral award in the Libyan oil concessions case represents, in this respect, an important event responding to the newly advanced claims of the developing countries.

V. THE LIBYA-OIL COMPANIES ARBITRATION (1977)

On September 1, 1973 and February 1974, Libya promulgated decrees purporting to nationalize all the rights, interests, and property of Texaco Overseas Petroleum Company, and California Asiatic Oil Company, granted under fourteen Deeds of Concession.⁹⁶ This action is believed to have been taken in response to the foreign corporations' refusal to agree to the Libyan demand to curtail the production of its crude oil by approximately half the existing levels, to increase by almost four times the then existing price of its crude oil, and also perhaps, to controls over the destination of its resource. The companies argued that the Libyan Government's actions violated the terms and conditions of their Deeds of Concession. The companies invoked the provisions in the concessions for compulsory arbitration and requested the President of the International Court of Justice to name an arbitrator. In a letter addressed to the Registrar of the Court, Libya, claiming its decision was an act of sovereignty over its natural resources, referred to the NIEO declarations, specifically to the provisions recognizing the competence of national procedures for resolving disputes relating to nationalization.⁹⁷ Professor René-Jean Dupuy, acting as the sole arbitrator, rendered an award for the plaintiffs holding that they are entitled to *restitutio in integrum*.⁹⁸ Subsequently, a settlement was reached under which Libya agreed to provide the companies, over a fifteen month period, \$152 million worth of crude oil from its refineries.⁹⁹

Although the *Libya-Oil Companies Arbitration* is narrowly focussed—limited to the question whether the Libyan decree constitutes a breach of the Deeds of Concession—and does not go into the

96. *Libya-Oil Companies Arbitration*, *supra* note 1, at 1. See Comment, *supra* note 86. For the terms of the Libyan Producer's Agreement, see 13 INT'L LEGAL MAT'LS 687 (1974).

97. *Libya-Oil Companies Arbitration*, *supra* note 1, at 27 (quoting the Memorandum of the Libyan Government, dated July 26, 1974).

98. *Id.* at 32-37.

99. See N.Y. Times, Sept. 26, 1977, at 55, col. 1; Wall St. J., Sept. 26, 1977, at 6, col. 4. Each of the two companies involved was to receive crude oil valued at \$76 million. Prior to 1973, the two subsidiaries had produced a total of 400,000 barrels of oil a day. This was reduced by half.

merits of the Libyan measures, or their admissibility for terminating the contracts and their validity under general international law, the Arbitration is significant in that it constitutes the first direct international response to the general demands for a new economic order represented by the NIEO declarations. By a different method, *albeit* the conventional route, the arbitrator reached the issues, making on the way some far-reaching statements about the significance of the NIEO principles to any claim of an emerging international customary law. This was done by inquiring whether the Deeds of Concession are "contracts," what law is applicable for their interpretation, and whether this law requires, in the event of their unilateral breach, payment of an appropriate compensation.

Although Libya does not appear to have invoked the NIEO principles for purposes of challenging the material scope and content of its obligations to the companies arising as a result of its nationalization, but only to question the competence of the international procedures invoked for examining its actions, the arbitrator nevertheless examined the substantive effect of the NIEO principles, while considering the applicable international law to the claims advanced by the applicants. Only those aspects of the Arbitration directly relevant to present discussion are noted here, in particular, (1) the international character of the contractual commitments; (2) the meaning of "applicable law" for their interpretation, and (3) the scope and content of the "appropriate compensation" principle in light of the NIEO Declarations on Permanent Sovereignty over natural resources.

A. *The Contractual Nature of the Deeds of Concession and the Doctrine of "Good Faith"*

The fourteen Deeds of Concession under which the companies acquired their legal rights have a contractual character in the sense they define the obligations of the parties, the law applicable to them, and the agreement of both sides to consider such applicable law as "frozen" from any unilateral changes, prompted by external or internal developments whether of a political, economic, or social character.

It appears . . . from a formal point of view and *prima facie*, the Deeds of Concession in dispute were of a contractual nature since they expressed an agreement of the wills of the conceding State and of the concession holders. Furthermore, the contractual nature of

the Deeds of Concession corresponds to the standard accepted both by international practice and by international theory¹⁰⁰

The "freezing of conditions" clause in the contract is believed to be an essential feature of the commitment designed to insulate the regime of the contract from the effect of public policy. As one writer has observed:

The contractual nature of a concession in the international field is in fact no longer seriously disputed either by writers or in case law. The judge or international arbitrator does not always even take the trouble to demonstrate the contractual nature of the deed: he simply states it.¹⁰¹

Obviously, what is at stake here is the certainty and stability of the expectations of the parties to an agreement. The arbitrator conceded that a concession deed can sometimes amount to more than a contract. But "this is only true when it has been conferred by and contained in a legislative instrument."¹⁰² Since these are not of a public nature, the public policy doctrine has no application.

Another type of international contract mentioned by the arbitrator is the so-called "administration type of contract"¹⁰³ found to be present within the national legal systems of states. On the ground that an administrative type of contract is essentially an unequal agreement because both sides admit renegotiation of its terms, it is not applicable where the parties have agreed to freeze the conditions of the national law applicable to the agreement, as they existed at the time the contracts were made by them. Moreover,

One should take into account here the fact that the theory of administrative contracts is somewhat typically French: it is consecrated by French law and by certain legal systems which have been inspired by French law. But it is unknown in many other legal systems which are as important as the French system and it has not been accepted by international law notwithstanding wishes which *de lege ferenda* may have been expressed in this field.¹⁰⁴

There are many valid reasons for upholding the sanctity of contractual terms if one can assume that the contract continues to operate

100. Libya-Oil Companies Arbitration, *supra* note 1, at 10.

101. *Id.* (quoting M. COHEN-JONATHAN, *LES CONCESSIONS EN DROIT INTERNATIONAL PUBLIC* 133-34 (1966)).

102. *Id.* at 11 (quoting Mann, *Contrats entre Etats et Personnes Privées Etrangères: The Theoretical Approach Towards the Law Governing Contracts between States and Private Persons*, 1975 REV. BELGE D.I. 562, 564).

