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THE NEW INTERNATIONAL ECONOMIC ORDER: INTERNATIONAL LAW IN THE MAKING?

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CONTENTS

PREFACE

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Introduction

Is the New International Economic Order "international law in the making"? To pose that question is to imply several others, all of daunting complexity and each more prone to controversy than to resolution. What is law? Is international law, law?[1] How is international law made? Does the United Nations make law?

Law has been described as congealed politics. Even if this is an aphorism not wholly acceptable in describing municipal law, it is not far from the mark when directed at international law. But "congealed" is the key word. Law seeks to be more static and, therefore, lays claim to greater fidelity than the politics to which it is in complex relationship.

"Congealed" in this context means, simply, a hardening which gives firm shape to a fluid precept through the passage of time and the effect of routine practice. A resolution — for example — passed by the General Assembly may set out such a normative precept. Whether it congeals into law or remains a mere statement of fluid politics depends upon several variables. As the international lawyer observes the work of United Nations agencies, he or she, if endowed with a trained and sensitive eye, can see the congealing take place; or, in other cases, not take place.

Why do some politics congeal while other politics do not? To address this question in concrete, experiential and empirical terms — politic by politic, so to speak — is the most practical and least abstract way to begin to answer those unmanageable questions posed in the opening paragraph.

Congealing vs. Legislating

In domestic law, legislation is the most apparent, although by no means the only, form of law making. In international law, the treaty or convention plays the corresponding role. It should be recognized, at the outset, that the congealing process, in the *political* organs of the United Nations, is not primarily one of formal legislation. The Charter of the United Nations does not provide legislative power to either the Security Council or the General Assembly or any other body.[2] These cannot enact, amend or repeal rules of international law, so it may safely be assumed that, whatever new law they make cannot derive its quality of being law from legislative fiat. The new norms being generated by resolutions of these bodies must congeal, if at all, in some more subtle and complex fashion.

This was predetermined at the conception. During the United Nations Conference on International Organizations at San Francisco, the Philippine Delegation suggested that the General Assembly be vested with legislative power to enact rules of international law which would become effective and binding upon the Members of the Organization after ratification by majority vote in the Security Council.[3] Committee 2 of Commission II, at its tenth meeting, rejected this suggestion by 26 votes to 1.[4] It was the dominant view that these bodies were not to become global legislatures. The Security Council may make binding decisions only under Chapter VII, that is, when a threat to the peace has been found to exist by a qualified majority, including the five Permanent Members.[5] The General Assembly, ECOSOC, UNCTAD, UNIDO and the myriad other bodies, large or small, in which the struggle for the New International Economic Order (NIEO) is being waged, have no power (except in budgetary and certain procedural matters) to do more than make recommendations in the form of resolutions, or to draft conventions, which States are free to ratify or reject.

There is every reason to suppose that, were the Philippine initiative today submitted to a new vote of the plenipotentiaries, the results would still be the same. The world shows little evidence of being ready to be ruled by a global parliament.

This is not to say, however, that congealing cannot take place. Indeed, it is surprising that there should be an effort of such magnitude to achieve *congealed* change through the political organs of the United Nations, to test the capacity of these organs to deliver not just *ad hoc* political pronouncements but to launch *norms,* new "rules of the game" that have the capacity, through acquiescence and usage, to become law.

The effort being waged on behalf of the NIEO is utilizing a peculiar technique of advocacy, what one might call *normative* politics. This is remarkable because the Third World, after all, is seeking revolutionary changes in the world economy. Revolutions are usually highly anti-normative, preferring fluid to congealed politics. Yet, here is a revolution that is seeking to proceed through the evolution of new sets of norms: a revolution of laws rather than of men.

There is another reason this strategy is significant. It is being employed at the very moment in history when a substantial segment of the Third World is leaping, or expects to leap, into the First World of affluent, industrialized, capital exporting States. At the heart of the normativity strategy is an implied commitment by these States to abide by the proposed new rules even when they cease to operate primarily in their favour. That commitment, in fact, is the difference between politics and law. International law is not a servant of any national interest but serves conceptual consistency and principled reciprocity.

The strategy to create a revolution by normativity is not quite a decade old. How is it faring?

The New International Economic Order — A Brief Historical Background

There is no single international relations issue of the '70s that has attracted more scholars from more disciplines — particularly lawyers, economists, and political scientists — than has the New International Economic Order. Between 1974 (the year the Declaration and the Programme of Action of the New International Economic Order were adopted) and 1980, some 600 books, and 1,600 articles in leading scholarly reviews and journals, have poured forth.[6] In addition, there exist about 700 studies and reports done by the United Nations Secretariat and related organs such as International Labour Organisation (ILO), International Monetary Fund (IMF), United Nations Conference on Trade and

Development (UNCTAD) and United Nations Educational, Scientific and Cultural Organization (UNESCO).[7] If words were deeds, a new order and, perhaps, the millenium itself, would be upon us.

Let us begin by examining the circumstances which gave rise to the demand for a New International Economic Order.

