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THE OIL PRODUCING NATIONS' EMERGING RIGHT TO DETERMINE OIL PRICES

DR. SAYED M. HOSNI*

I.

It is a fairly recent development in the petroleum industry that the oil producing states of the Middle East have acted together¹ to claim the right to price oil sold to the consuming industrial nations and "concessionaire"² oil companies. The first concerted action occurred in November of 1973, following the Arab-Israeli War in October of that year, only after lengthy and strenuous negotiations failed to produce an agreement on price increases. More than two years earlier, in February, 1971, six of the OPEC countries declared that they would implement through legislation or legal measures³ what they considered to be a minimum level of oil prices in the Arabian Gulf area. This declaration also followed extensive negotiations between the producing countries and the oil companies on the subject of price increases.⁴ Only after these companies showed unbending re-

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1. See Resolution XXXV. 160 of the Thirty-Fifth Meeting of the OPEC Conference, held in Vienna Sept. 15, 16, 1973; Supplement No. XLIII 54-55. In this resolution the Conference noted that in light of the projected future trends in crude oil markets, world wide inflation, etc., the present level of posted prices was not compatible with these conditions and required an "upward adjustment." The Conference then resolved to organize a Ministerial Committee to negotiate collectively the terms of the new agreements with the oil companies.

2. As one observer has pointed out, there is no agreed definition of the term "concession" in international law. For a survey of the various uses of concessions in different legal systems, see S. TORIGUIAN, LEGAL ASPECTS OF OIL CONCESSIONS IN THE MIDDLE EAST 17-41 (1972). In a general sense, the term embraces "franchise, license, patent, charter, monopoly and grant." *Id.* at 34.

3. For the full text of the February 14, 1971 Teheran Oil Tax-Price Agreement and an "appraisal" and synopsis of the terms of the Agreement, see 24 MIDDLE EAST ECON. SURVEY No. 17, at 4 (Feb. 18, 1971). See also 10 PETROLEUM INTELLIGENCE WEEKLY No. 8 (Feb. 22, 1971).

4. Actually, the negotiations started immediately after the Libyan increases were agreed to in October 1970. Subsequently the owners of IPC announced slight increases of their own posted prices of Iraqi crude. The oil producers were not satisfied with the increases implemented and, starting with Iran, forced the oil companies to enter into negotiations immediately.

sistence to the demanded increases was unilateral action declared by the producing countries.⁵

This turbulent period represents a significant phase in the struggle of producing countries to attain the right to determine the price of their oil. It is characterized by the assertion of the right by the oil producing countries to *share* in the decision making process, while simultaneously wielding every possible bargaining point to have preferred price levels accepted by the oil companies. Saudi Oil Minister Ahmed Zaki Yamani has described this period as one where the oil companies recognized that they had to share the power of price determination with the producing countries.⁶

The struggle to gain control over pricing has met with some success. In 1970, Libya sought to increase posted oil prices and tax rates by wielding its power in negotiations. Occidental Oil Company, a small independent, finally agreed to the higher levels. The remaining concessionaire companies eventually followed suit — the majors being the last — again under threatened cuts and suspension of production.⁷

Whether through outright unilateral action or through pressured negotiating tactics, the producing countries convincingly

5. The Twenty-Second Conference (Extraordinary) held in Teheran Feb. 3, 4, 1971 (See Supplement XXXI) resolved that

In the event that any oil company concerned fails to comply with these legal and/or legislative measures within seven days from the date of their adoption in all countries concerned, Member Countries, Abu Dhabi, Iran, Iraq, Kuwait, Libya, Qatar, Saudi Arabia and Venezuela, shall take appropriate measures including total embargo on the shipment of crude oil and petroleum products by such company.

6. The process by which the oil companies ceded much of their power to the producer countries accelerated during the 1960s and 1970s. It was after the Teheran Agreement that the oil companies recognized that the governments of the producing nations demanded an active role in setting prices. See Yamani, *The Oil Industry in Transition*, 3 NAT. RES. LAW. 396 (1975).

