'FROM SEOUL WITH LOVE' – THE CONTINUING RELEVANCE OF THE NEW INTERNATIONAL ECONOMIC ORDER

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1. INTRODUCTION

The purpose of this article is to reconsider, in the light of global developments and other challenges, attempts over the past four decades to agree principles and rules of international law relating to the establishment and operation of a New International Economic Order (NIEO). For its critics, the NIEO was a one-sided attempt, based on unsound legal and economic principles, to undermine the integrity of the global economic system, a system that had played a vital role in permitting the world to recover following the tragedy of the Second World War. For its proponents, it was, on the other hand, a life-and-death attempt to reorder a system that was perpetually and unfairly biased against the poor majority; 'life-and-death' because the poverty that results from lack of development was not (nor continues to be) an abstract issue.

In particular, in seeking to narrow the field of enquiry, this article will review the attempt by the non-governmental International Law Association (ILA)[1] – acting through its international committee on the topic – to forge a clearer North-South consensus on this matter through the adoption of its 1986 Seoul Declaration on Progressive Development of Principles of Public International Law relating to a New International Economic Order.[2] In consciously trying to overcome some of the more overt political divisions within the UN General Assembly, the ILA sought to find carefully crafted compromises on such topics as permanent sovereignty over natural resources, specifically expropriation, the right to development, common heritage of mankind, as well as on broader issues of equality, equity and economic solidarity. Now, over twenty years after Seoul, it is fitting to consider whether the 1986 Declaration, in trying to move the debate forward, ultimately proved little more than a symbolic, but largely futile, gesture.[3] Was this legal *desiratum* just too idealistic and utopian, particularly in the light of changing global circumstances and political realities?

In reviewing both the content of the Seoul Declaration itself and developments subsequent to it, the article suggests that while some might seek to argue that the Declaration is now somewhat dated and out-of-step with the current situation, the underlying premise on which it was built nevertheless remains extremely apposite. Moreover, the continued failure by states to implement and/

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1. As its own literature reads, '[t]he International Law Association was founded in Brussels in 1873. Its objectives, under its Constitution, are "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law". The ILA has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies.'

2. To be found in ILA, *Report of the Sixty-Second Conference (Seoul, 1986)* (London, ILA 1987) pp. 1-11.

3. This is not the first attempt to revisit, and review, the role and relevance of the 1986 Seoul Declaration; specific mention should be made of P. VerLoren van Themaat, 'Ten Years after the Seoul Declaration', in E. Denters and N. Schrijver, eds., *Reflections on International Law from the Low Countries in Honour of Paul de Waart* (The Hague, Martinus Nijhoff 1998) pp. 13-26.

or respect a number of the key principles in the Declaration should be taken less as evidence of their obsoleteness and more of the continuing inequality within the present system, a level of inequality that remains as detrimental to the promotion of a balanced global order as it ever did.

Nevertheless, things have changed and issues have moved on. The rise of globalization, liberalization and privatization, the growth of non-state actors (both multinational enterprises and non-governmental organisations), the adoption of significantly more intrusive trade and investment regimes, and the continued rise – both in popular and political currency – of societal concerns (e.g., environmental issues, human rights, labour standards and good governance) are amongst a range of phenomena that must inevitably affect any current discussion. Significantly, one of the factors that must now be considered especially relevant in a reappraisal of the NIEO is the global endorsement of the notion of sustainable development; this attempt to bring together economic development, social progress and environmental protection in a unified and holistic manner reflects a more balanced approach to issues previously considered purely from an economic standpoint. This was clearly the view of the ILA which, at its New Delhi conference in 2002, adopted the Declaration of Principles of International Law relating to Sustainable Development, using the Seoul Declaration as a conceptual basis from which these newer issues could be taken forward.[4]

In conclusion, though it is accepted that the more extreme – and partisan – versions of the NIEO must now be considered as consigned to legal and economic history, there is arguably a sufficient remnant of purpose within the NIEO *ideal* to continue to justify pursuing its underlying aims. And it is in that regard that, as an attempt to achieve a broad consensus of opinion across a range of geo-political and legal jurisdictions, the 1986 Seoul Declaration must be considered a pivotal starting point. Moreover, it should not be considered a criticism that its objectives are invariably longer-term in nature. What the ILA text does is to provide useful pointers towards the achievement of a goal, which is foundational to the functioning of a fairer international community, and which has arguably become even more urgent since 1986.

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4. ILA, *Report of the Seventieth Conference (New Delhi, 2002)* (London, ILA 2002) pp. 23-29 (also submitted by the governments of The Netherlands and Bangladesh to the 2002 World Summit on Sustainable Development as UN doc. A/57/329) and in 49 *NILR* (2002) p. 299. On the legal implications of sustainable development, see D. French, *International Law and Policy of Sustainable Development* (Manchester, Manchester University Press 2005).

2. NEW INTERNATIONAL ECONOMIC ORDER: A SUMMARY AND RETROSPECTIVE

Despite much that is well-known about the development of the South as a collective politico-legal entity[5] and, more specifically, its claim for the establishment of the NIEO,[6] it may nevertheless prove useful to provide a relatively brief review, both because of its undoubted importance in its own right for what it says about the legal and geo-political relations between North and South but also, within the context of this article, because it inevitably acts as a significant precursor to any examination of the 1986 Seoul Declaration, for which it provided both its background and its motivation. For many, however, talking about the NIEO, as enshrined in such documents as the 1974 Charter of Economic Rights and Duties of States, seems like talking about a bygone world; the sheer number of global economic events that have occurred since 1974 (depressions, up-turns, debt crises, monetarism, regionalism, the advent of globalization, etc.) merely highlighting the length of time that has past since those highly divisive issues were first discussed.

Nevertheless, and when viewed from a historical perspective especially, arguments over the nature of the economic system were inevitable as it should have been obvious to all that legal independence, by itself, would do very little to improve developing states' political and socio-economic position. As Anand notes, '[a] large majority of the new world community … [were] poor, weak, underdeveloped'.[7] Developing states were simply not prepared to accept the economic *status quo*, just as they had not been prepared to accept the colonial system. Issues such as the unfavourable terms of international trade, the operation of the international monetary and financial systems, participation in international economic institutions and, especially, sovereign control over a state's own territory became exceedingly high priorities for such countries. As was said at the time, '[i]t is being increasingly felt that the affluent sector of the world "cannot remain a quiet island in the midst of a stormy ocean, an oasis

5. For instance, see W. Verwey, 'The United Nations and the Least Developed Countries: An Exploration in the Grey Zones of International Law', in J. Macarczyk, ed., *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague, Martinus Nijhoff 1984) p. 531 and G. Verdirame, 'The Definition of Developing Countries under GATT and other International Law', 39 *GYIL* (1997) p. 164.

6. See, for instance, K. Hossain, ed., *Legal Aspects of the New International Economic Order* (London, Francis Pinter 1980), R. Anand, *Confrontation or Cooperation? International Law and Developing Countries* (Dordrecht, Martinus Nijhoff 1987) and, for a more recent discussion of many of the issues that still galvanise the South, see L. Boisson de Chazournes and V. Gowlland-Debbas, eds., *The International Legal System in Quest of Equity and Universality* (The Hague, Martinus Nijhoff 2001).

7. Anand, *supra* n. 6, at p. 44.

of prosperity in a desert of desperate poverty"'.[8] Economic self-determination, therefore, became as urgent a political necessity as the achievement of sovereign independence.

One of the earliest moves by the South at the international level was to ensure international recognition of the principle that each state has permanent sovereignty over its own natural resources. In 1962, the General Assembly adopted a landmark resolution endorsing such a principle, noting that such permanent sovereignty over natural resources was to be exercised so as to be in the interest of a state's 'national development and of the well-being of the people of the State'.[9] In itself, this resolution was only a small step towards achieving the aims of the South; nevertheless, it was highly symbolic as it emphasized the fact that developing countries were prepared to utilize fully their rights under classical international law to sovereign equality and independence. However, despite this early restatement of a clearly foundational legal principle – admittedly in a *then* modern guise – developing countries continued to collectively demand more. Following on from a special session of the General Assembly in 1974, which resulted in a Declaration on the Establishment of a New International Economic Order and a Programme of Action;[10] the Charter of Economic Rights and Duties of States (CERDS) was subsequently adopted by the General Assembly in normal session, later in 1974.[11]

CERDS envisaged the creation of a new economic order that was premised upon a revised normative structure for international economic relations based both on a number of general rules of public international law and guided by several over-aching principles. These principles included both seemingly non-contentious elements (i.e., respect for the sovereignty, territorial integrity and political independence of states, acceptance of the sovereign equality of all states and an acknowledgement of principles such as non-intervention and fulfilment in good faith of international obligations) and, equally apparent, more contentious elements (i.e., 'mutual and equitable benefit', 'no attempt to seek hegemony and spheres of influence' and the 'promotion of international social justice'). By far and away the most divisive of issues were the rules relating to, and the level of compensation to be paid for, expropriation. While the 1962 resolution on permanent sovereignty had secured consensus and was generally seen as acceptable by most (on this and other issues), the revisions in

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8. Ibid., at p. 106. The quotation is taken from a speech by the then President of the Gambia, President Jawara (UN Doc. A/PV. 2211, pp. 17-20 (11th April 1974)).