In the 1950s, the dominant theories of economic, as of social development, focused on decolonization. It was assumed that colonial status was the major factor in underdevelopment and it therefore followed that decolonization would provide a remedy. This was the era when words like participation, mobilization, regional cooperation and national planning were in vogue. By the end of the sixties, in which 36 new nations were born in Africa alone, the colonial powers had become primarily umpires rather than empires in the terminal stage of the decolonization process. The former imperial powers were also looked upon as sources of transitional aid, which would smooth the path to self-sustaining growth in the former colonies.

By the early seventies it had become painfully evident that neither decolonization nor the aid programmes had generated any meaningful transformation of the economies of the preponderance of ex-colonies that were "developing" in name only. Not only had their share of foreign investment decreased in real terms but also their share of global trade, this in a period of relatively sustained global economic growth, during the late '50s, the '60s and the '70s. Primary products' share of world trade fell from 40.2 percent to 20 percent between 1952 and 1972. This sector comprises raw materials, cash crops and semi-processed foodstuffs, which are the major exports of developing countries. Meanwhile, the share in world trade of manufactured goods exported by developed countries and which developing countries must import increased from 48.6 percent to 57.1 percent for the same period.[8] Concurrently, with few exceptions the prices of primary products, the principal export of the new nations, fell, stagnated or at best only rose sufficiently to offset inflation. A study done by the United Nations Conference on Trade and Development, UNCTAD, shows that between 1953 and 1972, the terms of trade of 28 commodities which comprise the chief exports of developing countries *declined* at an annual average of 2.2 percent.[9]

It was still more painful to developing countries to see the widening of the gap between their incomes and that of the rich nations. This gap is enormous. The developed market-economy countries with 20 percent of world population enjoy about two-thirds of total world income. By contrast, developing countries with almost 50 percent of world population (excluding the

People's Republic of China), receive only one-eighth of world income. Within the latter total, the poorest developing countries, some 30 percent of world population, have only 3 percent of world income. Their average per capita income of approximately $120 is only about one-fifth that for all other developing countries, and only 3 percent of the average per capita income in the developed market-economy countries.

By the mid-seventies the Secretary-General of UNCTAD reported that "the experience of the developing countries...provides a disquieting contrast...to the unprecedented expansion and prosperity of the developed market-economy countries. Whereas between 1953 and 1972, developed countries increased their share of world trade from 64.9 percent to 71.5 percent, the share of the developing countries' world trade declined from 25.5 percent to 18 percent. If the share of petroleum exporting countries, which improved from 3.7 percent to 5.6 percent is excluded, only a share [falling, during the period, from] 21.8 percent to 13 percent remains for the rest of the developing countries. Thus during this period, the total gross product of the developed market economies rose from $1,250 billion to about $3,070 billion, in terms of 1973 prices, the increase alone being 3½ times the aggregate gross product of the developing countries — $520 billion. In terms of per capita real income, the contrast is even greater. Real income in the developed market economy countries rose by $2,000 per head of population (again valued at 1973 prices), to a figure of almost $4,000. The corresponding real per capita income for the developing countries in 1972 was about $300, the increase since 1952 being only $125. Thus the increment in per capita real income of developed countries amounted to 16 times the increment in per capita real income of the developing countries during the same period."[10] While aspects of these figures are challenged by some economists in developed countries, there is wide agreement on the pessimistic development outlook generated by prevailing trends.

The deduction of the developing countries was that their poor performance was due not to an inadequate economic strategy or performance, but, in large measure, to the prevailing rules of the international trading and investment game, rules they had no part in shaping. Consequently, they concluded that these had to be changed. The concrete manifestation of this reaction was the Ministerial Meeting of the Group of 77, in October, 1967 which culminated in the adoption of the Charter of Algiers.[11] Whereas previous conferences of developing countries — for instance the Non-Aligned Summits at Belgrade in 1961 and at Cairo in 1964 —

dealt primarily with political issues, the Algiers conference was basically about economics. The Third Conference of Heads of State or Government of Non-Aligned Countries, held in Lusaka, Zambia in September 1970, confirmed the change in the developing countries' strategy.[12] It adopted the concept of "individual and collective self-reliance" for economic transformation.[13] Then, in 1971, the Second Ministerial Meeting of the Group of 77 meeting in Peru adopted the Lima Declaration and a Programme of Action.[14] The former blamed the low rate of the economic growth of the developing countries on "The contradictions inherent in the present structure of international economic relations based on an anachronistic and irrational division of labour" and called for joint action by the developing countries to compel systemic reform.[15]

The strategy for achieving such change could, at this point, have taken various turns. As it happened, in the next year it took a decisive turn towards normativity, as opposed to a political strategy of non-normative, collective, confrontational action. It is this tendency, less than the better noted emergence of a petroleum producers' cartel in 1973, which still characterizes the dominant strategy of the Third World. This heavy reliance on lawmaking is astonishing given the revolutionary rhetoric of many new nations which would suggest a preference for *ad hoc* political action over normativity as a means for effecting change.