7. The independent oil companies, among them Occidental, were much more economically vulnerable to governmental pressures. Occidental derived close to one-third of its earnings from the Libyan venture and, unlike the major oil companies, it could not fall back on alternative sources of supply. Occidental could not, as Mr. Mikdashi points out, endure a drastic cut in oil production without suffering heavy losses. The Libyan leadership took a series of "conservative measures" in June and August of 1970 which cut back Occidental's production levels by 45%. A settlement was reached quickly; its terms were announced in September 1970, and the company was allowed to resume normal production levels. For an expanded account of these negotiations, see Z. MIKDASHI, *THE COMMUNITY OF OIL EXPORTING COUNTRIES* (1972).

proved that the concessionaire oil companies no longer have the exclusive right to determine oil prices. It was no surprise in 1973, following the Arab oil embargo, that the producing countries did not wait for a final answer to their demands for revised price levels. Secure in their negotiating position, they felt free to announce unilaterally the increases they saw fit. Describing this final shift in power, Minister Yamani wrote:

By 1973, when the Teheran Agreement became meaningless by reason of developments, the power to determine prices was vested solely in the hands of the producers.⁸

This fact was also recognized by Mr. F. Houari Boumediene, President of the Revolutionary Council and the Council of Ministers of the Peoples Democratic Republic of Algeria, in his address to the United Nations General Assembly:

[F]or the first time in history developing countries have been able to take the liberty of fixing the prices of their raw materials themselves.⁹

It is clear that the OPEC countries now understand this power to be an attribute of their sovereign right of ownership. This was forcibly enunciated in the Solemn Declaration Concerning the International Economic Crisis of the OPEC Summit Conference in March 1975. The text of the relevant portion of the declaration is worth quoting:

The sovereigns and heads of state reaffirm the solidarity which unites their countries in safeguarding the legitimate rights and interests of their peoples, reasserting the sovereign and inalienable right of their countries to the ownership, exploitation and *pricing* of their natural resources and rejecting any idea or attempt that challenges those fundamental rights and, thereby, the sovereignty of their countries (emphasis added).¹⁰

This same position is held by Mr. Boumediene, although his reasoning differs somewhat. Enumerating guidelines for accel-

8. Yamani, *supra* note 6, at 396.

9. 6 U.N. GAOR 2208 (1974).

10. *Solemn Declaration of the Sovereigns and Heads of State of the Organization of Petroleum Exporting Countries*, 14 INT'L LEGAL MATS. 566, 567 (1975).

erated growth and development, he emphasized the principle that:

... [t]he developing countries must take over their natural resources, which implies, essentially, nationalizing the exploitation of these resources and controlling the *machinery governing the determination of their prices*. (emphasis added)¹¹

The right to determine oil prices in Boumediene's view is an indispensable extension of the right of nationalization:

Thus we see that *the power to fix prices* and the control of the related mechanisms are corollaries to the goal of recovering natural resources and are, therefore, indispensable extensions of naturalization. (emphasis added)¹²

The right of nationalization itself, stated Mr. Boumediene, is a consequence of the right of permanent sovereignty over natural resources:

In accordance with the principle of permanent sovereignty of peoples over their natural resources, the United Nations has formally and solemnly recognized and proclaimed the right of Nationalization.¹³

Under this analysis, then, the right of a producing country to determine the price of its oil, itself, a direct derivation of the intervening right of nationalization, rests ultimately on the proclaimed right of permanent sovereignty over natural resources.

II.

The radical nature of this shift in power is better appreciated when contrasted with the history of the traditional concession arrangement. This arrangement totally excluded the producing host countries from any form of participation.

Beginning with the introduction of the concession system to the Middle East in 1901,¹⁴ the concessionaire companies acted

11. 6 U.N. GAOR *supra* note 9, at para. 84.

12. *Id.* at 7 para. 96.

13. *Id.* at 6 para. 93.