9. Declaration on Permanent Sovereignty over Natural Resources (UNGA Res. 1803 (XVII) (1962)) para. 1. See generally, N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge, Cambridge University Press 1997).

10. Programme of Action on the Establishment of a New International Economic Order, UNGA Doc. A/RES/3202 (S-VI) (1974).

11. UNGA Res. 3281 (XXIX) (1974). Ultimately, CERDS controversial text meant that it was not adopted by consensus, but by a majority vote. 120 States voted in favour, 6 against and 10 abstained.

CERDS were viewed – by the North – as completely without foundation and wholly one-sided. With no reference to the need for an overriding ground of 'public purpose, security or the national interest' to legitimize the expropriation and with no reference to international law either in relation to the obligation to make appropriate compensation or as regards dispute settlement the view quickly formed in developed states that CERDS was not only *not* reflective of customary international law, but it reflected an economic – and short-termist – militancy on the part of the South.

Unsurprisingly, therefore, the final position of developed states was firmly against the wholesale adoption of this new economic platform. Moreover, even considered and more balanced voices within the North, viewed this attempt to use numerical superiority as a means of coercing change with a great deal of regret. In particular, many international lawyers from developed countries viewed with suspicion the attempt to develop a new international normative framework in such a combative atmosphere. As Stephen Schwebel commented,

> 'I see those documents as very mixed, containing progressive elements, but regressive elements as well. The resolutions of the NIEO were forced through the General Assembly in a lamentable atmosphere. They were not negotiated solutions but a partisan set of demands … As for the Charter of Economic Rights and Duties of States, it is not international law, and happily so, for in some respects it is sound, but in other respects, quite nationalistic and unsound.'[12]

Ultimately, the NIEO suffered not only for appearing partisan but also for being overly-radical. CERDS became to be seen not only as pro-South, but as anti-free trade. There was a feeling that, however worded, the NIEO was, as noted above, 'nationalistic and [economically] unsound'. There was also a somewhat exaggerated fear that the NIEO would ultimately require a socialistic redistribution of wealth.[13] Developed states also noted that the NIEO had little to say about intra-state redistribution; there was a genuine concern that economic restructuring would merely benefit the elites in developing countries, that the living standards of the majority of the population would remain unchanged. The claims of developing states might be genuine, but for developed states, the simplistic solutions were not as 'easy' as those proposed in such documents as CERDS.

One way for the North to undermine the NIEO was to deny it any form of legal status. And whilst some of its supporters were talking in terms of a 'new

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12. S. Schwebel, 'A Commentary', in T.M.C. Asser Institute, ed., *International Law and the Grotian Heritage* (The Hague, T.M.C. Asser Institute 1985) p. 142.

13. See R. Meagher, *International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States* (New York, NY, Pergamon Press 1979).

branch of international law' – an 'international law of development'[14] – critics argued that any action taken by developed states towards assisting developing states was purely voluntary and that the rules contained within such declarations as CERDS 'had not yet crossed the threshold of *lex lata*'.[15] By arguing that CERDS was not representative of customary international law, developed states were able to control the nature and extent of the reform of the economic system. The effect of this was to ensure that the NIEO became little more than an aspiration, and CERDS little more than a series of platitudes.

This lack of enthusiasm for economic reform coincided with a general reversal in the social and economic situation of many states, particularly at the end of the 1970s and the early 1980s. Thus, the NIEO as a *wholesale movement of change* was dead. However, despite a general failure to implement the NIEO, there were nevertheless subsequent developments which, at least, appeared to recognise more explicitly the needs and situation of developing countries, such as the GATT's 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries,[16] the conclusion of international commodity agreements,[17] the failed attempts to negotiate international codes of conduct for transnational corporations[18] and technology transfer,[19] and the increasing reference to the interests of developing countries in multilateral conventions, arguably most conspicuously in the negotiation and conclusion of the 1982 Law of the Sea Convention.

Another effort by developing states to force through change was the adoption by the General Assembly in 1986 of the UN Declaration on the Right to Development (UNDRD).[20] The purpose of UNDRD was to bring the development debate within human rights law.[21] As Article 1 of the Declaration states, '[t]he right to development is an inalienable human right by virtue of which

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14. For a general introduction, see D. Bradlow, 'Development Decision-Making and the Content of International Development Law', 27 *Boston College International and Comparative Law Review* (2004) p. 195.

15. G. Abi-Saab, 'Whither the International Community?', 9 *EJIL* (1998) pp. 263-265.

16. *BISD* 25th Suppl. (1980) p. 203. A more recent example of the requirement to take into account the concerns of developing states is Art. XI.2 1993 WTO Agreement which states, '[t]he least developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities'.

17. As World Commission on Environment and Development (WCED), *Our Common Future* (Oxford, Oxford University Press 1987) p. 81, notes '[they] have not been easy to negotiate, and regulation of commodity trade has been notoriously controversial and difficult', having already noted that 'real progress has been very limited and in fact there have been reversals'.

18. See Meagher, *supra* n. 13.

19. See P. Roffe, 'UNCTAD: Code of Conduct on Transfer of Technology – Sixth Session of the UN Conference', 19 *Journal of World Trade Law* (1985) p. 669.

20. UNGA Res. 41/128 (1986).

21. See generally S. Chowdhury, et al., eds., *The Right to Development in International Law* (Dordrecht, Martinus Nijhoff 1992).

every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'. However, despite attempts in the Declaration to shift the focus away from the right of developing states to the rights of the individual and peoples, many developed states continued to argue that UNDRD was merely a vehicle for re-introducing the NIEO, as well as diverting attention away from the protection of more traditional human rights, such as freedom from torture and death. In particular, UNDRD's insistence on 'effective international co-operation', and the provision of 'appropriate means and facilities'[22] to implement such cooperation, merely added to the concern of developed countries that this was just another attempt by developing states to establish a general customary obligation to cooperate.

So what interim conclusions can one draw from what undoubtedly is one of the most interesting periods of diplomatic and legal global politicking since 1945? If implemented, its supporters hoped, the NIEO would have ensured a very different international economic community from the one then in operation, one where the interests of the weakest would be of concern to the policies of the strongest.[23] In particular, and contrary to the view of developed states, many in the NIEO movement felt that international economic relations should not be left to an unfettered free market,[24] but should be recognised as a powerful tool by which the international community could redress imbalances in the present system. As Baxi notes, 'the basic impulse of the NIEO, its objectives and strategies, point to a restructuring of North-South relations in such a fundamental manner as to reduce dominance and dependence which characterized [previous] relations'.[25] On the other hand, the view of the North has remained very clear that the South, in trying to use its numerical strength, brought forward a number of ill-conceived proposals which would have jeopardised the operational integrity of the global economic system as a whole. Thus, many in the North have always been critical of the NIEO project *as a whole*, both in terms of the process relied upon *and* as regards some of the more contentious aspects of its content. What both sides can probably agree on is that the North very consciously – and arguably very successfully – negated giving the NIEO definitive normative status. As noted above, in circumscribing its legal status, developed states, in effect, ensured control over its (non-)implementation. For

22. Art. 4.2 UNDRD.

23. Abi-Saab, *supra* n. 15, at p. 263: '[NIEO] postulates as its basis the common interest of all states in the development of the weakest and most vulnerable.'

24. Ibid., at p. 265. He argues that the 'invisible hand' or 'supreme law' of the market means that economic decision-making is left to 'naked power relations in society, in the pure tradition of social Darwinism'.

25. U. Baxi, 'The New International Economic Order, Basic Needs and Rights', 23 *Indian JIL* (1983) p. 225.

the North, this was to be seen as a very positive outcome; for the South, on the other hand, this was something to be very much regretted.