It is useful to observe that, up to this point, the NIEO was taking form as a set of normative demands contained in resolutions passed by agencies not of the international community, but of the Third World. Certainly, one would not expect these organs of limited membership, in themselves, to have the capacity to be norm-creating, even when pointing the direction to normative change. In 1972, however, the scene shifted to UNCTAD, an important United Nations agency of global membership concerned with trade and development. The then President Luis Echeverria of Mexico proposed a Charter of Economic Rights and Duties of States with the objective of "reinforcing the precarious legal foundations of the international economy,. . .removing economic cooperation from the realm of goodwill and rooting it in the field of law by transferring consecrated principles of solidarity among men to the sphere of relations among nations."[16] The result was the appointment of a Working Group charged with responsibility for drafting such a Charter.

At the Fourth Conference of Heads of State or Government of Non-Aligned Countries, held in Algiers in September, 1973 an Economic Declaration and an Action Programme for Economic Cooperation was adopted.[17] This was plainly designed to influ-

ence the content of the Charter, and it did foreshadow many of the Charter's key provisions.

Two very significant developments occurred at this stage. One was the 1973 Middle East war, and OPEC's raising of the price of oil from $3.01 to $11.65 per barrel by January, 1974. The second development was the commodity boom of 1973-74, which created rising expectations, inflation and over-production and underscored the Third World's dissatisfaction with the wild swings and roundabouts of the global commodity market.

It was against this backdrop that the Sixth Special Session of the United Nations General Assembly met from April 9 to May 2 1974.[18] It was a raucous, confrontational meeting, although it succeeded in adopting a Declaration on the Establishment of a New International Economic Order and a Programme of Action, based, sometimes verbatim, on the instruments adopted by the Third World at Algiers in 1973.[19] The resolution setting forth the Declaration passed by consensus; but Western industrialized States made very significant reservations and the United States, particularly, questioned whether there had really been a consensus at all.[20]

At that year's regular session of the General Assembly, the Working Group charged with the task of drafting the Charter of Economic Rights and Duties of States finally presented their draft. After two years of intensive negotiations and amid fierce opposition from the developed countries, the Charter was adopted by the Assembly, but by a divisive majority vote.[21] The principal sticking point was article 2(2)(c) of the Charter, which deals with expropriation. More of that later.

Whatever the problem of acquiescence, it was now clear that the strategy of normative rule-making had shifted from purely Third World to the key global bodies, UNCTAD and the General Assembly. In those forums, the strategy of seeking to congeal politics through normative resolutions produced varying results: some resolutions or declarations passed by unanimity, some by real or by illusory consensus and still others by majority vote over the opposition of important States. It must be asked whether this variable makes a difference to the congealing process, to the lawmaking potential of a resolution.

In 1975, a less combative Seventh Special Session of the General Assembly adopted a landmark resolution on Development and International Economic Cooperation.[22] It called for reform of the trading system in raw materials and commodities and proposed a series of negotiations leading to new marketing arrangements, including the establishment of an integrated system of buffer stocks and compensatory financing. This resolution was adopted

by consensus, both apparent and real. It was the result of patient negotiations and compromises, generating rather a different mood from the one in which decisions were taken at the Sixth Special Session.

These, in brief, are the normative building blocks of the NIEO. As noted, they consist of a number of different kinds of documents: resolutions adopted at Third World forums; others adopted by consensus or unanimity at the United Nations; resolutions adopted with reservations; and resolutions adopted by a divided vote. If these instruments have different pedigrees, do they also have different congealing — law-making — capability?

Proposed International Trade Norms

The developing nations assert that States have a duty to cooperate in an expansion and liberalization of world trade, including the amendment of present rules to facilitate nonreciprocal preferential access by manufactured products of developing countries to the markets of developed countries.[23] They seek an equitable link between the prices of raw materials and other products exported by developing countries and the prices of goods (including capital goods and equipment) imported by them.[24] To promote stable, remunerative and equitable prices they want a network of mutually reinforcing, long-term multilateral commodity agreements, supported by a common fund.[25] The fund should stabilize prices on an upward curve and should also do other things through a "second window" of financing, such as aid natural products to resist market incursion by synthetics.[26] Agreement is also sought on the need to protect existing landbased producers from sudden loss of markets by new sea-based sources of the same commodities.

Parallel to these objectives is the pursuit of global recognition for the right of States to associate in organizations of primary commodity producers.[27] Such recognition includes a duty of primary-product consumers to bargain in good faith with such associations.