14. The oil concession to W.K. D'Arcy in 1901 "was the first effective concession that resulted in the discovery and production of oil in the region." H. CATTAN,

on the assumption that they alone held all rights under their concessions to determine the price of the oil they extracted. The concession was the legal basis of all rights in the oil; it was a grant of the exclusive right to search for, obtain, exploit, develop, render suitable for trade, carry away, export and sell petroleum and other materials. The terms just enumerated were common in the traditional concession system and were contained in virtually every agreement concluded with a Middle Eastern host country.¹⁵ The grant made by such terms was interpreted to mean that the host government had alienated the legal rights of possession and ownership in the mineral itself.¹⁶ It has even been speculated that the concession passed ownership in the oil before it was extracted.¹⁷

This one-sided arrangement prevailed and was operative until 1960, when the oil producers joined together in response to the companies' unilateral price cuts and formed the OPEC alliance.¹⁸

THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA 1 (1967).

15. *See id.* at 2. The grants usually included, at least implicitly, extensive territorial control. Rare was the explicit provision limiting the territorial boundaries within which the companies should operate. The duration of the early concessions was similarly extensive. The Iranian concession to the Anglo-Iranian Oil Co. was typical; it was agreed to continue through 1993. M. MUGHRABY, *PERMANENT SOVEREIGNTY OVER OIL RESOURCES: A STUDY OF MIDDLE EAST OIL CONCESSIONS AND LEGAL CHANGE* 49-50 (1966).

16. H. CATTAN, *THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* 21 (1967). An express provision substantiating this interpretation was incorporated in some agreements, but exceptions to it have been noted.

17. At least one agreement was quoted to support the idea that it did. Article 23 of the Iranian Offshore Agreement of 1965 expressly stated that the petroleum produced is owned by the parties at the well head. *See* CATTAN, *supra* note 14, at 21 n.5.

18. The oil price cuts in 1959 and 1960 were the moving force behind the creation of the OPEC alliance.

The August 1960 posted price cuts implied an imputed 'loss of tax proceeds' to Middle East host governments of 4 cents a barrel assuming an inelastic demand; this 'loss' was imputed at some \$300 million for exports over the period of August 1960 to the end of 1963. Following this price reduction, representatives from the governments of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela conferred in an atmosphere of crisis in Bagdad from 10 to 14 September 1960.

MIKDASHI, *supra* note 7, at 33. At this meeting, the decision to form OPEC was made.

It is a well-accepted fact that the concessionaire companies considered the power to determine oil prices a mere administrative prerogative incidental to their power to manage the concession.¹⁹ As late as the 1962-64 negotiations, a major oil company argued that while it had the administrative power to raise posted prices to their pre-August 1960 level, it would be reluctant to do so.²⁰

There is support for this view of the oil companies' power over pricing even among authors who are not typically proponents of the oil companies' point of view. Mr. S. Toriguian, a Lebanese jurist, has written that in the Middle Eastern concession system actual ownership of the oil passes to the concessionaire companies.²¹ He cites, as examples, provisions from the Petroleum Law of Iran, enacted as recently as 1957.

Another writer, Henry Cattán, has maintained that "[i]n effect, an oil concession entails the alienation, present or eventual, of the right of possession and ownership of a State-owned mineral."²² There is, he notes, but one exception to this pattern:

The NIOC-ERAP Agreement of August 27, 1966 constitutes the only exception in this regard. It does not confer upon the partner in the joint venture any right of ownership of a part of the oil which is discovered and produced, but gives

19. See Jersey, *Middle East Oil Revenues in Relation to the Price of Imported Goods*, Sept. 16, 1969, at 8 (unpublished, as cited in MIKDASHI, *supra* note 7 at 146). MIKDASHI, *supra* note 7, at 145-46.

20. The company's reluctance to raise prices was based on the existing market conditions of excess availability of supplies and stiff price competition. It feared that the added costs of increasing the price of crude would not be recovered through resulting higher prices to the consumer because of these market conditions. See MIKDASHI, *supra* note 7, at 145-6.

21. See TORIGUIAN, *supra* note 2, at 49. Art. 11, I of the Iranian Petroleum Law of 1957 provides:

. . . Petroleum produced by an operator from wells within an area held by it, upon production at the well head, shall become the property of the operator. He also cites a Western Hemisphere example which is atypical of Middle Eastern concessions. Article 3 of the Venezuelan Law of Hydrocarbons of 1955 provides: "Exploration — exploitation concessions and those of exploitation do not confer ownership of the deposits, but only constitute a real right to explore the area granted and to exploit, for a definite period, the deposits that may be found therein, in accordance, with this law and the title to the concession.