3. THE 1986 ILA SEOUL DECLARATION: REAL MOVEMENT, CONSENSUAL PROGRESS?

It was in this politically divided atmosphere that the ILA decided in the late 1970s to establish an international committee to research further into the legal issues surrounding the topic. The committee – made up of primarily legal academics from both developed and developing countries, chaired by Kamal Hossain of Bangladesh – considered the whole gamut of issues associated with the international economic system and developing countries' demands for change. The committee worked primarily through its four sub-committees; on general principles and CERDS (sub-committee I), permanent sovereignty over natural resources, economic activities and wealth (sub-committee II), transnational corporations, transfer of technology, restrictive business practices and participation of developing countries in the multilateral trading system (sub-committee III) and, latterly, monetary and financial matters relating to development (sub-committee IV).

After a number of initial reports, and greatly assisted by a questionnaire disseminated by the committee's Rapporteur-General Professor Milan Bulaji (Yugoslavia) as well as a further questionnaire drafted by Professor Schachter (United States), the committee decided at a meeting in Belgrade in 1985 to aim to draw up a draft declaration of basic legal principles in time for the next ILA conference a year later. As the committee's 1986 (fourth) report notes, '[c]onsensus was reached at the Belgrade meeting … that the draft declaration should have a similar character to the 1970 United Nations Declaration of Principles of International Law … and that it should aim at overcoming the controversies which appeared in 1974 … by listing a relatively small number of principles of international law relating to a NIEO on which consensus can be reached'.[26] After a period of intense discussion and consultation, a draft text was ready for consideration which, after numerous last minute and substantive changes to the text, was adopted at the biennial ILA conference in Seoul in 1986.

The final version of the Seoul Declaration is structurally divided into three parts; a preamble, a specific part (which lists 11 of the 12 principles) and a general part (which sets out a rule of interpretation,[27] a 'without prejudice' clause to the UN Charter, a restatement of the importance of the peaceful settle-

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26. ILA, *supra* n. 2, at p. 425.

27. Para. 12: 'In their interpretation and application the above principles are inter-related and each principle should be construed in the context of the other principles.'

ment of disputes (the twelfth principle) and an 'appeal' to states to be 'guided by the principles embodied' therein). Before considering the principles themselves, it is worth making three introductory points. First, as the preamble to the Declaration makes clear, the principles listed are not intended to be exhaustive, rather they are 'a selection of the most important of such principles on which a consensus can be expected'. This immediately imports a strong note of realism into any discussion; though the ILA, through its work, hoped to move beyond some of the difficulties faced in previous intergovernmental attempts on these matters, the Seoul Declaration would not provide – nor was intended to be – an all-encompassing panacea. Success for the Seoul Declaration was always to be limited by its own recognition of the *real politic*. Nevertheless, as a counterbalance, one should also note VerLoren van Themaat's comment that '[f]rom a doctrinal point of view the Declaration indeed contributed to overcoming the stagnation in the North-South global negotiations in at least some important areas'.[28]

Second, the Declaration very consciously included both principles it argues are *lex lata* and those principles which were still evolving. Though some questioned whether the correct balance was achieved in assigning the appropriate normative status to the principles included, nevertheless those who took the lead in drafting the text genuinely sought to highlight this difference between the principles. On this basis, the reference to 'progressive development' in the title of the Declaration is clearly intentional. Of course, even legally binding principles rarely operate as meaningfully and as comprehensively as they should, and thus are often as much in need of reinforcement as those principles that are still *de lege ferenda*. As the preamble makes clear, '[c]onsidering the affirmation and where appropriate further refinement of the following principles would secure their more *effective application* in the interest of the international community and promote the realization of the purposes of the United Nations'.[29]

Third, it may be appropriate at this point to note that the preparation of the Seoul Declaration was not a misguided – and overtly political – endeavour for the ILA, but was, in fact, an integral part of the role the organisation considers it should play in international affairs. As one speaker at Seoul noted,

> '[o]ur subject … is one of the most important and delicate undertakings in the history of the ILA … The members of the International Committee … have been very conscious of their role and responsibilities … Because of the bifurcation of the world into developed States and developing States, our task has not been easy … the Committee's draft Declaration represents a substantial improvement over the text of the [1974] Charter.'[30]

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28. VerLoren van Themaat, *supra* n. 3, at pp. 14-15.
29. Emphasis added.
30. ILA, *supra* n. 2, at pp. 474-475. Though the summary report does name individual speakers, and thus does not follow Chatham Rules in this regard, I felt it was unnecessary to attribute

3.1 The Seoul principles – a step forward?

As noted above, the specific part of the Seoul Declaration contains eleven of the twelve principles; the twelfth concerning the peaceful settlement of disputes is incorporated in the general part. The other eleven principles are:

1) the rule of public international law in international economic relations;
2) *pacta sunt servanda*;
3) the principles of equity and solidarity and the entitlement to development assistance;
4) the duty to co-operate for global development;
5) permanent sovereignty over natural resources, economic activities and wealth;
6) the right to development;
7) the principle of common heritage of mankind;
8) the principle of equality or non-discrimination;
9) participatory equality of developing countries in international economic relations;
10) principles of substantive equality, including the preferential and non-reciprocal treatment of developing countries in international economic relations;
11) the right of every state to benefit from science and technology.

Though it is beyond the scope of this article to outline each principle in turn in any detail, it will undoubtedly be worthwhile to highlight certain key principles, especially those which were considered foundational to the securing of consensus over the text of the Declaration, and thus seen as an advance on the political divisions evident during the General Assembly debates on CERDS. Three principles were particularly contentious; permanent sovereignty, right to development and common heritage of mankind. Compromise was only found on these issues very late during the Seoul conference itself, with many significant differences being evident between the drafts presented at the outset of the conference and the final text. This article will briefly say something on the first two.[31]

Out of all the principles, the principle of permanent sovereignty (principle 5) was undoubtedly the most difficult to resolve. The principle – as set out in the final Declaration – contains a number of key elements, including that it expressly extends national jurisdiction not only over natural resources but also to economic activities and wealth, that it emanates from the principle of self-determination and

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these quotations, as it does not add to – and may, in fact, divert attention away from – the weight of what is being said.

31. As regards common heritage of mankind, the principal issue was the extent to which it only became binding and operational once located within a treaty regime, thus negating autonomous customary status – this being the approach the Seoul Declaration finally took.

that it empowers a state 'to regulate, exercise authority, legislate and impose taxes in respect of natural resources enjoyed and economic activities exercised and wealth held in their own territories by foreign interests subject only to any applicable requirements of international law'.[32] Unsurprisingly, the most divisive issue under this broad banner of permanent sovereignty was the matter of expropriation. The original draft had left in much that was still contentious; in particular, some felt that it failed to reflect adequately current law, departing from 'the jurisprudence of competent international tribunals, agreements between and among States and pronouncements of international organisations'.[33] Conversely, others argued that it took 'State practice and commercial practice duly into account'.[34] In the final version, the Declaration was significantly more concise than the draft, resolving – or, perhaps more accurately, not discussing – some of the most difficult issues. In its adopted version, it read:

> '5.5 A State may nationalise, expropriate, exercise eminent domain over or otherwise transfer property or rights in property within its territory and jurisdiction subject to the principle of international law requiring a public purpose and non-discrimination, to appropriate compensation as required by international law, and to any applicable treaty, and without prejudice to legal effects flowing from any contractual undertaking.'

In the final version, much was changed; out went a presumption against restitution *in integrum*, a discussion of a state's sovereign right to revise or adjust an agreement, the attempt to define appropriate compensation, and an elaboration of the role of dispute settlement in this area, and in came a requirement of non-discrimination as a criterion for expropriation and, significantly, a rather more express and generic 'without prejudice' reference to the effect of contractual undertakings. Also missing was any explicit reference to the effect of so-called stabilization clauses in economic development agreements. Of course, some still remained concerned at the precise balance; '[t]he emphasis illustrated by the wording of Principle 5.5 is too much on control'.[35] And on the issue of compensation, views continued to differ as to what precisely 'appropriate' truly did mean – was it what is just and reasonable, or did the Hull formula ('adequate, effective, and prompt payment') still take precedence? Nevertheless, most speakers recognised what one speaker called the 'welcome improvements … over earlier versions'.[36] Significantly, and this point should not be lost in highlighting such divergences between the participants, a broad-based consensus was reached that traversed North-South (capital-exporting and

32. Para. 5.4.
33. ILA, *supra* n. 2, at p. 465.
34. Ibid., at p. 469.
35. Ibid., at p. 480.
36. Ibid., at p. 477.

capital-importing) opinion. True, most of the voices were academic, thus not as tied to the political realities as governments within intergovernmental fora, but nevertheless it showed that the rules relating to expropriation *could* be of universal application, and were thus not necessarily a partisan tool. And though it is also true that on numerous contentious aspects the matter was, at best, deferred – thus suggesting less than true universality of agreement on the topic – what was achieved, and the fact that all were able to 'sign up', was still of real significance.