103. *Id.* at 19.

104. *Id.* at 21.

on the principle of strict equality between the parties. Admittedly, the parties intended to contract on a footing of strict equality but when the balancing context is disrupted, it appears it is not abstract doctrines of equality that characterize their continuing obligations, but their obligation to adjust their respective rights under the contract to correspond to their initial commitment. In other words, those who advocate renegotiation of international concessions argue that the freezing clauses to which they agreed (the State Party is acting not *jure imperii* but as *jure questionis* as an ordinary contracting party) should not be interpreted to perpetuate an artificial context of equality unresponsive to the economic and political developments which are taking place.

A long-term investment agreement spelling out comprehensively the relations between the Government and the corporation in respect of the development and marketing of a major natural resource and specifying all relevant fiscal arrangements is anything but a private contract—an institution of the market place. Governments of less developed countries quite properly regard these agreements as major instruments of public policy—a prominent feature of their development strategies, hardly distinguishable from a development plan.¹⁰⁵

Admitting that long term Deeds of Concession are in the nature of public contracts, this argument does not answer the validity in law of a state's commitment not to use its sovereign powers to vitiating the contract which it has freely made to the corporation, which assurance is in the first place an important consideration for the companies to enter into an agreement and risk extensive financial investment. Invoking the principle of good faith as defined in the *Sapphire Arbitral Award*,¹⁰⁶ the arbitrator came to the conclusion that the Deeds of Concession in dispute had a binding force.¹⁰⁷

The essential difficulty in this dilemma is not so much the applicability of the doctrine of good faith, which is also mentioned in the NIEO Charter, but the objectives for which it is invoked. When the claim for renegotiation is found unacceptable, it often meets with the claim of *pacta sunt servanda*. As Dr. Asante has pointed out, renegotiation is generally rejected as a helpful tool for maintaining contractual obligations.

105. Asante, *supra* note 6, at 2.

106. 35 I.L.R. 136 (1963).

107. Libya-Oil Companies Arbitration, *supra* note 1, at 37.

Renegotiation is now an incontrovertible fact of the current investment process throughout the developing world Yet investors are loathe to accept express stipulations for renegotiation in investment agreements. Why? Investors are understandably concerned about the security of their deal, and this yearning for certainty induces them to maintain the pretence that a deal once concluded would endure Multinational corporations protest that renegotiation is fundamentally offensive to the financing arrangements made with their financiers which are predicated on the assumption that the undertaking will yield a certain return at a specific time to amortize the investment Some investors concede that they would be prepared to honour an invitation to renegotiate, but they argue that it is a bad precedent to expressly provide for it.¹⁰⁸

On the other hand, the considerations for enforcing a contract, especially a long term concessionary contract such as in the petroleum industry, is to protect, as the arbitrator has pointed out, precisely those interests which the corporations seek to ensure through the operation of law, outside the legislation of the host state.

[T]he emphasis on the contractual nature of the legal relation between the host State and the investor is intended to bring about an equilibrium between the goal of the general interest sought by such relation and the profitability which is necessary for the pursuit of the task entrusted to the private enterprise. The effect is also to ensure to the private contracting party a certain stability which is justified by the considerable investments which it makes in the country concerned. The investor must in particular be protected against legislative uncertainties, that is to say the risks of the municipal law of the host country being modified, or against any government measures which would lead to an abrogation or rescission of the contract. Hence, the insertion, as in the present case, of so-called stabilization clauses: these clauses tend to remove all or part of the agreement from the internal law and to provide for its correlative submission to *sui generis* rules . . . or to a system which is properly an international law system.¹⁰⁹

However, the arbitrator's options here appear quite limited in view of the absence of the defendant before the tribunal, a factor not acknowledged as such. The initial Deeds of Concession had in fact been changed by mutual agreement.¹¹⁰ Not only had the parties' shared expectations of the principles governing the applicable law

108. *Asante*, *supra* note 6, at 3.

109. *Libya-Oil Companies Arbitration*, *supra* note 1, at 17.

110. *Id.* at 14-15.

"varied over time," the arbitrator notes that the parties' agreement at every stage "had a very distinct contractual character: it is truly the whole balance of the contract that was at stake This did in fact improve the legal situation of the concession holders while, for its part, the defendant Government obtained, as a counterpart, substantial economic advantages."¹¹¹ When there is failure to agree or to approve new changes, the contractual balance is lost, a balance which was intended and achieved by the contracting parties. Is it then merely the logic of the circumstances, which had permitted the companies to agree on more than one occasion to basic changes in the concessions that made them "legal," but did not allow them to agree, either for commercial or for political reasons, the changes proposed in 1973 that they became "illegal"? If a contract is a "union of free wills" and if a concession contract of long duration virtually determining the economic security of a sovereign state must be based on a contractual balance, what gives one side a unique veto power on that security? Is not the source of authority for determining the meaning of the obligations of the parties to perform their commitments in good faith then to be located, not in the regime of the concession, nor in the national legal system of the government, but in the changing concepts of international law itself?

More precisely, should we not take into account for the preservation of the needed "balancing" of interests, the equilibrium of the market, stability of the pricing arrangements, the scarcities and demands on the commodity, the economic and political goals of the sovereign, and other similar considerations? Is it not a simplistic exercise in academic irrelevance to suggest that because the parties had intended to deal on a footing of equality, that equality somehow is captured and sealed in the black letter of the contract, unaffected by the changing world context? These questions are germane and the arbitrator has indeed dealt with them at length when considering the scope and meaning of the principle of "applicable law" governing the concessions.

B. The Scope and Meaning of a Reference to National Law and Legislation in Respect of Claims of Permanent Sovereignty

Clause 28 of the Deeds of Concession described the applicable law as follows:

¹¹¹ *Id.* at 15.