Supplementing this cluster are such normative assertions as the "right" of developing countries to participate in (i.e. to be assisted in participating in) world shipping, the negotiation of "equalizing" freight rates in order to reduce the geographic disadvantage of Third World producers in developed markets, a right to preferential treatment in the pricing of insurance and reinsurance for developing countries and a demand for help in developing national and regional insurance markets and institutions.[28] Special preferential treatment is also asked to offset the geographic disadvantages of landlocked and developing island countries, particularly with regard to their transportation and transit costs in order to increase their trading ability.[29]

Monetary Issues

This cluster has to do, primarily, with reform of the procedural rules for making decisions in multi-lateral monetary institutions. By and large, the present rules allocate power (i.e. votes) in accordance with the amount of each State's subscribed capital. This principle is being challenged by the NIEO, which advances the new normative concept of participatory equality as between developed and developing countries in making decisions concerning world economic, financial and monetary problems.[30] Such reform would affect, primarily, institutions such as the International Monetary Fund and the International Bank for Reconstruction and Development, and its affiliates.[31]

The effort to redistribute voting power within these institutions is aimed in large part at achieving additional liquidity, primarily for the developing countries, through further revision in the system of allocating special drawing rights.[32] The Third World also seeks to reform the methods of operation of the International Monetary Fund, in particular the terms for credit repayments and stand-by arrangements.[33] It seeks a more favourable and comprehensive system to compensatory financing, and more favourable terms for the financing of commodity buffer stocks.[34]

Investment Issues

NIEO demands acknowledgement of every State's full permanent sovereignty over its natural resources, over its economic activities and choice of social system.[35] This subsumes the right to nationalize or to transfer foreign owned property to its nationals.[36] The developing nations insist that no economic, political or any other type of coercion may be used to prevent the free and full exercise of these inalienable rights.[37]

Behind these rather general normative assertions lies the very particular issue of compensation for expropriated assets of for-

eign States or corporations. The NIEO acknowledges the duty to pay "appropriate" compensation in case of nationalization, expropriation or transfer of ownership of foreign property.[38] But it avers that the nationalizers must only take into account their own circumstances, laws and regulations, not international standards, except to the extent these are part of national law or specific treaty commitment.[39] Moreover, settlement of disputes over compensation should ordinarily take place under the domestic law of the nationalizing State and in its tribunals.[40]

The NIEO also asserts a right of all States and peoples to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources under foreign occupation or alien or colonial domination, and, of course, under a regime of *apartheid*.[41] If nothing else, such a "right," if recognized, would facilitate large-scale set off in the event of nationalization.

Industrialization

The NIEO asserts a right by developing countries to assistance from developed countries for financing of industrial projects, particularly export-oriented industrial production projects, within the context of the laws and regulations of developing countries.[42] It calls for the formulation of an international code of conduct for transnational corporations governing the transfer of those technologies most appropriate to developing countries and seeks to impose on the corporations a duty to help developing countries create technology suitable to their specific needs.[43] The NIEO also calls for a code of conduct to prohibit corporate interference in the domestic affairs of countries where they operate; to eliminate restrictive business practices such as intra-corporate allocation of markets; and to limit the expatriation of profits accruing from an enterprise's operations in a developing country and to require substantial reinvestment therein.[44]

In addition, the NIEO proposes norms applicable to bilateral development assistance,[45] to the rescheduling of bilateral or consortium debts,[46] and to the management of the oceans beyond national jurisdiction.[47] The last-mentioned has received attention in the General Assembly, which passed by consensus the resolution on the common heritage of mankind and on exploitation of the seabed; but it has also been the subject of global treaty negotiations at the United Nations Third Conference on the Law of the Seas (UNCLOS III). If such a treaty is concluded, and is widely ratified, then this aspect of the NIEO would become law through the

more conventional route of global "legislation." It is a particularly fruitful subject for exploration because, if the projected International Seabed Authority is established, it would have real potential for effecting automatic resource and technology transfer.

Indicators of "Becoming" Law

As noted, the San Francisco Conference roundly rejected the idea of giving the General Assembly legislative power to enact rules of international law binding on States. But the United Nations Charter does provide that the General Assembly "shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and codification."[48]

This process may be formal or informal. At the formal end of the spectrum the General Assembly may ask the International Law Commission to draft a treaty, or to prepare a restatement of existing law gleaned from agreements, state practice, the decisions of international courts or special tribunals and other relevant sources. Or the Assembly may ask a committee to draft a formal Charter or Declaration, which purports to be more solemn than an ordinary resolution by dint of intent and nomenclature, although not of procedure. Or the Assembly may simply proceed by ordinary resolution, which may be enacted by consensus, unanimity, or appropriate majority vote.

The International Court of Justice has had occasion, in the 1971 Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* to consider the effect of United Nations resolutions on the legal status of *apartheid;*[49] and in the *Western Sahara* Advisory Opinion to consider the effect of resolutions on the development of a legal right to integral self-determination by territories at the final stage of decolonization.[50] In both cases, the Court cited a General Assembly resolution, the Declaration on the Granting of Independence to Colonial Countries and Peoples[51] — passed by a vote of 89-0 with 9 abstentions — as evidence of evolving international law,[52] together with treaty and custom.