Official Gazette No. 471, Oct. 13, 1955.

22. CATTAN, *supra* note 16, at 21.

him only the right *to purchase* from NIOC a portion of the oil produces. (emphasis added)²³

This agreement was the forerunner of the more modern concept of joint venture²⁴ which producing countries later attempted to institute to gain control over their basic natural resources. Their concept was a half-step toward participation, placing limits on the rights acquired by the concessionaire companies. This was a distinct departure from the earlier, traditional concession arrangements.

According to the modern concept the concessionaire company was limited to a grant of the right "*to purchase*" a portion of the oil produced. Clearly, the determination of price was not to be included among the prerogatives granted. On this specific point the modern concession arrangement, as cited in the 1966 agreement above, displayed a distinct and radical departure from the economic tradition dating back to the beginning of the century.

III.

As instrumental as the interpretations of the oil contracts are the systems and principles of law which give them life. The question of what legal principles should govern oil contracts was one of the major issues facing the newly formed OPEC and the lack of a satisfactory answer was the irritant source of problems in several bilateral concession agreements by member states.²⁵ OPEC nations have never reached a consensus on these questions of legality, despite the claims of several individual members. Although a full exposition of the various theories on this subject is beyond the scope of this paper, several matters are particularly relevant to the question of who has the power to set oil prices.

It has been observed that "[e]ven in the same country it can happen that different oil concessions are governed by dif-

23. *Id.*, n.5.

24. The joint venture model developed as a means for reconciling the aspirations of the producing countries for greater control and revenue with corporate investment requirements. The formulation of the theory expressed the desire of the participating governments to limit the authority of the concessionaires and to have a more direct influence on the development of their prime economic resource. See MUGHRABY, *supra* note 15, at 55-56.

25. See *From Concessions to Contracts*, paper presented at Fifth Arab Petroleum Congress, Cairo, Mar. 1965, cited in CATTAN, *supra* note 16.

ferent laws and legal principles.”²⁶ It has often been said that the legal systems of the Middle East countries, during the times of the traditional oil concessions, were underdeveloped, even embryonic.²⁷ Nevertheless, pinpointing the nature of the rights granted by a *traditional* concession as interpreted under Islamic law aids in the analysis of modern agreements.

According to their own provisions, the traditional concession agreements were to be interpreted in light of general principles of law, principles of law common to the two countries, or, as one concession stipulated, according to the judicial principles contained in Article 38 of the Statute of the Permanent Court of International Justice.²⁸ It is not clear exactly what was intended by these clauses, but since the great majority of the Middle Eastern countries follow the Islamic law generally, problems of resorting to Islamic law for interpretation of concession agreements naturally arose. It is particularly instructive to examine the treatment given the application of Islamic law to oil contracts in arbitrations involving one or more of the Islamic states. The arbitrators generally concluded that Islamic law affords very little guidance on the principles of law applicable to the concession agreements and particularly little on the specific nature of rights granted therein.

Sir Alfred Bucknill, the referee in the dispute between the Ruler of Qatar and the International Marine Oil Company, wrote in the award he rendered on June 23, 1953:

[I]n my opinion, after hearing the evidence of the two experts in Islamic law, Mr. Anderson and Professor Milliot, ‘there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments.’²⁹

26. The issue of applicable law presents some complex legal problems. There is extensive disagreement over whether the domestic law of the contracting state prevails over international law, and over the relative merits of contract law and administrative law. For further discussion see CATTAN, *supra* note 16, at 31-32.

27. Islamic law lacked any precedent for contractual relations between non-private parties. There were similar deficiencies in the Islamic law of taxation. Thus, sophisticated economic agreements were made in a virtual legal vacuum. See MUGHRABY, *supra* note 15, at 48.

28. This was a requirement in the Anglo-Iranian Oil Co. concession of 1933 (Art. 22). See CATTAN, *supra* note 16, at 62.