This concession shall be governed by and interpreted in accordance with the law of Libya and such rules and principles of international law as may be relevant but only to the extent that such rules and principles are not inconsistent with and do not conflict with the laws of Libya.¹¹²

This revised formulation of the applicable law agreed upon by the parties in 1963, amending an earlier statement on the same subject, clearly recognizes the applicability of the Libyan law, supplemented wherever necessary by principles of international law.¹¹³ The arbitrator recognized the need to establish a distinction between the law which governs the contract and the legal order from which the binding nature of the contract stems. By referring to the provisions under which the parties have agreed to have recourse to the International Court of Justice for purposes of constituting an arbitral tribunal, the *Arbitration* concluded that it "implies that it was their intention that this arbitration should come under the aegis of the United Nations and, therefore, the system of law governing this arbitration should be international law."¹¹⁴

It should be noted that the invocation of the general principles of law does not occur only when the municipal law of the contracting State is not suited to petroleum problems . . . [or] by the lack of adequate legislation in the state considered . . . It is also justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State: it plays, therefore, an important role in the contractual equilibrium intended by the parties.¹¹⁵

This is quite true. But, it does not answer what comparable policies apply to the recurring claims of states to exercise their permanent sovereignty over natural resources, contracted out under those concessions when the terms and conditions for their continued performance have become, in the opinion of one of the parties, inequitable, unjust, or onerous.

The reference to international law in that context, it is contended, is a reference to the changing concepts, practices, and norms which reflect considerations that have become compelling in the relations between the parties. The developing countries see some unreality in the argument that because the effective date of the

112. *Id.*

113. *Id.* at 18.

114. *Id.* at 8.

115. *Id.* at 16.

concessions is the date when "the Libyan law is frozen," subsequent changes in the Libyan national policy are therefore irrelevant, unless those changes are consented to by the corporations. Had the learned arbitrator considered the merits of any of those factors generally considered reasonable by the international community for purposes of characterizing what is equitable in the true nature of the contractual relationship, *qua* the initial terms of the contract between the parties, the policies appropriate for its renegotiation would have become clearer.

The parties' failure to renegotiate the terms of their agreement in accordance with the changing conditions, and under the national legislation of the state, would then have become legitimate grounds for nationalization. Where the demands made by the state party are manifestly unreasonably, discriminatory, or unrealizable, then the act of nationalization may give rise to claims of international responsibility going beyond the monetary losses suffered by the parties. The empirical content of "the international law system" would have been more clear than it is now.

C. The Scope of the NIEO Concepts Concerning Permanent Sovereignty of States

It remained to be seen how much of the present NIEO claims have significantly altered the meaning and scope of the doctrine of permanent sovereignty of states, and whether that change also altered the meaning of the relevant principles of international law applicable here. The arbitrator limited his concern of the permanent sovereignty principle to the limited issue he posed for the arbitration in the first place; whether the Libyan decree breached the contractual obligations accepted by the parties. The arbitrator stated the issue in the following manner:

[D]oes the act of sovereignty which constitutes the nationalization authorize a State to disregard its international commitments assumed by it within the framework of its sovereignty?¹¹⁶

Further, by distinguishing the legal effects attributable to an act of nationalization at the international level between those situations where the state concerned has made no particular commitment to guarantee and protect foreign nationals or their interests, and the others where the state has concluded with a foreign enterprise "an internationalized agreement entered into directly under the aegis of

116. *Id.* at 22.

international law," the arbitrator inferred the existence of an obligation on the part of the nationalizing state wider in scope and content than the obligation that would otherwise arise by the operation of the principles of diplomatic protection in international law. It almost amounts to the proposition that the sovereign right of states to nationalize is nonexistent when there exists a contractual commitment, even when such a commitment is precisely the target of and reason for invoking the nationalization measures.¹¹⁷

It would be an entirely different argument to advance that when the unilateral acts of nationalization result in losses, the sovereign state is under an obligation to compensate properly the losses suffered by the other party. Subject to the entailing international responsibility for compensation, the sovereign state party to a concession agreement, has, just as the other party, the private corporation, comparable freedom if not greater liberty, to attempt to correct inequities which have become apparent during the course of the performance of the contract. Denying the state the capability to exercise its permanent sovereignty over all its natural wealth and economic activities by projecting an absolutist doctrine of *pacta sunt servanda*, obscures the true considerations germane for maintaining the continued contractual relations between the parties. Such an interpretation has the effect of robbing the operational content of the norm, and denying to the recognized right of states competence to exercise their permanent sovereignty. It is not surprising therefore that the arbitrator is compelled to offer a restrictive view of international customary law when confronted with the international practice pertaining to recent nationalizations:

The fact that various nationalization measures in disregard of previously concluded agreements have been accepted in fact by those who were affected, either private companies or by the States of which they were nationals, cannot be interpreted as recognition by international practice of such a rule; the amicable settlements which have taken place having been inspired basically by considerations of expediency and not of legality. Nothing prohibits the parties involved in a nationalization . . . from negotiating a new agreement leading to a new legal status.¹¹⁸

117. *See id.*

118. *Id.* at 24. A typical approach to analysis of the practice in this regard is the view advocated by Mann, *The Consequences of an International Wrong in International and Municipal Law*, 68 *BRR. Y.B. INT'L L.* 1, 46-57 (1976-1977). After pointing out that in a January, 1977 publication of the International Chamber of Commerce, entitled *Bilateral Treaties for International Investment*, there were 141 treaties entered into between 1945 and

Not only the efforts to establish a NIEO loudly and clearly declare the purposes and policies governing nationalization, realization of the NIEO goals is viewed as dependent upon making changes in, and where beneficial, the termination of such concessionary arrangements. Concessionary agreements spread over such long durations (a period of 50 years in the Libyan Deeds), involving the exploitation of the only natural resources upon which the economy and the development of the state depend, cannot be construed narrowly merely because the concession is accompanied by a stabilization clause.