Under-Secretary-General Dr. Eric Suy, the United Nations Counsel, has recently observed that "The General Assembly resolution is becoming a useful tool for standard setting and rule creation in an expanded international society that requires more rapid formulation of standards governing the conduct of its Members." He carefully added, however, that "whatever the importance of the standards and norms created through this novel process may be,

sovereign consent naturally still remains a very important basis of international lawmaking." Reconciling these conclusions, he found that resolutions become more normative as they succeed in being recognized as "conventional" since "conventional rules have contributed to the emergence of the new world order and should be enabled to play a still larger role in defining its future course."[53] By odd happenstance of language, "conventional," in this sense, does not mean practice congealed by a convention (i.e. treaty) but by customary usage and other evidence of acquiescence by States.

Progress in the Assembly's task of "progressive development" of international law does, however, have several indicators. One is whether the process of progressive development, whatever the form of its written product — convention, declaration, resolution or report — has had an integrative, consensus-building effect on participants.

Experts in the law of contracts insist that the effectiveness of a contract is determined not by its language, but by the process of bringing the parties together into an activity that can generate a shared, understood set of jointly acquired mutual assumptions.[54] In other words, whether a contract makes law between two signatories depends less on its text, or on the signatures at the bottom, than on the learning experience of the parties in negotiating it.

The same concept certainly applies in international law: If one has to enforce a treaty against repeated violation, it has failed. International law is what States do, and what States do is to a large measure based on shared expectations of mutuality. To say this is merely to repeat that law is congealed politics, but politics that have congealed because the sides, through patient negotiation — the ultimate learning experience — have found a *reciprocal equilibrium.*

The key words, here, are *negotiation, reciprocal* and *equilibrium.*

It follows that the General Assembly, or UNCTAD, or UNIDO, or the Law of the Sea Conference, for that matter, are possible sites for the development through negotiation of mutual expectations that establish a self-sustaining reciprocal equilibrium in the behaviour of States. Such a result may be marked by a resolution, or a treaty, or neither. Does anyone doubt that, whether we have a Law of the Sea treaty or not, its chief innovations — the 200 mile economic zone,[55] the 12 mile territorial sea,[56] the demarcation of the shelf,[57] the rules pertaining to rights of passage[58] and exclusive fishing rights[59] — are already, or are already becoming a part of the mutual, shared expectations of States? This despite the fact that these new rules differ very significantly from those hitherto applicable to the same issues.

That, in any event, appears to be the perception of a number of prominent United States courts which have given legal effect to norms found in United Nations instruments which are not technically binding on the United States — both General Assembly resolutions and unratified conventions — insofar as they are seen to incorporate the standard accepted as normative by the vast preponderance of the nations of the world (including, in these cases, the United States).[60] The judges in these cases were of the opinion, which we share, that even a normative instrument which is in itself clearly not binding, may become "the law" insofar as its normative concepts become "conventional" in the special sense of Professor Suy's usage.

Is the NIEO International Law in the Making?

Our conclusion is that this question cannot be answered solely in terms of the vehicle containing the normative assertion. It is a much more complex process that transforms a desirable idea, strongly advocated, into a binding rule of law. The answer depends in part on whether the new principles find their way into "black letter" instruments of law, such as the agreement on the establishment of a common fund,[61] or a Law of the Sea convention,[62] or the agreement establishing a new UNCTAD commodity agreement on cocoa[63] or rubber,[64] or a STABEX agreement (the Lome Convention) creating a new system of compensatory financing,[65] or a resolution of agreement by the governor of the IMF broadening a credit facility.[66] Even of these "black letter" instruments, it is necessary to ask whether they describe what is rapidly becoming the actual normative practice of States. Many do. The Lome Convention, for example, stabilizes earnings of developing producers of named products exported to the EEC which are susceptible to wide price fluctuation. The Lome Convention opts for compensatory payments in lean years with repayment in fat years, as a way of stabilizing income.[67] The poorest do not have to repay at all.[68]

A complementary approach to stabilization is being taken by the UNCTAD integrated programme for commodities, emphasizing ten primary products which together account for about three-quarters of the value of exports of developing countries.[69] The UNCTAD approach focuses on establishing international commodity stockpiling arrangements that can keep prices within negotiated ranges by buying when prices fall below the bottom of the range and selling when they rise above the upper level. Some of these price-sustaining systems are already in operation, others are still being negotiated. Law-making? Certainly, insofar as they become effective operationally.

On 27 June 1980, the United Nations Negotiating Conference on a Common Fund under the Integrated Programme for Commodities adopted the Agreement establishing the Common Fund for Commodities.[70] The Agreement was opened for signature 1 October, 1980 and among the twenty-four States that have signed the Agreement are the major industrialized countries, including the United States. The creation of the common fund should make additional commodity-by-commodity agreements possible and the norms of voting and market intervention applicable to them are already pretty well determined by the practice of the existing parts of the system. Law? Well, yes, if the agreement is ratified, implemented and reasonably effective in its market impact.