The second principle which generated much discussion was the right to development, which was simultaneously being discussed within the United Nations as a prelude to its adoption in December 1986 as the UN Declaration on the Right to Development. The final text of the Declaration on this point is instructive:

> '6.1 The right to development is a principle of public international law in general and of human rights law in particular, and is based on the right of self-determination of peoples.
> 6.2 By virtue of the right to development as a principle of human rights law, individuals and peoples are entitled to the results of the efforts of States … in order to achieve a proper social and international order for the implementation of the human rights … through a comprehensive economic, social, cultural and political process based upon their free and active participation.
> 6.3 The right to development as a principle of public international law implies the co-operation of States for the elaboration of civil, cultural, political and social standards … These standards should be taken into account by States in the formulation, adoption and implementation of administrative, legislative, policy and other measures for the realization of the right to development at both national and international levels.'

The draft of this text was very much based on work undertaken within the Commission on Human Rights, with members of the ILA Committee also actively involved in the preparation of the UNDRD. Thus, the inclusion of a right to development in the Seoul Declaration was seen by many as a *sine qua non*. During the Seoul working sessions however, others – particularly speakers from the North – were less convinced. As a good example of this scepticism, still held today by some, one might quote from a speaker from the United Kingdom, '[t]here is also undoubtedly a difficulty … about the description of it as "a human right" – or even, I think, in the terminology of the new amended version, as a "principle of human rights law" – and the potential effects which this assimilation has for human rights in the classic sense'.[37] Such a view, though supported by some (another participant questioned whether such a right was 'juridically sound'), was nevertheless in a minority. Most were able to accept – if somewhat grudgingly – the final wording, reflecting as close to a

37. *Idem*.

compromise as was going to be possible on a newly emerging strand of human rights. What the final wording does suggest, perhaps, is that the initial desire to provide clear divisions between *lex lata* and principles and rules *de lege ferenda* was not always easy, even with the best intentions. And as will be noted in the next section, this lack of firmness in the language used has perhaps reflected a rather soft law approach to the issue of the right to development subsequently.

Though these principles were the most contentious, it would be amiss not to mention the significance of the others, as the Declaration sought to be read – and should be read – as a whole. Though the Declaration makes many pertinent points (ranging from trade liberalization through to equitable participation in international economic decision-making), four of the more general principles are briefly mentioned here, if just to highlight the broader parameters of the debate, as well as what – in its view – the NIEO should be aspiring to achieve. First, the advancement of the rule of public international law in international economic relations (principle 1), including the instruction that 'States have a duty to abstain from measures of economic policy, incompatible with their international obligations'. Second, the principle of equity (first part of principle 3), namely that 'development should aim at a just balance between converging and diverging interests and in particular between the interests of developed and developing countries'. Third, the principle of solidarity (second part of principle 3), namely '[i]n the legitimate exercise of their economic sovereignty, [States, whose economies have the most global impact] should seek to avoid any measure which causes substantial injury to other States'. And finally, fourth, the principle of cooperation for global development (principle 4), which 'implies the progressive development of this duty in proportion to the growing economic interdependence between States … with a view to a coherent implementation of a new international economic order'. As the final section of this article will highlight, these and many of the other principles have struggled to find expression in the global economy post-1986.

Two final points on the text as a whole may be made. First, some remained troubled by the continuing focus on juridical principle, rather than practical devices by which development and economic growth might be promoted. As one speaker at the Seoul working session noted, 'the grave problems facing the developing countries and the international economic order require remedies that go beyond the formulation of abstract principles'.[38] Second, though there was a range of specific issues that some felt should have been included in the final text that were not there (i.e., rules restricting the subsidization of agricultural exports),[39] there was a more general criticism amongst some that the Declaration failed to express – at least sufficiently clearly – the contribution that economic wealth makes towards global development. As one speaker commented, '[t]he

38. Ibid., at p. 475.

39. Others rejected such an approach, highlighting the general nature of the principles included (ibid., at p. 484).

positive role of private property in economic development cannot be denied, and should find an appropriate expression in the Draft Declaration'.[40] Though the Seoul Declaration could never be described as reflecting an ideological mistrust of the private ownership of wealth – a criticism, rightly or wrongly, levelled at previous inter-governmental attempts in this area – nevertheless, the absence of an affirmative right to property does now make the text appear somewhat asymmetrical.

4. SINCE SEOUL – THE GLOBAL ECONOMY AND GLOBAL NORMS

It is almost unnecessary to say that the current global economic situation is very different from that faced in 1974, even from that faced in 1986. The question then becomes how far do such economic and political changes justify an adjustment to and/or rejection of the norms and principles of the NIEO, as contained in the Seoul Declaration? In particular, how far have such changes impacted upon those principles that were merely *in statu nascendi* in 1986? The aim of this section is first, to outline briefly some of these changes, second, to consider to what extent the Seoul principles remain relevant and third, to review the role and relevance of the principle of sustainable development within this wider debate.

Unfortunately, one of the great difficulties in making any form of solid judgment about the current state of such rules and principles is the current lack of interest in the topic by the international community. Though matters of development and global cooperation continue to form major planks of the policy and operational work of organisations such as the United Nations and the World Bank, they are rarely discussed these days in legal terms, and when such discussions do take place they are usually within a specific context rather than general international law. The topic of the international law of development has become both marginalised in light of emerging meta-disciplines, such as WTO or foreign investment law, and subsumed within the day-to-day workings of the World Bank, the International Monetary Fund (IMF) and other international organisations. Thus, international development law *per se* not only is considered a niche issue, only worthy of dwindling *legal* analysis, but its parameters – already subject to significant inroads from supposedly 'harder' (i.e., more legal) disciplines – seemingly does not provide a sufficient core of certainty to justify renewed political or legal interest.[41] Commentators who once studied

40. Ibid., at p. 474.

41. Bradlow, *supra* n. 14, at p. 217: '[I]t is safe to conclude that while the direction of the future evolution of IDL [international development law] is clear, and the scope of its content is discernible, the precise contours and content of IDL are very hard to define and its evolution even harder to predict.'

and researched matters of developmental law are increasingly few in number, in contrast to the over-abundance of voices on many of the legalistic – and commercially attractive – elements of world trade law, for instance.

Nevertheless, some attempt may still be made to map out the current state of the rules and principles contained in the Seoul Declaration. As noted at the beginning of section 2, a range of political, economic and social forces have changed dramatically the global economic situation. Depressions, up-turns, debt crises, monetarism, regionalism, the rise of global currency trading, severe currency fluctuations, the advent of globalization have all featured heavily in the past twenty years. Along with, and in light of, these phenomena, there have been numerous developments in the legal and policy sphere. It is beyond the capacity of this article to provide anything other than a mere overview of some of the more important changes, and there is certainly no scope here for a comprehensive account. However, the following developments – which have arisen either completely since 1986 or have become significantly more prominent since then – may be briefly outlined.

4.1 **A changed landscape?**

Perhaps it has been on issues of global trade that the changes have been so obvious since 1986. The successful completion of the Uruguay Round, not only led to the establishment of the World Trade Organization (WTO) but also codified – in binding forms – various disciplines that had either previously only been plurilateral in nature (i.e., technical barriers to trade) or had not previously been included within the international trade arena at all (i.e., intellectual property). Moreover, the agreement on a significantly firmer dispute settlement system as part of the WTO, together with the newly established Appellate Body's clear views on the importance of general international law in its deliberations,[42] reaffirmed the role of legal norms in the settlement of trade disputes. Alongside these global changes, there were numerous regional developments, including the completion of the NAFTA negotiations in North America and the strengthening of other regional blocs. If, on the surface, such developments indicated the existence of a much stronger framework of regulation, nevertheless, as the current impasse in the Doha round of trade talks begun in 2001 has shown, strong legal rules do not, of themselves, create a positive legal environment for global development. On-going difficulties in areas such as tariff peaks and tariff escalation, non-tariff barriers, agricultural subsidization, the over-use of safeguard clauses as well continuing problems of implementation of Uruguay obligations all point to a system that has now become what might be described as 'legally-dense' but politically-inchoate.