The precise nature and scope of what is thus frozen, or when and for what purposes the frozen status is warmed-up to serve the changing interests of the parties, are matters not limited exclusively to the context that, in the first place, permitted the parties to strike a bargain. It would be an unjustly rigid theory of contract law which insists upon performance of a contract in terms of a frozen context when the very context calling for the continued performance of the commitments is radically changed, not because of any acts of commission or omission of one party, but by the developments in the market and global economies, especially when the latter have the effect of fundamentally changing the situation, making the performance of the commitments excessively onerous or burdensome.

Nor is the argument advanced to reject the "oil concessions" as a special category of "public service concessions," on the theory that "[o]il concessions . . . while remaining in the nature of acts governed by public law, have a contractual character which is much more designed to afford to operators who assume important economic risks guarantees of greater stability,"¹¹⁹ demonstrates a sufficient degree of sensitivity to the emerging public policy concerns of states to regard energy, food, international travel, and similar other basic needs, as special areas for international regulation and protection.

The arbitrator, on the other hand, appears to recognize that nationalization can, in certain circumstances, have the effect of

1976, which by the operation of the Most-Favoured Nation Treatment, further expand the scope of their application, the author attacked the opinion that the actual practice obtaining in this regard is at variance from this treaty language: "The treaties . . . prove that the States contemplated by Rigaux and many of their supporters or defenders have a habit of being doubletongued; their standard is not the law, but their interest." *Id.* at 47 n.6. This learned author is able to come to this conclusion by excluding, at the outset, whether the circumstances in which a taking of a foreigner's property is contrary (or *ex hypothesis* non-contrary) to public international law are, as outside the confines of his discussion. *Id.* at 46.

119. Libya-Oil Companies Arbitration, *supra* note 1, at 25 (citation omitted).

placing the nationalizing state "on a level outside of and superior to the contract and also to the international legal order itself" which then "constitutes an 'act of government' . . . which is beyond the scope of any judicial redress or any criticism."¹²⁰ The subtle manner in which the "political question" argument is thus introduced into the discussion merely serves to gloss over the essentially critical function expected of third party decisionmakers. Not only do "Act of State" and "sovereign immunity" defences have no function to perform in commercial arrangements of this nature, failure to inquire into the appropriateness and reasonableness of a state's claim to nationalize the vital resource supply sources upon which its own economies and those of the global community depend, amounts to abdicating an essentially judicial function expected of such third-party decisionmakers.

There is perhaps a procedural difficulty for inquiring into a dispute on the above lines attributable to the failure of the parties to agree on a third-party procedure for settlement. The failure of Libya to appear before the arbitrator is appropriately viewed as an important factor here. But it is only one factor and, judging from the language of the award, it does not appear to have been a compelling reason for the award rendered. The argument was cast in terms of whether the right to nationalize within the terms of the doctrine of permanent sovereignty of states was a standard of *jus cogens*. Even admitting that the right of permanent sovereignty of states has the character of *jus cogens*, its exercise via the system of concessionary contract is quite acceptable. The analysis of this concept has been quite persuasively presented by the arbitrator. Referring to the concept of *jus cogens* he observed:

It could only be a justification in those cases where a Government resorted to nationalization procedures in order to retract an effective alienation of its sovereignty to which it or one of its predecessors had agreed. But this is not—or at least this is not necessarily—the significance of a petroleum concession The notion of permanent sovereignty can be completely reconciled with the conclusion by a State of agreements which leave to that State control of the activities of the other contracting party. As regards the question of perma-

120. *Id.* This is the crux of the problem. Claims of "Act of State" on the ground that because existing norms of customary international law against unjust and arbitrary deprivations of foreign interests are not "universally accepted" are *not* political questions when presented before *international* decisionmakers. See R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964); see the comment of McDougal and Jennings in *The Aftermath of Sabbatino*, 1975 *REP. OF THE CITY OF N.Y. BR. OF THE AM. BAR ASS'N.*

nent sovereignty, a well-known distinction should be made as to enjoyment and exercise.

[T]he concept of *jus cogens* . . . should not apply to any treaty or contract simply because such treaty or contract concerns the exploitation of natural resources; in each particular case, verification should be made as to whether the act considered does in fact alienate the sovereignty of the State over such resources.¹²¹

These are quite persuasive considerations and must be examined carefully. Admittedly, the highly controversial concept of *jus cogens* is not really germane to the claim that when a certain arrangement involving foreign collaboration is perceived to be resulting in inequities which could not be rectified through negotiation, exercising the option of termination is within the recognized competence of the parties, not limited to the state authorities alone.

The inequities mentioned above need not be limited to the aggregate yields of profits, but may include some of the welfare objectives declared in the NIEO. For example, recognition of the needs of the developing countries to exercise complete control and ownership over the means of production and distribution of natural resources situated within their jurisdiction, including all economic activities related to them, has been accepted by all sides concerned. In recent practice, most direct foreign investment arrangements are made with the understanding that over a period of time they would be "phased out" in the sense that the host country would be placed in a position to exercise its complete control. Such phasing-out arrangements, modern turn-key projects, joint ventures, and foreign investment arrangements all indicate the presence of a certain shared expectation that there will be a take-over of the concern sooner than later. Consequently, the doctrine of good faith which finds its expression in Chapter I(j) of the Charter of Economic Rights and Duties of States¹²² has its own special connotation considered in light of these emerging international economic relations.¹²³

The appropriate question, then, is not whether nationalization

121. Libya-Oil Companies Arbitration, *supra* note 1, at 26.

122. G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, 54, U.N. Doc. A/9631 (1974).

123. See Libya-Oil Companies Arbitration, *supra* note 1, at 31 (quoting Ambassador Castaneda of Mexico). For a most persuasive analysis of this issue, see Stanford, *International Law and Foreign Investment*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 471, 486 (R. Macdonald, D. Johnston, & G. Morris ed. 1978). The fact that Mexico initiated the Charter and originally intended it to be a legally binding document underscores the value of the views of the Mexican Ambassador.

per se is, or is not, permissible; it may even be regarded as a most desirable objective from the point of view not only of the host state but the corporations as well. The fact that implementation of this goal, in so far as exploitation of natural resources in the extractive sector has been resisted by transnational corporations, has given rise to serious debates and disputes.¹²⁴ Most major controversies over nationalization have been in the extractive sector where the entrenched interests of the transnational giants are not easily reconciled with the aspirations of the host states for their economic development on equitable bases. To say this is not to suggest that such "wealth deprivations" are matters beyond the pale of international law. The interesting question then is, *what* principles of international law govern such disputes?