The International Monetary Fund has also made progress in responding to the demands and claims of developing countries, doubling, in 1976, the quotas of the major oil exporters and deciding that the collective share of all other developing countries should not be allowed to fall below its present level;[71] creating the Oil Facility to assist Third World members in payments difficulties resulting from initial impact of increased costs of imports of petroleum and petroleum products (1975);[72] providing a buffer facility to cushion export fluctuations (1975);[73] establishing a trust fund for the purpose of providing special balance of payments assistance to developing members with the profits from the sale of gold (1976);[74] establishing Special Drawing Rights as a central international reserve asset and utilizing these in part to re-distribute liquidity.[75]

Of course, treaties and binding decisions of entities created by treaty are not the only sources of "black letter" law incorporating aspects of the NIEO. There are also decisions of international tribunals and, in particular, of the International Court of Justice. For example, in its advisory opinion on Namibia, the ICJ seemed to adopt, at least in part, the claim of restitution advanced by peoples living under the system of *apartheid.*[76] The court took the view that States have a legal obligation to take measures to prevent their nationals from exploiting resources in illegally occupied territories.

Beyond these instances of NIEO principles becoming "black letter" law is the grey area of politics becoming congealed, or failing to congeal. But note that even "black letter" instruments are effective only to the extent that painstaking negotiation and mutuality have made them likely to be implemented in practice.

In the *South West Africa* cases, the International Court reminded us that "Rights cannot be presumed to exist merely because it might seem desirable that they should."[77] However, when

the desirability of a right comes to be solemnly expressed by an organ of global membership, and is the expression of the shared will of its members, the congealing process has been set in motion.

Where a United Nations General Assembly expresses a true consensus, a genuine *ad idem,* the result is likely to be law in the sense that parties will act in accordance with their genuinely shared, mutual expectations. The principle of permanent sovereignty of a State over its resources is surely in that category, even though embodied not in a treaty but only a General Assembly resolution.[78] So is the right to nationalize.[79] So is the right to form producers' associations.[80]

But no such consensus, no *ad idem* exists when it comes to the right to expropriate, on discriminatory, unilaterally determined terms,[81] or to use producers' associations to coerce consumers — in peacetime — particularly with respect to their sovereign political behaviour in matters unrelated to the terms of trade in that commodity.[82] The record of the General Assembly makes clear that, even though the Charter of Economic Rights and Duties of States was passed, the majority and the minority did not have quite the patience or the flexibility to postpone formulating a few controversial normative principles until such time as the learning experience of negotiation had produced genuine mutual expectations and equilibrium. The result is a text at least part of which is hortatory, rather than law in the making, because it will not affect the behaviour of States. It simply will not yet congeal.

Article 2(2) (c) of the Charter[83] proclaims that "each State has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

This Article was the one that generated the most controversy in the Assembly and among the drafters.[84] It represents, roughly, the Calvo Doctrine prevalent in Latin America and the training and predilection of the Latin American scholars and statesmen who conceived and guided the development of the Charter. But the concept is rejected by a number of important capital exporting States.

Moreover, it may be at variance with the practice of the many African and Asian States which, for example, are parties to bilateral agreements facilitating and insuring investments. It is also at variance with important arbitral awards. While States may wish to assert the theoretical right of unfettered expropriation, there is, in fact, very little of it in practice. The reason is obvious. Those who engage in it lose access to virtually all external sources of capital investment. That fact, and not article 2(2) (c), shapes normative behaviour of States.

In their reservations to resolutions 3201 (S-VI) and 3202 (S-VI) on the Establishment of the New International Economic Order, and the Programme of Action, respectively, the United States, the United Kingdom and the Federal Republic of Germany expressly stated their opposition to the right of States to form *coercive* producers' associations.[85] That position remains unchanged.

To any extent that article 2(2)(c) and parts of resolution 3201 and 3202 do not restate but seek to alter the sum of present practice, and yet do not represent a genuine negotiated consensus, their potential for law-making is far exceeded by a potential for generating dissonance.

However, dissonance is by no means the antithesis of legal creativity. It merely summons States to try again, and harder, to have the kind of collective experience that alters expectations, and, consequently, behaviour. Then politics may further congeal into law.

NOTES

1 Unlike the time of John Austin, today these questions may be dismissed as interesting but too academic to serve any practical purpose. This is precisely because we live in a world in which much of the practice of inter-State relations is routine and has manifestly "congealed."

2 The legislative competence of the United Nations organs, particularly the General Assembly, has been the subject of numerous articles in legal journals and law reviews and even books: Falk, On the Quasi-Legislative Competence of the General Assembly. 60 Am. J. Int'l L. 782 (1966); Sloan, The Binding Force of a 'Recommendation' of the General Assembly of the United Nations. 25 B.Y.B.I.L. 1 (1948); Schwebel, The Effect of Resolutions of the United Nations General Assembly on Customary International Law. PROCEEDINGS AM. SOC. INT'L. 73rd Annual Meetings 301 (1979); Castaneda, LEGAL EFFECT OF UNITED NATIONS RESOLUTIONS (1969); Higgins, The United Nations and Law-Making: The Political Organs. PROCEEDINGS AM. SOCIETY INT'L L. 37 (1970); Higgins, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); Johnson, The Effect of Resolutions of the General Assembly of the United Nations; 32 B.Y.B. Int'l. L. 97 (1955-56); Asamoah, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966).