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42. For its earliest statement, see *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (AB-1996-1), 29 April 1996, p. 16.

Moreover, the ascendancy of public regulation of international trade, on the one hand, has been accompanied by significant shifts – some would suggest downgrading – in the role and purpose of international commodity agreements, on the other. Though recent changes to such agreements have been heralded as a more holistic approach to all aspects of commodity trade, there is no doubt that the market intervention aspects of such agreements have been increasingly marginalised at the expense of a more rounded – some would argue 'softer' – focus upon wider developmental issues. Though these changes have been premised upon such notions as the integration of multiple objectives and the endorsement of sustainable development, which are, in and of themselves, undoubtedly positive ideas,[43] producer-developing countries are now forced to face the stark realities of the effect of the global market with fewer guarantees. The safety net argument so strong in CERDS – and which finds some inclusion in the Seoul Declaration – has not been reflected in practice in an increasingly fast-paced globalized world.

Moving from the public regulation of international trade to the commercial sphere, multi-national corporations have become global players, with an influence that could only be envisaged twenty years ago. Though now accepted by virtually all states as occupying a pivotal space in the global economy – emblematic of globalization itself[44] – there are continuing difficulties and disagreements over whether and how to regulate their affairs. As with the situation in 1986, there continues to be limited international supervision, and what there is is exclusively soft in character, accompanied by a patchy national regulatory framework.[45] Though the international community has found ways to move beyond the failure of the draft UN Code of Conduct for Transnational Corporations, those divisions continue to permeate the broader debate.[46] Moreover, though corporate social responsibility has become a necessary part of such corporations' – and the global community's – political and commercial mantra, implementation thereof remains decidedly variable in practice.

Central to the ability of such corporations to operate successfully has been a dramatic freeing-up of national restriction on foreign inv estment, accompanied by a significant increase in the use of bilateral investment treaties (BITs) and the development of new norms (such as 'fair and equitable treatment') that have

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43. See French, *supra* n. 4, at p. 119: 'Recent international commodity agreements have begun to recognise this link between such international trade and maintaining biodiversity.'

44. See generally S. Hobe, 'The Era of Globalization as a Challenge to International Law', 40 *Duquesne L Rev.* (2002) p. 655.

45. S. MacLeod, 'Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared', 13 *European Public Law* (2007) pp. 671-702.

46. See, in particular, the current debate surrounding the 'Draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' originally drawn up by the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/2003/12/Rev.1 (30 May 2003)).

had a substantial effect on what host states may and may not do, together with the increased reliance on binding arbitration to determine the permissibility of governmental action and subsequent levels of compensation when that is found to be in the wrong.[47] Of course, as with trade law, the existence of law does not *per se* guarantee either domestic development or fair distribution of benefits within a state.

In addition to these matters, the World Bank – less so, perhaps, the IMF – has refocused and restructured its approach to development.[48] The Washington Consensus – market liberalization, deregulation, privatization, cutting social spending – on which the 1980s was built, has been replaced, by and large, with a focus on poverty eradication and assisting developing countries themselves, together with their stakeholders, implement their 'own' national development programmes and poverty reduction plans. This has been further supported by international efforts – led by the Bretton Woods Institutions – to begin to tackle the grotesque levels of third world debt.[49] Whether the reality of this change is as significant as the rhetoric continues to be debated, though most are prepared to accept that changes over the last two decades at the World Bank, in particular, are more than just cosmetic; how much more, however, is contestable.

Undoubtedly much of this institutional change has been prompted by greater consideration being given to various non-economic factors, including human rights, social development (life, water, food, habitation), environmental protection and the emergence of sustainable development as a global objective as means of integrating economic development, social development and environmental protection.[50] The rise of specialist interest groups and active non-governmental organizations with their consequent focus on substantive issues (such as those identified above), constitutional matters of legitimacy, transparency, accountability and systemic topics of good governance, anti-corruption, debt relief and poverty eradication *et cetera* have also done much to broaden the debate.

Of particular relevance to this article is the emergence of the notion of sustainable development, specifically as a means to bridge the economic and non-economic discussion.[51] As the International Court noted in *Case Concerning Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Request*

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47. On changes in foreign investment and the attendant regulatory environment, see M. Sornarajah, *The International Law on Foreign Investment*, 2nd edn. (Cambridge, Cambridge University Press 2004).

48. See N. Bridgeman, 'World Bank Reform in the Post-Policy Era', 13 *Georgetown International Environmental L Rev.* (2001) p. 1013.

49. Through the heavily indebted poor countries (HIPC) and the enhanced-HIPC programmes.

50. As reaffirmed by the Johannesburg Plan of Implementation adopted at the World Summit on Sustainable Development in 2002, UN Doc. A/CONF.199/20.

51. For a general discussion of the emergence of sustainable development, see N. Schrijver and F. Weiss, eds., *International Law and Sustainable Development: Principles and Practice* (Leiden, Martinus Nijhoff 2004), M-C. Cordonier Segger and A. Khalfan, *Sustainable Development*

for the Indication of Provisional Measures (2006), 'the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development … account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States'.[52] Moreover, the challenges that the international community face in promoting sustainable development are all inherently economic in one way or another. As the 2004 Declaration of Nuevo León makes clear,

> '[i]n the search for sustained and equitable economic growth that contributes to long-term development, reduces poverty, eliminates hunger, and raises the standard of living of the population, with special attention to the most vulnerable sectors and social groups, we commit to continue implementing sound macroeconomic policies, prudent fiscal and monetary policies, appropriate exchange rate regimes, prudent and appropriate public debt management, diversification of the economy, and the improvement of competitiveness.'[53]

Nevertheless, as section 4.3 will explore, the connexions between the NIEO and sustainable development – though both intuitive and foundational to a fairer and successful international system, are not without their complexities.

4.2 **A continuing relevance for the Seoul principles?**

These and many other changes are reshaping the economic – and the legal – landscape. But what does this – admittedly brief – review say about the rules and principles in the Seoul Declaration? The remainder of this article therefore seeks to make an assessment of this, grouping various of the cognate principles together. First, it is arguable that the rule of public international law in international economic relations (principle 1) has been strengthened since 1986; over 150 parties to the WTO, the exponential rise of BITs, the emergence of rule-based regional trading and investment agreements would all appear to be testament to the importance of legal norms within economic affairs. Nevertheless, it remains the case that some institutions (such as the IMF) still prefer to operate within the 'grey' sphere of legal norms and, much more worryingly, some states continue to act unilaterally – outside accepted parameters – when this is felt necessary in the economic field. The persisting belief in the United States, in particular, as to the permissibility of wide-ranging extra-territorial (extra-national) legislative measures, particularly to achieve foreign policy

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Law: Principles, Practices and Prospects (Oxford, Oxford University Press 2004) and French, *supra* n. 4.

52. Judgment of 13 July 2006, para. 80.

53. Adopted at the 2004 Special Summit of the Americas, January 2004, available at <www.summit-americas.org/SpecialSummit/Declarations/Declaration%20of%20Nuevo%20Leon%20-%20final.pdf>.

objectives,[54] remains a real risk to the authority of an international community built upon law. Moreover, some issues remain un- or under-regulated. International investment law continues to be a rag-bag of rules and arbitral decisions without global coherence and developed states, especially, remain extremely cautious about regulating the activities of transnational corporations, other than through promoting self-restraint or other non-coercive measures. Thus, to be truly comprehensive, the rule of public international law in international economic relations must not only work effectively in those areas in which it currently exists, but it must also be extended to significantly more issues.[55]

A related principle in the Seoul Declaration is *pacta sunt servanda* (principle 2). As a general principle of law it, of course, underpins international law as a whole. However, though arguably a rule of *jus cogens*, it remains, in the field of economic relations, in some instances, inchoate. Continuing problems in the implementation of various aspects of the multilateral trade agreements annexed to the 1994 WTO Agreement can unfortunately be pointed to as regrettable evidence of a blatant breach of this principle, as well as highlighting the often one-sided nature of trade commitments. Moreover, despite the serious nature of such a breach, developed states have sought as far as possible to avoid a strictly legal solution in favour of negotiation.[56] And though some developing countries are no longer prepared to accept the old hegemony and have thus begun to use the WTO dispute settlement mechanism much more proactively to tackle these issues,[57] other developing countries remain – not necessarily by their own

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54. For an earlier discussion, see V. Lowe, 'US Extraterritorial Jurisdiction: the Helms-Burton and D'Amato Acts', 46 *ICLQ* (1997) p. 378.