In appraising the scope of the "national legislation" standard employed in the Charter and other NIEO documents in place of the "international standard" mentioned in earlier resolutions, and generally claimed to be applicable for determining the lawfulness of nationalization measures, the award quotes prior arbitral decisions as evidence for the existence of a norm of customary international law. But, the fact remains, that since the *Anglo-Iranian* case,¹²⁵ the *Sapphire*,¹²⁶ *ARAMCO*,¹²⁷ and others,¹²⁸ in virtually every nationalization, the host country legislation provided for negotiations to determine the amount of compensation payable to the companies involved. Consequently, it is perhaps not so much the language of selected paragraphs in the various cases that reflects the state of customary international law as the actual practice, the nature of the settlements made, that provides the relevant evidence for inferring

124. See generally R. CASAD & R. MONTAGUE, *EXPROPRIATION IN CENTRAL AMERICA AND PANAMA—PROCESSES AND PROCEDURES* (1975); Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AM. J. INT'L L. 359 (1975); Weston, *International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry*, in 2 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 36 (R. Falk & C. Black ed. 1970). For a comprehensive bibliography on this subject, see U.N. Secretariat: Nationalization or Takeover of Foreign Enterprises, Select Bibliography, U.N. Doc. ST/Lib/35 (1974). For a summary of nationalization measures reported in studies for the House Committee on Foreign Affairs, see U.S. Department of State Report on Nationalization, Expropriation, and other Takings of U.S. and Certain Foreign Property since 1960, reprinted in 11 INT'L LEGAL MAT'LS 84 (1971); Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century, reprinted in 2 INT'L LEGAL MAT'LS 1066 (1963).

125. *The Anglo-Iranian Oil Co. Case*, I.C.J. Pleadings 268 (1952).

126. *Sapphire Int'l Petroleum Ltd. v. National Iranian Oil Co.*, 35 I.L.R. 136 (1963).

127. *Saudi Arabia v. Arabian Am. Oil Co. (ARAMCO)*, 27 I.L.R. 117 (1958).

128. See *Libya-Oil Companies Arbitration*, *supra* note 1, at 21-22 (evaluating the state of customary practice). See also *The Compensation Requirement in the Taking of Alien Property*, 22 N.Y.C. BAR ASS'N REP. 195 (1967).

the appropriate norms of international law.¹²⁹

If this interpretation of customary international law is correct then the actual practice of states provides an additional dimension relevant to a proper interpretation of the concept of "good faith." The fact that in most instances of recent nationalization the very same enterprises are able to collaborate with the host states in continuing the undertakings in question reinforces the function served by such third-party decisions. They play an important role in the post-nationalization negotiations relating to the terms of settlement. They play only a marginal role in the development of the substantive norm of customary international law governing the principles either of the sanctity of contract or the scope of the municipal law applicable for its interpretation and application. This also explains why it has been relatively easy for the parties in the *Libyan-Oil Companies Arbitration* case to negotiate a mutually acceptable settlement within five months of the arbitral award.¹³⁰

D. The Scope and Meaning of the "Appropriate Compensation" Principle in Light of the NIEO Declarations

As noted earlier, the meaning and scope of the right of permanent sovereignty of states over their natural resources and, the nature of the legal obligations which the exercise of that right would entail are among the most severely contested elements in the proposals relating to the establishment of a new international economic order. Article 2(2)(c) of the Charter of Economic Rights and Duties of States has been claimed to epitomize the change brought about in the relevant principles of international law.¹³¹ The arbitrator examined these provisions of the Charter and other United Nations Resolutions pertaining to NIEO, invoked by Libya in support of its nationalization, to determine whether these have changed the applicable principles of international law.

129. Raman, *Toward a General Theory of International Customary Law*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* (W. Reisman & B. Weston ed. 1975); Raman, *The Role of Customary Practice in the Development of Universal International Law*, in *ASIAN STATES AND THE DEVELOPMENT OF UNIVERSAL INTERNATIONAL LAW* 212 (R. Anand ed. 1972); Raman, *The Role of the International Court of Justice in the Development of International Customary Law*, 1965 PROC. AM. SOC'Y INT'L L. 169.

130. From the information available on the terms of settlement negotiated by the two companies, it is not clear to what extent \$152 million of Libyan crude oil over a period of fifteen months is in conformity with the legal rights of the concession holders endorsed by the arbitrator. Nor is there any clear evidence that the Libyan agreement to pay this compensation is influenced by the arbitral award in any significant manner.

131. See Adede, *supra* note 6; Brower & Tepe, *supra* note 6, at 304-09.

The customary practice on this subject quite clearly demonstrates the existence of an obligation to pay compensation.¹³² The classical formula of Secretary Hull, invoked by the United States in its claims prior to the Charter of the United Nations, has not been shown accepted in later international practice. Indeed the Department of State acknowledged in 1957 that "there are great variances among nations as to the degree to which they are prepared to bind themselves legally to accord fair treatment, even among those which in fact accord fair treatment in practice."¹³³ General Assembly Resolution 626(VII),¹³⁴ of 1952, entitled "Right to Exploit Freely Natural Wealth and Resources," was adopted with the negative vote of the developed countries because it failed to recognize the proprietary rights of private investors under international law. Resolution 1803 (XVII),¹³⁵ adopted during 1962 recognized the demands of the developed industrialized countries and provided for payment of appropriate compensation in accordance with international law. That resolution was adopted by a vote of 87-2-12, with all twelve abstentions and negative views being those of countries of Eastern Europe. This situation was again changed when Resolution 2158(XXI)¹³⁶ was adopted during 1966 by 104 in favour and the six industrialized countries abstaining, which has endorsed the general policies for promoting the participation of the host states in their foreign controlled enterprises. The claim that General Assembly Resolutions 3171(XXVIII)¹³⁷ of 1973 and 3281(XXIX),¹³⁸ which contained the Economic Charter, reflect the *consensus* on the matter of compensation, is rejected by the arbitrator on the following grounds:

In appraising the legal validity of the above-mentioned Resolutions this tribunal will take account of the criteria usually taken into consideration, *i.e.*, the examination of voting conditions and the

132. See H. STEINER & D. VAGTS, *supra* note 85, at 460-83 (survey of the most recent cases on this subject).

133. *Report to Congress on the Mutual Security Program for Six Months Ended Dec. 31, 1956, Hearings before the House Committee on Foreign Affairs*, 85th Cong., 1st Sess. 14 (1957) (statement of T. Kalijarvi).