29. Ruler of Qatar v. Int'l Marine Oil Co., 20 I.L.R. 634, 544 (Sir Alfred Bucknill, Referee); June 1953.

Also referring to Professor Milliot's opinion on Islamic law, the referee said further:

According to Professor Milliot, the Principal Agreement was full of irregularities from end to end, according to Islamic law, as applied to Qatar. This is a cogent reason for saying that such law does not contain a body of legal principles applicable to a modern commercial contract.³⁰

The same conclusion was reached by the arbitrator in the dispute between the Shiekh of Abu Dhabi and the Petroleum Development Company in 1951.³¹ In the arbitration between the Government of Saudi Arabia and Aramco, the arbitration tribunal observed that "the regime of mining concessions, and, consequently, also of oil concessions, has remained embryonic in Moslem law. . . ."³²

In addition to the arbitrators, it is the opinion of several legal scholars that Islamic Law provides little guidance concerning rights and duties of parties to concession agreements. Two Lebanese jurists, H. Cattán and S. Toriguian, devoted valuable chapters to the study of the provisions of Islamic law and their relation to oil concessions.³³ Both authors came to the conclusion that no comprehensive set of rules exists in Islamic law to handle the more complicated aspects of the modern concessionary system. Mr. Toriguian, not satisfied with these observations, called for further studies of the applicability of certain provisions of Islamic law to oil concessions.³⁴

30. *Id.* at 545.

31. Petroleum Development, Ltd. v. Sheikh of Abu Dhabi, 18 I.L.R. 144, 149 (Lord Asquith of Bishopstone, Umpire); Sept. 1951, 1 I.C.L.Q. 247, 250 (1952).

32. Saudi Arabia v. Arabian American Oil Co. (Aramco); Arbitration Tribunal of Aug. 23, 1958; Award of the Arbitration Tribunal, 27 I.L.R. 117, 163.

33. TORIGUIAN, *supra* note 2, ch. IV., and CATTAN, *supra* note 16, at ch. III.

34. Mr. Toriguian stresses the importance of a thorough knowledge and study of Islamic law for several reasons. It is essential in view of the religious hold it has on the peoples of the Middle East, and it is helpful in the smooth running of the "multifarious activities" that accompany an oil concession. Finally it is important to have a working knowledge of Islamic law "since it is maintained that the 'proper law' of concessionary agreements should be the principles of law common to the systems of the law of the parties, on equitable grounds and on the ground that more and more agreements are making express provisions in the text itself to this effect." TORIGUIAN, *supra* note 2, at 110-11.

The learned modern Islamic jurist, Sheikh Mohamed Abu Zahara, has noted that the concept of a concession is legally supported by the Islamic legal institution of "iqt'a."³⁵ There is some confusion, however, in describing the nature of the legal right conferred by such an institution, whether it be the right to take *possession* of the mineral or the right to own it. The learned Sheikh said:

In such an "iqt'a" the leader of the Moslem community (Imam) grants *permission* to one or more persons to explore a specified area and take out whatever minerals he may discover.³⁶

There is nothing in this explanation of "iqt'a" to suggest that the grant confers absolute ownership to the concessionaire company, and certainly no reservation of the right to determine price. In fact, the discussion of the legal principles involved is quite confused on the precise nature of the right established by a mineral discovery in a concession area. At one point in Sheikh Abu Zahara's opinion, he allows that "the concessionaire has the best claim to it." In another, it is "his property," and in a third, "the concessionaire has the right to continue to take the mineral and no other person to compete with him for it."³⁷ He cites as his authority the celebrated Islamic source, Tashih al-Furu — a source quoted often by the commentators.³⁸ It is the opinion of this author that this text leaves much to be said on the question whether rights accruing as a result of discovery are rights of ownership or rights of priority to purchase the oil. Indeed, the question of who has the power to determine the price of the mineral discovered is not examined by any of the sources

35. Arbitration between Aramco and the Government of Saudi Arabia, Transcript of Arbitration Proceedings, Vol. II, p. 761. (unpublished). See quoted portions discussed in CATTAN, *supra* note 16, at 55-58. See also TORIGUIAN, *supra* note 2, at 100. Mr. Toriguian explains that "Iqt'a" is a verbal noun of the verb Qata's meaning to cut: "A concession was named an Iqt'a because by conferring an exclusive right upon an individual concerning a certain plot of land, the Moslem community was cut off from the benefits of the land in question."