3 United Nations Conference on International Organization, Committee II/2, Doc. 2, G/14 (k), pp. 2-3, U.N.C.I.O. Documents, Vol. iii (1945), pp. 536-7.

4 Doc. 507, II/2/22, p. 2, U.N.C.I.O. Documents, Vol. ix (1945), p. 70. Note also that the proposal that the General Assembly should be empowered to impose conventions was also defeated, Doc. 571, II/2/27, pp. 2-3, U.N.C.I.O. Documents, Vol. ix (1945), pp. 80-1.

5 See the Charter of the United Nations Chapter VII, Articles 39-51.

6 See THE NEW INTERNATIONAL ECONOMIC ORDER: A Selective bibliography ST/LIB/SER.B/30; Sales No. E/F80.I.15.

7 Id.

8 Calculated on the basis of figures from UNITED NATIONS YEARBOOK OF INTERNATIONAL TRADE STATISTICS (New York).

9 See UNCTAD, INDEXATION: REPORT BY THE SECRETARY-GENERAL OF UNCTAD. TD/B.563, July 7, 1975 Table 3.

10 UNCTAD NEW DIRECTIONS AND NEW STRUCTURES FOR TRADE AND DEVELOPMENT: Report by the Secretary-General of UNCTAD to the Conference, UNCTAD IV TD/183. Rev. 1, April 14, 1976.

11 Ministerial Meeting of the Group of 77, Algiers, October 24, 1967. TD/38 and Add. 1 and 2.

12 See the LUSAKA DECLARATIONS, Adopted by The Conference of Heads of State or Government of Non-Aligned Countries, Lusaka, September 10, 1970.

13 Id. The Declaration on Non-Alignment and Economic Progress. NAC/Conf. 3.RES. 14.

14 Group of 77 (MM/77/II/11) 9 Nov. 1971.

15 Id. Section C.

16 UN DOC. A/PV. 2315 at 67 (1972). See also Rozental, The Charter of Economic Rights and Duties of States and The New International Economic Order, 16 VA J. Int'l. L. 309 (1975-76); White, A New International Economic Order, 16 VA J. Int'l L. 323 (1975-76).

17 FOURTH SUMMIT CONFERENCE OF NON-ALIGNED COUNTRIES: ECONOMIC DECLARATION, ECONOMIC RESOLUTIONS, PROGRAMME OF ACTION, Adopted at the Fourth Conference of Heads of State or Government of Non-Aligned Countries, Algiers, September 5-6, 1973.

18 U.N. G.A.O.R. 6th Special Session, Doc. A/9559.

19 Resolutions 3201 (S-VI), 1974; 3202 (S-VI) 1974 (hereinafter to be referred to as the DECLARATION and the PROGRAMME OF ACTION, respectively).

20 The reservations may be found in XIII 1.L.M. No. 3 at 744, 749, 753, 759 and 762 (1974).

21 G.A. Res. 3281 (XXIX) 29 U.N. G.A.O.R. Supp. (No. 31) 60. U.N. Doc. A/9631 (1974), (hereinafter to be referred to as the Charter).

22 Res. 3362 (S-VII) 1975.

23 The PROGRAMME OF ACTION Section I generally; the Charter Arts. 6 and 14.

24 The DECLARATION para. 4(j), and the PROGRAMME OF ACTION Section I, para. 1(d); the Charter Art. 28.

25 The PROGRAMME OF ACTION, Section I, para. 3(iii), (iv) and (xi); the Charter Art. 6.

26 See TD/RES/93 (iv).

27 The DECLARATION para. 4(t); the PROGRAMME OF ACTION Section I, para. 1(c); the Charter Art. 5.

28 The PROGRAMME OF ACTION Section I, para. 4; the Charter Art. 27

29 The DECLARATION para. 4(c); the PROGRAMME OF ACTION Section I, para. 4(e); the Charter Art. 25.

30 The DECLARATION para. 4(c); the PROGRAMME OF ACTION Section II, para. 1(d); the Charter Art. 10.

31 The PROGRAMME OF ACTION Section II, para. 1(g).

32 The PROGRAMME OF ACTION Section II, para. 1(e)

33 The PROGRAMME OF ACTION Section II, para. 1(i).

34 Id.

35 The DECLARATION para. 4(e); the PROGRAMME OF ACTION Section I, para. 1(a); Section VII para. 1(b); the Charter Art. 2.