134. G.A. Res. 626, 7 U.N. GAOR, Supp. (No. 20) 18, U.N. Doc. A/2361 (1962).

135. Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962).

136. Permanent Sovereignty Over Natural Resources, G.A. Res. 2158, 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966).

137. Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, 28 U.N. GAOR, Supp. (No. 30A) 52, U.N. Doc. A/9030 (1974).

138. Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974).

analysis of the provisions concerned.

[On] the occasion of the vote on a resolution finding the existence of a customary rule, the States concerned clearly express their views. The consensus by a majority of States belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated, *i. e.*, with respect to nationalization and compensation the use of the rules in force in the nationalizing State, but all this in conformity with international law.¹³⁹

It does not appear necessary here to dwell on the inconsistencies and confusions manifest in the use of terms such as "consensus" and "universal recognition" in one and the same breadth in the above statement.¹⁴⁰ According to the tribunal "the conditions under which Resolutions 3171 (XXVII), 3201 (S-VI) and 3281 (XXIX) . . . [were adopted] were notably different."¹⁴¹ The specific paragraph concerning nationalizations in the above resolutions "disregarding the role of international law, not only was not consented to by the most important Western countries, but caused a number of the developing countries to abstain."¹⁴²

Having stated that the resolutions of the General Assembly are only of a recommendatory value and that "they must be accepted by the members of the United Nations in order to be legally binding," the arbitrator found Resolution 1803 (XVII) of 1962 as expressing "*opinio juris communis*," or "the expression of a real general will," whereas the later pronouncements, irrespective of the numerical majorities found in their favour, are not truly reflective of any consensus.¹⁴³ Why is this so? "In the first place, Article 2 of this Charter must be analysed as a political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by nonindustrialized states."¹⁴⁴ This view has indeed quite far-reaching implications to the issue of how international law is created. Secondly, "the absence of any connection between the procedure of compensation and international law and the subjection of this procedure *solely* to municipal law cannot be regarded by this Tribunal except as a *de lege ferenda* formulation,

139. Libya-Oil Companies Arbitration, *supra* note 1, at 28, 30.

140. Compare the views of Judges Dillard and de Castro in the *Fisheries Jurisdiction Cases*, [1974] I.C.J. 109; [1974] I.C.J. 125.

141. Libya-Oil Companies Arbitration, *supra* note 1, at 29.

142. *Id.*

143. *Id.* at 30.

144. *Id.*

which even appears *contra legem* in the eyes of many developed countries."¹⁴⁵ Although the arbitrator quoted with approval the explanations advanced by Ambassador Castaneda, which amply clarify the continuing *relevance* of all prior resolutions mentioned in the preamble, and hence within the scope of international law, the recent formulations of the principle of nationalization have been stated to be not acceptable. They compromise the contractual balance between the parties. "In law, such an outcome would go directly against the most elementary principle of good faith and for this reason it can not be accepted."¹⁴⁶

Obviously, the foregoing statement of reasons advanced against the NIEO provisions deserves careful consideration. The assumptions that because national policies are not stated expressly to be subject to international law and therefore they would invariably be contrary to international law in all circumstances may not be warranted. Such a contingency can nevertheless arise even when a reference to international law is included, where the nationalizing state claims that its conduct is not contrary to any established principle of international law, a principle established with the consent of *all* the representative interests thus affected. Not only is there some circularity in this argument, international doctrine has always recognized that even when a certain impugned conduct is governed exclusively by the municipal law of a state, when such actions have effects at the international level, they are subject to international law.¹⁴⁷

The function and effect of the third-party procedures for settlement of disputes mentioned in Article 2(2)(c) of the Charter may not always prove to be a conclusive test or a proper element for determining the normative value of changes those provisions have brought in international law. The distinction that some law-creating efforts are political, and hence they are suspect, betrays confusion. *Prescription* of international law is always a political act; it involves a choice of policy among competing policy options. Application of international law calls for judicious appraisal and brings into question the reasonableness, appropriateness, and practical consequences of the choices made for relating a prescription to the conflicting claims in a context.¹⁴⁸ At the international level, the

145. *Id.* (emphasis added).

146. *Id.* at 31.

147. See *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 132; H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 363-65 (1958).

148. For an illuminating discussion of the different decision-functions, especially those of "prescription" and "application" of law, see M. McDUGAL, H. LASSWELL, & J. MILLER.

application process also is not completely immune from *political* considerations, although there is a high degree of expectation that third-party decisionmakers, as objective policy-makers, are insulated from "political considerations."¹⁴⁹

Why then do the majority of the developing countries deliberately choose not to repeat the expressions referring to "international law" contained in the 1966 resolutions in their 1974 and 1975 declarations? Why, after accepting the possibility of submitting their disputes to third-party settlement procedures, did they insist on the necessity for "mutual agreement" in the choice of a forum for such settlement? Would they have agreed on a provision, automatically conferring jurisdiction on a forum, if the Charter was drafted in a treaty form open for acceptance and ratification? Has not this latter point something to do with the views expressed by the Group of 77 that the Charter is only an element in the process of law-making, rather than a final treaty, but not so much to do with the question whether or not the Charter is also a law-making effort in that direction?