36. See CATTAN, *supra* note 16, at 57.

37. *Id.* at 57-58.

38. *Id.*

mentioned. If there is any conclusion to be gleaned from the work of arbitrators and scholars, it is that Islamic law fails to lend unequivocal support to the notion that actual ownership of oil extracted under contract passes to the concessionaire company. For these reasons it is easy to agree with the idea advanced above that further studies on this matter are needed without sympathizing with the claim that Islamic law remained "embryonic" or too underdeveloped to cope with this problem.

For modern purposes, the analysis of pertinent Islamic law must take into account some very significant developments in the international petroleum industry and international law. The problem of what Islamic law principles, if any, are applicable to the oil concessions in the Middle East has lost its importance as a result of changes in the constitutional and legal systems of those countries.

The problem which results from the dearth of legal rules or even the divergence of principles between Islamic schools with regard to mines and minerals has now been largely solved in practice in the Arab countries either by constitutional provisions or mineral and petroleum laws and, in their absence, by custom.³⁹

Another development important to the modern analysis of oil pricing is the fact that most of the producing countries have become owners of controlling interests in the equity of the oil companies operating in the Middle East, and have also established effective control over their management of the concessionaire companies. Indeed, most of these companies are soon to be owned outright through the system of participation so persistently expounded by Minister Lamani.⁴⁰ It has been observed that with this change in controlling interest, the question of applicable law, and particularly the legal relationship between

39. See CATTAN, *supra* note 16, at 58.

40. By means of the so-called participation principle, the governments of the producer countries have gradually increased their equity interests in the concession companies. The companies acquiesced to these evolutionary takeovers when the producers unilaterally initiated the Participation Agreements. Yamani, *supra* note 6, at 394. Recent developments in these takeover agreements have brought negotiations to the brink of total ownership. For a report on recent developments, see *The Wall Street Journal*, Mar. 8, 1976, at 5, col. 2.

the State and the oil company, becomes a matter of purely academic interest.⁴¹

The third, and in this writer's opinion, dominant consideration in the analysis of Middle East oil rights is the new developments in the international law applicable to natural resources in general. International legal principles in this domain are being slowly but effectively developed through the various instruments of the United Nations. This growing body of law will no doubt apply to the producing states' activities in disposing of their natural resources. Applicability will be achieved through the implementation of provisions in local petroleum codes, or through bilateral concession agreements providing for reliance on principles of law universally recognized or common to the two legal systems. These new legal principles will temper the relationship of the producing countries to the consuming world, with regard both to the exercise of permanent sovereignty over natural resources and to the determination of oil prices.⁴²

It is abundantly clear that this body of law is not only new and evolving, but also that it falls outside the traditional reach of international law.⁴³ In a thorough and comprehensive study of the laws regulating economic activity within the international system, three noted authorities observed that:

. . . there is no customary international law imposing duties and creating correlative rights⁴⁴

41. TORIGUIAN, *supra* note 2, in postscript, 290b.

42. It should be noted, however, that these questions are no longer the concern solely of the oil companies. As a result of the shift in price determination, the interests of the industrialized consuming countries have been brought directly into the struggle. They are expressing these interests by increasingly acting *through* their oil companies. Consequently, the issue of oil pricing has become one of terms of trade and balance of payments between the producing countries and the consuming countries. See MIKHASHI, *supra* note 7, at 151.

43. As a body of international law, these principles are still being developed and for this reason there is considerable controversy as to their binding force. This paper does not attempt to resolve this controversy. It does refer to this body of law as a set of general principles common to the legal systems of some, if not most, of the countries involved in the question of oil price determination. Further, the determination of oil prices has entered the realm of international economic relations — the very subject of this evolving body of international law. No longer is pricing a matter solely between the producing countries and the concessionaire companies, particularly in light of the fact that the latter have lost their legal basis for asserting ownership of the oil extracted.

44. CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 1035 (Leech, Oliver and Sweeney eds. 1973).

This unfortunate conclusion tends to support the claims of some countries that since oil is now their undisputed property they have the right and free rein to do with it what they want. If the sovereignty of all nations were to be interpreted in such an absolute manner, the world community would quickly be reduced to economically isolated and selfish units pursuing national interests. Resulting conflicts could only be resolved through force.