36 Id.

37 The DECLARATION para. 4(e); the PROGRAMME OF ACTION Section I, para. 1(a); the Charter Art. 2.

38 The Charter Art. 2(c).

39 Id.

40 Id.

41 The DECLARATION para. 4(f); the Charter Art. 16.

42 The PROGRAMME OF ACTION Section III; the Charter Art. 22.

43 The DECLARATION para. 4(p); the PROGRAMME OF ACTION Section IV; the Charter Art. 13.

44 The DECLARATION para. 4(g); the PROGRAMME OF ACTION Section V; the Charter Art. 2(b).

45 The DECLARATION Para. 4(k); the PROGRAMME OF ACTION Section III (a); the Charter Art. 22.

46 The PROGRAMME OF ACTION Section II para. 2(f), (g), (h) and (i).

47 The Charter Arts. 29 and 30.

48 Article 13.

49 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order No. 3 of 26 January 1971, I.C.J. Reports 1971, p. 9 (hereinafter to be referred to as the "Namibia Case").

50 Western Sahara, Order of 3 January 1975, I.C.J. Report 1975, p. 3 (hereinafter to be referred to as the "Western Sahara Case").

51 G.A. Res. 1514 (XV) December, 1960.

52 Namibia Case, supra. n. 49 at 31, and Western Sahara Case, supra n. 50 at 32.

53 Professor Erik Suy, "A New International Law for a New World Order," Joint UNITAR — Uppsala University Seminar on International Law and Organization, 9-18 June, 1981, pp. 11-12.

54 See WILLISTON ON CONTRACTS Vol. 1 3rd Ed. Section 18 at 31 (1957); MURRAY ON CONTRACTS (revised ed.) Section 18 at 28 (1974); CORBIN ON CONTRACTS (1st Vol. Edition) Sections 152 and 9 ps. 221 and 14 respectively (1951).

55 Draft Convention on the Law of the Seas, Doc. A/Conf.62/WP.10 Rev. 3 September 22, 1980, arts. 55-75.

56 Id. arts. 2-16.

57 Id. arts. 76-85.

58 Id. arts. 17-19, 45, 52 and 37-44 respectively.

59 Id. arts. 55-75.

60 Orama v. California, 332 U.S. 633 (1948) at 649-50, 673; Filartiga v. Pena-Irala, 630, F.2nd 876 (2nd Circ. 1980); Fernandez v. Wilkinson, 31 Dec. 1980, Case No. 80-3183, D.C. Kansas; Lareau v. Manson, Campos v. Manson, Case No. H-78-145 and 199, D.C. Conn., 29 Dec. 1980.

61 TD/1PC/CF/Conf./24.

62 Doc.A/Conf.62/NP.10/Rev. 3, September 22, 1980.

63 TD/COCOA.6/7.

64 TD/RUBBER/15/Rev. 1.

65 Convention between the European Economic Community and the African Caribbean and Pacific States, signed February 28, 1975 (Lome I). 14 I.L.M. 595 (1975).

66 For instance, the Decision of the IMF to increase the upper limit of drawings on Compensatory Financing Facility, Dec. 24, 1975. See 1976 IMF ANNUAL REPORT.

67 Supra. n.65 arts. 16 and 17. See also the Second European Economic Community — African Caribbean and Pacific States Convention, signed at Lome, October 31, 1979 (Lome II), Art. 23. 19 I.L.M. 327 (1980); Treaty Series 15 (1979) Comnd. 7460.

68 Art. 21(5) Lome I; arts. 43 and 44 Lome II.

69 See TD/B/503, 1974; TD/B/498, 1974; TD/B/C.1/166, 1974; TD/B/C.1/133, 1975; UNCTAD Resolution 93, May 1976.

70 TD/1PC/CF/Conf./24.

71 Decision of the IMF Executive Directors, March 22, 1976, see IMF ANNUAL REPORT, 1976.

72 The Oil Facility lapsed after the middle of 1976.

73 The expansion and liberalization of the Compensatory Financing Facility.

74 Decision of the Executive Directors of the IMF, May 5, 1976.

75 See IMF ANNUAL REPORT, 1976.

76 Supra. n.49.

77 South West Africa, Second Phase, Judgment I.C.J. Reports 1966, p.6 at 48.

78 The Declaration on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII) Dkec. 14, 1962.

79 Id. para. 3.

80 See Professor Bowett's treatment of this issue — "Economic Coersion and Reprisals by States" in LILLICH (ed. and Cont.) ECONOMIC COERSION AND THE NEW INTERNATIONAL ECONOMIC ORDER (1976).

81 For instance, the Soviet Union's proposal for "inalienable rights of peoples and nations to the unobstructed execution of nationalization, . . ." was rejected by most developing countries, see Gess, Permanent Sovereignty Over Natural Resources. 13. I.C.L.Q.398 (1964); Schwebel, The Story of the United Nations' Declaration on Permanent Sovereignty Over Natural Resources. 49 AM. B.A.J.463 (1963).

82 See generally LILLICH, supra, note 80.

83 See note 21.

84 For a very critical analysis, see Brower and Tepe, Jr., The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law? 9 INT'L L.295 (1975). See also U.N. DOC. A/C.2/SR.1638 Nov. 1974; U.N.G.A.O.R. (XXIX), 2nd Committee 1974-75.

85 See note 20.