Questions such as these must be raised and answered, not in a confrontational jargon of a court dialect, but in a constructive spirit of real concern with the interdependent interests of both the developing and the developed countries. The fact that that is precisely what usually transpires during the negotiations for settlement of compensation claims, as Oscar Schachter has pointed out, throws into sharp relief many of these polemical arguments.¹⁵⁰

E. Appraisal of the Libya-Oil Companies Arbitration

One should approach, with considerable circumspection, the task of evaluating the possible impact on the NIEO of the various observations contained in the opinion of the sole arbitrator in the *Libya-Oil Companies Arbitration*. There is no doubt that the *Arbitration* will influence the attitude of both developing and the developed countries. The doctrine and jurisprudence of international law has been considerably enriched by the lucid analysis of

INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 206, 258-62 (1967).

149. *Id.* at 360-69.

150. Schachter, *supra* note 4, at 8. See O. SCHACHTER, *supra* note 4; Bourquin, *Arbitration and Economic Development Agreements*, 15 BUS. LAW. 860 (1960); Hyde, *Economic Development Agreements*, 105 RECUEIL DES COURS 267 (1962); Onejeme, *supra* note 80; Schmidt, *Arbitration Under the Auspices of the International Centre for the Settlement of Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L.J. 90 (1976); Smith & Wells, *Conflict Avoidance in Concession Agreements*, 17 HARV. INT'L L.J. 51 (1976).

the learned arbitrator, especially on the issues of customary international law and the authority of United Nations resolutions. Its direct impact on the current NIEO debates does not, however, appear quite so clear.

For example, it will be difficult to assess the importance of the findings in the *Arbitration* relating to the legal issues of nationalization and compensation in the absence of a properly argued brief for the respondents. The Libyan reply to the Registrar of the International Court of Justice, rejecting the arbitral procedure of the concessions to submit to third-party arbitration, has not been made public. It is not quite clear whether the Libyan objections referred to the "existence of a dispute" in the sense in which it is used in the contracts, or to the final obligation to accept a third-party settlement procedure.

Even if we assume that the objections are not of a procedural character, there is still considerable doubt whether this arbitral opinion, which has found that the obligations of the government under the Deeds of Concession continue to be valid, has in any way strengthened or influenced the subsequent settlement negotiations. Because the parties have been able to negotiate the terms of their settlement, as it appears, independently of any third-party presence, the arbitrator has not been called upon to resolve what compensation or damages accrue to the plaintiffs that were in the first place denied by the respondent.

Even the so-called *restitutio in integrum* as a solution, is hardly a major achievement when one considers that the payment in kind to the value of a negotiated sum, according to the increased price of oil, is not in any true sense reparation or damages for the termination of the contracts accomplished by the impugned act of nationalization. Such would have been the case if Libya had rejected totally any compensation in the first place; on the substantive plane the focus of the arbitration is so innocuously limited to a finding, as though that is in doubt, whether the Libyan act of nationalization violated the commitments made by Libya, the arbitrator did not inquire into the legality or otherwise of the justifications adduced for their termination. As a matter of fact, if Libya had appeared before the tribunal, or if the sovereign right of Libya to embark upon nationalization is in itself the subject matter of inquiry, then the arbitrator would have been compelled to adjudge the lawfulness of the two claims advanced by Libya and rejected by the corporations, viz.: (1) the newly imposed quantitative production controls reducing the supply of crude oil to nearly half of the existing levels, and

(2) the quadrupling of the price of oil again unilaterally determined by the sovereign state accompanied by other restrictions imposed concerning the destination of its resource. On both of these issues the claims were *not* before the arbitrator; nor did the arbitrator consider them either explicitly or by implication in his analysis of the scope of the sovereign right of a state to carry the measures of nationalization.

Indeed, by 1977, the date of the arbitral award, considerable public debate on the issue of the lawfulness of economic coercion, outside the authority of the Security Council of the United Nations, has raised interesting questions whether the OPEC countries' use of the oil cartel for the political purpose of securing their objectives in the Middle East conflict with Israel, is a lawful or reasonable exercise of their individual and collective right of self defence under international law.¹⁵¹ Undoubtedly these are "political arguments," but on that account alone they cannot be regarded as outside of the concern of international law, any more than nationalization itself, which is also a political act on the part of the sovereign state. Consequently, for these and similar other reasons, the arbitral award, though very cogently argued, appears to have only marginal relevance to the continuing debate on the future course of a New International Economic Order.

VI. THE TASK AHEAD

What is the status of the legal principles concerning foreign investment disputes today? On the one hand, the traditional formulations on this subject have been considerably changed by the 1962 United Nations resolution,¹⁵² cited with approval as reflecting the current international law on the subject. Between the *Sapphire* and the *Libya-Oil Companies* arbitral awards, there is a considerable body of jurisprudence and practice that has accumulated, which may even appear to be supporting many of the formulations of the 1962 United Nations resolution. The NIEO formulations of 1974-76 on those very same principles have been rejected by one side and vigorously championed by the other. The differences are not just on the verbal plane.

The NIEO recognizes the scope of the permanent sovereignty concept to include not only the activities over the resources *in situ*,

151. See Shihata, *supra* note 6.

152. Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962).

but all economic activities of foreign corporations related to such resources. So much so, the interests which the developing countries seek to control through domestic legislation including, where necessary, by outright nationalization, embrace many of the business and trade practices of transnational corporations; the factors giving rise to a dispute in the interpretation and application of an international commercial agreement, including concessionary contracts, are too many and varied in character, all subsumed under the amorphous notion of permanent sovereignty over natural resources.

Tax computation, adequate technology inputs, indexation of prices, quality control, production quotas, transfer pricing mechanisms, consultancy fees, marketing arrangements and destination controls, to name only a few, are all matters intimately related to the performance of an international resource development agreement. To assume that somehow "the doctrine of good faith" can resolve all such issues in a manner satisfactory to both the developing countries, concerned with making economic progress, and the multinational corporations, whose only interest is in making profits to stay in business, is to ignore the complexities of modern trade and commerce. International law must grapple with these nuances and clarify the policies which meet the common interests of both sides.