55. As regards what might be considered a related – generic – principle of international law in the Seoul Declaration (the peaceful settlement of disputes (principle 12)), the situation would appear to be generally positive; this including the establishment of a significantly strengthened dispute settlement mechanism within the WTO, more widespread acceptance of the value of international arbitration in international investment disputes (both state-to-state and mixed), as well as the emergence of non-judicial mechanisms of dispute avoidance, including the Inspection Panel mechanism of the World Bank, in which those communities affected/likely to be affected by World Bank lending have a right to seek redress where the Bank fails to respect its own procedures. However, notwithstanding these and other developments, it may be worth reminding oneself about the continued lack of development in many other areas that the Seoul Declaration also highlighted; 'new arrangements of a similar kind … should be envisaged in … the fields of international monetary, financial and tax relations, transnational corporations and the natural environment'. Despite some innovation, especially in the area of international environmental law, there have, however, been very few other developments. If the existence of independent dispute settlement is a sign of a healthy and dynamic legal regime, international economic law remains, at best, a partial and incomplete version of what it might otherwise be.

56. Decision of 14 November 2001 on Implementation-related issues and concerns (WT/MIN(01)/17), preamble: '*Determined* to take concrete action to address issues and concerns that have been raised by many developing-country members regarding the implementation of some WTO Agreements and Decisions …'

57. See *United States – Subsidies on Upland Cotton*, Report of the Appellate Body (AB-2004-5), 3 March 2005 and *United States – Domestic Support and Export Credit Guarantees for*

choice – passive players in an organisation which they are formally equal partners.

Second, as regards the principles of equity and solidarity and the entitlement to development assistance (principle 3) and the duty to co-operate for global development (principle 4) these remain either *de lege ferenda* or 'soft' law at best. Though the rhetorical outcomes from the major United Nations social conferences on environment, human rights, women, *et cetera* all appear to be sensitive to the needs of developing countries, and to an equitable global system more generally, the political and economic reality over the last twenty years has ensured that many of these things remain aspirational in nature. In particular, though progress has been made on some issues (i.e., further regional cooperation within the South being a reasonably good example),[58] many other matters have either remained largely outside the legal sphere (i.e., the entitlement to developmental assistance) or the outcomes – as compared to the negotiating mandates – have continued to reflect predominantly the needs and views of developed countries.

This is not to negate important developments in the policy and operational fields, most significantly, at the present time, the Millennium Development Goals (MDGs) as inspired by the General Assembly's Millennium Declaration, which many states and organisations are seeking to meet and build upon.[59] However, such targets remain decidedly soft and, though they have been adopted by virtually all global actors as key objectives, not only is there widespread pessimism as to the long-term likelihood of success, but there are deeper questions as to how such objectives inter-relate not only with each other, but also with 'binding' legal obligations.[60] This is a question that no one seems to want to answer. And this is arguably characteristic of everything that has been and will be said; though there are – important – developmental initiatives taking place, how they fit into the greater whole remains vague. Even as regards those objectives as universally endorsed as the MDGs, the conceptual framework which underpins them is far from clear. And just with the non-implementation of the 1974 CERDS, developed states in particular have been very successful in removing any sense of legal obligation from such initiatives, this being made

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Agricultural Products (request for consultations received 11 July 2007), both complaints brought by Brazil.

58. Regional economic groupings, such as ASEAN, CARICOM, the Andean Pact, the Southern African Development Community (SADC), continue to play – to a greater or lesser extent – an important role within the wider global system.

59. An annual report seeks to monitor progress towards the attainment of the MDGs and obstacles to their success (see <www.un.org/millenniumgoals>).

60. For instance, see The Programme of Work of the [Biodiversity] Convention and the Millennium Development Goals – Note by the Secretariat (UNEP/CBD/COP/7/20/Add.1, 30 November 2003), para. 37: 'Achieving the Millennium Development Goals as such is not necessarily a threat to biodiversity, but the implementation of specific development activities may well be.'

much easier by the fact that developing states have generally become much less militant on such matters in recent years.

Third, on the principles that caused most discussion at Seoul, especially permanent sovereignty (principle 5) and the right to development (principle 6), the twenty years since Seoul has seen both movement and continuing debate. As regards permanent sovereignty, much that was contentious has now moved on, reflecting largely a more general acceptance of foreign investment. Though there continue to be disputes over such matters as the exact level of compensation payable in the event of expropriation, this no longer excites as it once did. Direct expropriation (in the absence of 'appropriate' compensation) is increasingly rare, though not completely unknown.[61] The increasing use of BITs and regional agreements to regulate foreign investment is establishing agreed standards on what is and is not permissible, though whether this represents general custom is vehemently debated.[62] What is presently divisive is the how far host states may 'police' their economy, whether for reasons of environmental protection or other reasons of social protection and development, without incurring challenges on the basis of either indirect expropriation and/or unfair treatment. Recent case-law has been unfortunately divided on this point.[63] On permanent sovereignty more generally,[64] what was seen primarily as an exclusionary concept has now been imbued with a more positive slant, including the imposition of emerging duties in the field of environmental protection.[65]

As regards the right to development, though some work has been done within human rights bodies to develop it further, both as a discrete right within the Commission on Human Rights (now the Human Rights Council)[66] and, more

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61. See, for instance, S. Subedi, 'The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"', 40 *International Lawyer* (2006) p. 121.

62. Sornarajah, *supra* n. 47, at p. 328.

63. See H. Mann, 'The Final Decision in *Methanex v. United States*: Some New Wine in Some New Bottles' (IISD, 2005), available at <www.iisd.org/pdf/2005/commentary_methanex.pdf>.

64. It is interesting to note that the International Court in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (Judgment of 19 December 2005) was not prepared to accept the argument that the principle of permanent sovereignty over natural resources (which the Court had agreed was a principle of customary international law) was applicable in this particular context as 'there is nothing in these General Assembly resolutions [namely UNGA resolution 1803 (XVII), the Declaration on the Establishment of a New International Economic Order (UNGA resolution 3201 (S.VI)) and the Charter of Economic Rights and Duties of States (UNGA resolution 3281 (XXIX)] which suggests that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State' (para. 244).

65. Schrijver, *supra* n. 9, at p. 392: 'Gradually, it has become recognized that, under international law, natural-resources management should no longer exclusively be within the domestic jurisdiction of individual States.'

66. See Report of the high-level task force on the implementation of the right to development on its fourth session, UN Doc. A/HRC/8/WG.2/TF/2, 31 January 2008.

implicitly, as an important background influence in the consideration of other rights, such as under the 1966 Covenant on Economic, Social and Cultural Rights, most developed states seem prepared to allow it to remain inchoate and largely unimplemented, if they accept it at all. Principal discussion of the right has been reserved to 'soft' diplomatic negotiation at the major UN social conferences of the 1990s.[67] Nevertheless, it is hoped that overtime – and despite continuing protestations by some – the Seoul Declaration will be proved correct in asserting that the right to development is both a 'principle of public international law in general and of human rights in particular'. Moreover, if the right to development *qua* human right is still subject to ongoing political debate, more has been done to reflect the Seoul Declaration's encouragement for the 'formulation, adoption and implementation of … measures for the realization of the right to development'. The elaboration of safeguard policies (such as on indigenous peoples) within the World Bank, the rhetoric of poverty reduction strategies within the IMF, the setting of targets such as MDGs, improvements in development funding and clarification of the objectives of such developmental assistance[68] may all be regarded as an attempt to mainstream such a 'realization'. This is not to try to suggest that all is positive – by no means – and there is little room for complacency (all the above examples have been subject to criticism to a greater or lesser extent), but nevertheless there continue to be attempts to operationalise such considerations.

Fourth, are the related principles of equality and non-discrimination (principle 8), participatory equality (principle 9) and substantive equality (principle 10). These three principles were always the central modalities in achieving the NIEO, though – at the same time – its principal tension. It is a basic presumption within the NIEO that to achieve a just outcome, states must be both treated equally *and* non-equally depending upon the precise circumstances. Whereas on some matters, formal equality is a prerequisite to attaining an equitable result, on other matters formal equality is, in fact, the obstacle to be overcome, and should be replaced with substantive equality. In the period since Seoul, progress in achieving these principles has been significantly variable. And though there are things which might be noted on all three principles, it is on the principle of substantive equality that arguably the most can be said. Since Seoul, work

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67. For instance, in the 1993 Vienna Declaration of Programme of Action on Human Rights (A/CONF.157/23, 12 July 1993), para. 10 ('reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights').