Finally, nothing is gained by the acrimonious debate whether international law remains or is abandoned as a yardstick for determining the reasonableness of claims in dispute in respect of NIEO matters. The *Libya-Oil Companies* award amply demonstrated the impermissibility of any arguments that international law is not relevant, even when a municipal legislation seeking nationalization is patently unjust or arbitrary in character. There is nothing in the NIEO formulations to indicate that such an extreme view is either intended or invariably the consequence of those formulations.

On the contrary, the NIEO documents, for reasons mentioned above, have rejected the applicability of the traditional concepts of international law. Their proponents reject the contention that the global economic policies, designed to promote their rapid economic development, should continue to be judged by an international law whose meaning and content is clearly antithetical to those aims and aspirations. In this respect, the practice of not subjecting to existing international law standards, or to third-party settlement procedures wedded to those standards, is scarcely confined to developing countries.¹⁵³ The important question here is not whether international

153. See note 147 *supra*. Interesting questions arise when one considers the competence of individual states to *change*, by their unilateral acts, general international law of customary

law is applicable, but whether the changes in the economic development policies sought to be made (on which there is, indeed, consensus among the developed and the developing states) are treated as part of the corpus of international law. The reticence of states initiating changes in international law from submitting their disputes to third-party settlement procedures reflects, perhaps, their deep-seated, but not completely misplaced, mistrust of the authority and enlightenment of such procedures.

The efforts underway to restructure the world economic system, both within and outside the United Nations forums, are not limited to making some structural adjustments to tackle specific issues of particular interest only to some sectors of world economy. The aim of the NIEO is to bring about fundamental changes in the policies and practices governing the generation, distribution, and enjoyment of global wealth. The perceptions of the industrialized and the developing states as to what NIEO is all about are at odds. For the great majority of the states their development needs are capital, technology, and access to markets. For the industrialized states their needs are security, protection of foreign investment, and free access to the raw materials. International law can play a useful role in harmonizing and promoting the interests of both sides. The developing countries have identified a number of areas in which informational and servicing functions on a regular basis can serve to promote TNCs transparency, train them in the skills of contract negotiation, and offer realistic assessments of what is available for trading, bartering, and collectively promoting, in order to facilitate growth and enjoyment of goods and services across national and cultural frontiers.

Perceptions of changing customary international law can be integrated into policy and be reflected in the analysis of decision-makers. There is really no need to confuse between the "is" and the "ought" under the guise of some unspecified theories of customary international law. The fact is that international law, in this vital

character and how this individual competence is accounted for when a group of such states in common interest attempt to change that very same customary international law through concerted action, *albeit* through majority views and declarations. See Statement of Ambassador Elliot Richardson, Before the Resumed Seventh Session of the Law of the Sea Conference, U.S.I.S. Information Release 78-15 (Sept. 1978); Henkin, *Arctic Anti-Pollution: Does Canada Make-or Break-International Law?*, 65 AM. J. INT'L L. 131 (1971).

Such examples may be multiplied at will, but the point remains, it is not the modality by which claims not to be bound by extant prescriptions are made, but for what purposes, in what contexts, and with what consequences external decisionmakers should respond to such claims.

area of mutual interest to both the developing and the developed economy states, is considerably altered, *albeit* strengthened, despite claims of incompatibility on the verbal plane.

For example, Joseph Stanford, in his perceptive analysis of current foreign investment practices, comes to the following sober conclusion:

The need for investment capital will remain, however, and even if significantly diminished will continue to be, potentially at least, a major tool at the disposal of development planners in the developing countries. The extent to which this tool is used will depend largely upon whether the commercial motives of the investor are perceived, by either side, as inconsistent with the sovereignty and development objectives of the host country. There is no inherent reason why these two objectives should be inconsistent. It is for the investors and the development planners to devise investment arrangements which respond to both objectives. If they are successful, bilateral state practice will generate a new body of customary international law respecting both the sovereignty of the host state and the legitimate interests of the investor.¹⁵⁴

Commenting on the impasse in the North/South dialogue in Paris, and the deadlock reached in the recent Committee of the whole of the General Assembly of the United Nations, Ambassador Donald Mills summed up the task ahead thus:

We are not trying to build a world that is just a place that will look after the interests of developing countries. We are trying to contribute to the building of a world which will be a better place for everybody It will be a world that will be somewhat different from the one that history bequeathed us, in which a few countries dominate the rest of the world. This situation has ended. The future will not go in that direction. So if we want to build an equitable world in which we can all share and create a satisfied global population, then join us now. Don't run the risk of leaving it to drift, because drifting is to invite disaster for all of us.¹⁵⁵

154. Stanford, *supra* note 123, at 493. The trend, in direct foreign investment in the basic extractive sectors, such as petroleum, toward the elimination of TNCs, is pointed out by Michael Tanzer. 1978 NATURAL RESOURCES FORUM 121. See also Lipton, *Fiscal Aspects of Negotiating Third World Mineral Development Agreements*, 260 TRANSACTIONS OF THE SOC'Y OF MINING ENGINEERS 56-62 (1976) (pointing out the trend toward more sophisticated types of contractual arrangements); Smallbone, *Mineral Exploration and Exploitation—Proposals for a Fiscal Regime*, COMMONWEALTH SECRETARIAT, Feb. 1977.

155. *Blocked on the Way Around the Block*, 6 DEVELOPMENT FORUM 7 (Oct. 1978) (interview with Ambassadors Donald Mills and Manuel Perez-Guerrero). Some limited options in this respect have been projected in Farer, *The United States and the Third World—A Basis*

It is a challenge from which international lawyers can ill afford to remain aloof, or hold from lending their authority, until all the pieces of the puzzle are well in place.

for Accommodation, 54 FOREIGN AFF. 79 (1975), which do not take into account the wide range of the Third World demands outlined in this essay. *See also* Statement by Mr. Idriss Jazairy, Chairman of the Committee Established Under G.A. Res. 32/174, U.N. Doc. OPI/CESI Note/467 (May 1978).