68. See, for example, the 2003 Rome Declaration on Harmonization (25 February 2003), the purpose of which is to 'harmonize the operational policies, procedures, and practices of [multilateral and bilateral development institutions and the IMF] with those of partner country systems to improve the effectiveness of development assistance, and thereby contribute to meeting the Millennium Development Goals' (para. 1), available at <www1.worldbank.org/harmonization/romehlf/Documents/RomeDeclaration.pdf>.

towards substantive equality has, despite the rhetoric,[69] become very much a secondary objective, significantly behind the push towards more market-orientated goals. Though it is true that in many situations developing countries are still provided with certain exceptions and exemptions, the general thrust of developments since that time has been towards the elaboration of rules that are non-discriminatory, both in law and fact. The completion of the Uruguay trade round signalled a major shift in approach; though special and differential treatment continued to exist across a spectrum of issues, often such differentiation was no longer absolute, but either time-limited or otherwise restricted. Preferential and non-reciprocal treatment, though it continues to be endorsed particularly for least developed countries, is increasingly subject to other, competing, pressures which often minimise the full effect of such benefits. Probably the most contentious example is the implementation of the 1994 TRIPS Agreement on Intellectual Property Rights which, through its finite implementation periods and other limitations, has sought to create a global system of intellectual property protection within a timeframe that largely ignores the substantially longer historical period in which developed countries were able to devise and shape their own systems in tune with their own priorities and values.[70]

In a similar vein, much could be said on many of the remaining Seoul principles. In particular, the imbalanced nature of current trade law also continues to be of significant concern. Issues such as the continuation of tariff peaks and tariff escalation for semi-finished and finished products, agricultural subsidization and other protective measures, and the increased use of non-tariff measures (sometimes now under the guise of environmental protectionism)[71] continue to hurt the poorest the most. Though the announcement in 2001 of the start of the Doha Development round of trade talks was meant to reflect the reality that the majority of the members of the WTO are developing countries, since then, the round has stalled amid the usual, and rather predictable, divisions on traditional issues. Debates over the international regulation of agriculture, in particular,

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69. See WTO Doha Ministerial Declaration (WT/MIN(01)/DEC/1, 20 November 2001), para. 44: 'We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements … We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.'

70. For a summary discussion on the relative merits of IP protection in and for developing countries, see M. Matsushita, et al., *The World Trade Organization: Law, Practice and Policy*, 2nd edn. (Oxford, Oxford University Press 2006) pp. 709-711.

71. For a relatively early instance of this concern, see the 1991 Beijing Declaration of Developing Countries (INC Doc. GE. 91-704433, 24 June 1991), para. 6: '[E]nvironmental considerations should not be used as an excuse for interference in the internal affairs of the developing countries, nor should these be used to introduce any forms of conditionality in aid or development financing, or to impose trade barriers affecting the export and development efforts of the developing countries.'

continue to act as a very accurate barometer as to the *just* – as compared to the legal – nature of international trade law.[72]

4.3 The NIEO and sustainable development – a commitment to social justice

Despite the generally negative prognosis of the above section – thus suggesting that most principles are best respected in the breach than the observance – all is not forgotten. Within the ILA itself, for instance, the 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development expressly 'reaffirm[s]' the Seoul Declaration;[73] building upon its precepts of equity, solidarity and global co-operation, amongst other concepts. And for many, the NIEO is not just simply a historical antecedent to the current debate on sustainable development, but movement towards the NIEO is a prerequisite for the long-term achievement of sustainable development. Of particular relevance is the inclusion within the New Delhi Declaration of notions of intergenerational equity and, especially, intragenerational equity, the latter being defined as 'the right of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources'[74] – this corresponding very closely with many of the underlying assumptions in the Seoul Declaration. Moreover, the New Delhi Declaration – reflecting changing political times – contains matters that would *now* be considered essential to the achievement of the NIEO; not only environmental conservation[75] but also good governance,[76] public participation,[77] human rights,[78] gender empowerment,[79]

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72. See generally, M. Cardwell, C. Rodgers and M. Rosso Grossman, eds., *Agriculture and International Trade: Law, Policy and the WTO* (Wallingford, CABI Publishing 2003).

73. See *supra* n. 4, preamble.

74. Ibid., para. 2.1.

75. Ibid., para. 1.2: 'States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems.'

76. Ibid., para. 6.1: 'The principle of good governance is essential to the progressive development and codification of international law relating to sustainable development.'

77. Ibid., para. 5.1: 'Public participation is essential to sustainable development and good governance in that it is a condition for responsive, transparent and accountable governments as well a condition for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions.'

78. Ibid., para. 6.1(c): '… to respect the principle of due process in their procedures and to observe the rule of law and human rights'.

79. Ibid., para. 5.1: 'The vital role of women in sustainable development should be recognized.'

precautionary approach to human health and natural resources[80] and poverty eradication[81] to name but a few. All of these notions are, of course, legitimate in their own right as well as fully capable of being operationalised in isolation, but it is when they are understood within the broader framework of sustainable development – a principle that is now regularly finding judicial support[82] – that the inter-connected nature of these issues becomes that much more apparent.

In his review of the Seoul Declaration, VerLoren van Themaat rightly identified both these changing trends ('[a]t the time of the preparation of the Seoul Declaration nobody would have dared to contemplate binding rules of public international law on this issue')[83] as well as pointing to the significance of sustainable development, more generally: 'The new concept of sustainable development is potentially the most fundamental legal principles on the correction of the role of market forces by measures of "positive integration" on a world-wide scale.'[84] However, though the New Delhi Declaration rightly upheld the Seoul Declaration, and at a rhetorical level at least, sustainable development and the legal principles underlying the NIEO clearly both complement and mutually reinforce one another, there are nevertheless genuine questions over how they inter-relate which, in turn, go to the heart as to what vision of a global economy do the Seoul and New Delhi Declarations envisage. VerLoren van Themaat viewed sustainable development as a 'correct[ive]' of the negative aspects of the market economy, but how might this occur and what does it say about the current system?

The central focus of international efforts to promote sustainable development has largely been through international trade[85] and, more recently, foreign

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80. Ibid., para. 4.1: 'A precautionary approach is central to sustainable development in that it commits States, international organizations and the civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, including in the light of scientific uncertainty.'

81. Ibid., para. 2.4.

82. See, for instance, n. 52 and *United States: Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle I)* (WT/DS58/AB/R) (1998), para. 153: 'We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994.' Cf., *Arbitration regarding the Iron Rhine Railway (Belgium/The Netherlands)* (2005): 'There is considerable debate as to what, within the field of environment law, constitutes "rules" or "principles"; what is "soft law"; and which environment treaty law or principles have contributed to the development of customary international law … The emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations' (Award of 24 May 2005, para. 58).

83. VerLoren van Themaat, *supra* n. 3, at p. 23.

84. Ibid., at p. 21.

85. Agenda 21, para. 2.5: 'An open, equitable, secure, non-discriminatory and predictable multilateral trading system that is consistent with the goals of sustainable development and leads

direct investment.[86] As with the underlying ethos of the World Commission's 1987 report, *Our Common Future*, which initiated the current sustainable development debate, Agenda 21 does not directly challenge the primacy of the market paradigm, but sees sustainable development as working within it.[87] In fact, whether it is examining difficulties in the commodity sector, encouraging regional cooperation, promoting market access or further trade liberalisation, or strengthening aspects of international economic governance, sustainable development is seen, in many respects, as a natural corollary to simply a more effective international economy. As Agenda 21 notes, 'inspired by the need to achieve a more *efficient* and *equitable* world economy'.[88] Whether, in fact, it is either conceptually or pragmatically possible to reconcile efficiency and equity in this way is questionable; nevertheless, politically both notions are central to the intergovernmental 'bargain' over sustainable development.

Though the 2002 Johannesburg Plan of Implementation seems, on an initial reading, more circumspect than Agenda 21 as regards the ability of the international economy to deliver sustainable development and other social goods – noting in passing the 'serious challenges' that globalisation presents, and the fact that '[g]lobalization should be fully inclusive and equitable'[89] – the actual recommendations that it makes remain firmly entrenched in the *status quo ante*. This is, of course, hardly surprising; states, even developing states, are inherently conservative and have become wary of radical change.

On the other hand, many commentators have sought to challenge this belief that sustainable development is achievable through the present economic system. As Khor summarises '[a] deep understanding of the conditions, and of the stages and levels of development, required for liberalization to have positive effects on sustainable development is urgently required. Correspondingly, when those conditions are not present, liberalization should not be pursued.'[90] However, the 'official' agenda is very much premised on modifying what already exists rather than seeking to overthrow the established order.

Moreover, as the Johannesburg Plan of Implementation makes plain, globalisation is not regarded as a policy choice but rather something of an inevitability that must be worked within.[91] Though not immutable – states have themselves

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to the optimal distribution of global production in accordance with comparative advantage is of benefit to all trading partners.'

86. 2002 Johannesburg Plan of Implementation, *supra* n. 50, para. 84: '[Foreign investment should be facilitated] so as to support the sustainable development activities, including the development of infrastructure, of developing countries, and enhance the benefits that developing countries can draw from foreign direct investment.'

87. On this, see French, *supra* n. 4, at pp. 175 et seq.

88. Agenda 21, para. 2.1. Emphasis added.

89. 2002 Plan of Implementation, *supra* n. 50, para. 47.

90. Comments of M. Khor, in WTO Secretariat, ed., *Trade, Development and the Environment* (The Hague, Kluwer Law International 2000) p. 58.

91. F. Weiss and P. De Waart, 'An Introductory View', in F. Weiss, E. Denters and P. de Waart, eds., *International Economic Law with a Human Face* (The Hague, Kluwer Law Interna-

recognised that globalisation can be made 'fully inclusive' – the general direction in which the international economy is moving is unquestionable, and largely unquestioned. As the Plan of Implementation notes, the aim, rather, is to equip particularly developing states with 'policies and measures at the national and international levels … to help them to respond effectively to those challenges and opportunities'.[92] Whatever the merits of fundamental change – no one could really deny the apparent virtue in Gillespie's comment that '[i]f international trade was based on the basic norms of social justice and environmental sustainability … then it might, in certain instances, be quite beneficial to forms of sustainable development'[93] – sustainable development is ultimately constrained to operate within the confines of the pre-existing system. Nevertheless, and asserting more forcefully than perhaps Gillespie does the merits of free trade, one might suggest that though these 'basic norms of social justice and environmental sustainability' are accurately reflected in the principles of both the Seoul and New Delhi Declarations, it is only when these texts are read *conjunctively* and in an *integrated* fashion[94] do they provide a convincing and potentially effectual normative framework for change.

5. A CONCLUDING THOUGHT: THE NIEO IS DEAD! LONG LIVE THE NIEO!

The Seoul Declaration was a conscious attempt to transcend the more divisive North-South opinions, which characterised the UN General Assembly debates of the 1970s, particularly those surrounding the adoption of CERDS in 1974. However, though hard-fought, the Seoul Declaration achieved approval largely by being selective in what it included; in the final analysis, contentious text was simply replaced with less contentious text, but that does not, of course, equate with full unanimity on all issues. As section 3 noted, matters such as

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tional 1998) p. 4: 'The ongoing integration of the world economy, popularly described as "globalization", constitutes a comprehensive challenge to established principles of ordering life in economically and legally distinct territories.'

92. 2002 Plan of Implementation, *supra* n. 50, para. 47.

93. A. Gillespie, *The Illusion of Progress: Unsustainable Development in International Law and Policy* (London, Earthscan 2001) p. 96.

94. For a thorough discussion of the principle of integration within the context of sustainable development, see the second report of the ILA International Committee on International Law on Sustainable Development in ILA, *Report of the Seventy-Second Conference (Toronto, 2006)* (London, ILA 2006) pp. 467-513. Integration is, however, no utopian solution; as the report notes, 'concurrent attainment of both human development and environmental protection is often difficult to achieve fully other than at the level of rhetoric. Real life situations almost always involve trade-offs; the best that one can hope for … is to mitigate, as far as possible, the consequences. Nevertheless, for many, if sustainable development is to be different from the *status quo*, it should require us to aspire to a *macro* vision of development that attains, at all times, the highest levels possible in environmental quality and human development' (pp. 473-474).

permanent sovereignty (especially expropriation) and the right to development were amongst the issues that continued to generate debate right up to, and after, the Declaration's adoption. Since this time, the global economy has changed in some hugely significant – and unexpected – ways; such changes inevitably leading to the suggestion that this must invariably impact upon the relevance and applicability of the rules and principles related to the achievement of the NIEO. However, as recently as 2002, the ILA reaffirmed the importance of the Seoul Declaration in the preamble to its New Delhi Declaration on Sustainable Development. Thus, the question must surely be, what now for Seoul?

This article has sought to argue that whilst the global situation has changed, potentially affecting the political acceptability of some of the norms, they nevertheless remain extremely pertinent. Though the more extreme and partisan versions of the NIEO (including various aspects of CERDS) must now be considered largely of historical interest only, the underlying purposes that lie behind the *ideal* are still worth pursuing. And as an attempt to achieve a broad-span of opinion across a range of geo-political and legal jurisdictions, the 1986 Seoul Declaration must be considered a pivotal starting point. Of course, one might always suggest changes to the wording or the addition of new principles. As noted above, a revised declaration might incorporate and/or increase references to issues of good governance, human rights, sustainable development, poverty eradication, the range of international actors now involved, together with emphasis upon the current role of capital markets in the global economy and a more balanced view of both the positive aspects of economic growth and private wealth alongside recognition that these benefits are not evenly distributed. However, to the extent that most of these issues are either now reflected in the ILA's New Delhi Declaration or can be interpreted as falling within more general principles,[95] any attempt at rewording would be nothing more than a distraction.

But what of the dual nature of the Seoul Declaration; both declaratory of existing law and reflective of more progressive rules and principles? What this article has sought to show is that it is not just a case of an overly simplistic divide between what is law and what is not, but between what is accepted and thus has been implemented and what is not. This leads to two conclusions, which on first impressions would seem to be contradictory. First, attaining legal status for *de lege ferenda* and principles *in statu nascendi* does not, in itself, guarantee their acceptance and implementation. Second, legal status is not required to achieve positive outcomes, so long as there is the necessary political will. For instance, if successful, the MDGs would achieve much more than any abstract legal principle ever could. Of course, political will and legal acceptance

95. For instance, the desire to regulate capital markets so as to ensure a balanced and stable world economy could be argued as falling within the principle of global solidarity ('[i]n the legitimate exercise of their economic sovereignty, [States, whose economies have the most global impact] should seek to avoid any measure which causes substantial injury to other States' (para. 3.2).

are often the same thing; nevertheless they are distinct. And as noted above, what is required is not just that principles that are currently *de lege ferenda* be 'converted' into hard law, but as important, that there is political acceptance of – as a precursor to political movement towards – the fulfilment of legally binding rules and principles.

Some would thus suggest that achieving the NIEO is like searching for Nirvana or spiritual enlightenment, however hard the striving, reaching the end-point is never fully possible. As Koskenniemi remarks about international law generally, '[t]here is a Messianic structure to international law, the announcement of something that remains eternally postponed'.[96] There may be some truth in this, however in this context, it can also be a useful excuse on the part of developed states, in particular, to resist fundamental and structural change. A sounder argument is to consider documents such as the Seoul and the New Delhi Declarations as containing useful pointers – if not, in some instances, also measurable signposts – towards the achievement of longer-term goals, in this case arriving 'at a just balance between converging and diverging interests and in particular between the interests of developed and developing countries',[97] which must be considered foundational to the functioning not only of an equitable economic system but also, in the light of changing expectations, a sustainable international community, more generally. But being longer-term makes such objectives no less important. If anything, what the past twenty years has shown is that taking action towards establishing a new international economic order is now even more important than ever even if, concurrently, it is now likely to be more difficult to implement than it would have been back in 1986. But, as VerLoren van Themaat, noted in his ten year review of the Seoul Declaration, 'one must conclude that it is very difficult and in any case will take far more time to change the course of the powerful ship of sustained quantitative economic growth, supported as it is by free trade, towards the target of a qualitative development designed to enhance "the productivity of natural resources within the social and ecological context"'.[98]

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96. M. Koskenniemi, 'What is International Law for?', in M. Evans, ed., *International Law*, 2nd edn. (Oxford, Oxford University Press 2006) p. 78.

97. Seoul Declaration, para. 3.1.

98. VerLoren van Themaat, *supra* n. 3, at p. 23, partially quoting H.E. Daly.