The reality of the situation is that countries, while sovereign, are inescapably interdependent. None can claim complete self-sufficiency or even the potentiality for it. Again, even though the principles of law governing international responsibility of states are not the subject of agreement and have not been codified, it is clear that tremendous damage can be inflicted by certain economic measures, such as price increases, embargoes and the like, resulting, in Secretary Kissinger's words, in an effective "economic strangulation." Even in asserting their right to adjust oil prices after failing to obtain satisfactory increases during negotiation, the producing countries recognized the reality of interdependence:

[T]he interdependence of nations, as apparent in the world economic situation, calls for a greater attention to be paid to international cooperation and [they] declared themselves ready to contribute, by their efforts, to the objectives of economic development and stability in the world, in accordance with the declaration and programme of action for the establishment of a new international economic order . . . adopted by the General Assembly of the U.S. during its sixth extraordinary session.⁴⁵

In further recognition of the principle of economic interdependence, OPEC has subscribed to the principle that no one country should be allowed to inflict economic damage or undermine the economy of another country through the use of any economic measures.⁴⁶ It has rejected "any allegation attributing to the price of oil the responsibility for the present instability of the world economy"⁴⁷ and condemned attempts to attribute to OPEC "the intention of undermining the economies of the

45. See Solemn Declaration of OPEC, 14 INT'L LEGAL MATS. 566, 567 (1975).

46. *Id.* at 568.

47. *Id.*

developed countries.”⁴⁸ Finally, OPEC has declared that it is “prepared to negotiate the conditions for the stabilization of oil prices which will enable the consuming countries to make necessary adjustments to their economies.”⁴⁹

The foregoing quotations from the Solemn Declaration of OPEC leave no doubt that the member countries subscribe to the notion that the determination of oil prices is not their exclusive prerogative, nor is their power to legislate absolute. Rather, they recognize that the stability of the world economy is of equal concern — to the developed countries for the possible effect on their industrial economies, and to the producing countries for their continuing growth. Consequently, oil pricing has developed into a subject of negotiation and international cooperation based on the undisputed principle of modern coexistence: interdependence.

These principles have been accepted by a majority of states in the world community. Numerous instruments passed by the U.N. General Assembly by overwhelming majorities, when carefully analyzed, demonstrate widespread acceptance.

For example, the International Development Strategy for the Second Development Decade stated that “economic and social progress is the common and shared responsibility of the entire international community,”⁵⁰ and proclaimed that:

every country has the right and duty to develop its human and natural resources, but the full benefit of its efforts can be realized only with concomitant and effective international action.⁵¹

The same principle was prefaced by the stipulation, on the specific issue of the power to determine prices, that efforts will be made to reach *agreement* . . . on a set of general principles on pricing policy to serve as guidelines for consultations and actions on the individual commodities.⁵² (emphasis added) The fundamental direction of the Development Strategy was said to be “aimed primarily at strengthening the sense of interdependence and partnership implicit in the Concept of the Decade.”⁵³

48. *Id.* at 569.

49. *Id.* at 572.

50. G.A. Res. 2626, 25 U.N. GAOR Supp. 28, at 39, U.N. Doc. A/8124 (1970).

51. *Id.*

52. *Id.*

53. *Id.*

The conclusions reached in the foregoing document are strongly supported by the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States.⁵⁴ This declaration purports to spell out basic principles of international law which merely clarify and apply the broader principles of the U.N. Charter.⁵⁵ Describing the duty of states to cooperate with one another in accordance with the Charter, it provides that:

States have the duty to cooperate with each other, irrespective of their political, economic and social systems, in the *various spheres* of international relations, in order to maintain international peace and security and to *promote international economic stability* and progress, the general welfare of nations and international cooperation free from discrimination based on such differences. (emphasis added)⁵⁶

The Charter of Economic Rights and Duties of States,⁵⁷ adopted by the Twenty-ninth Session of the United Nations General Assembly, is even more specific about the responsibility of interdependence. It is repeatedly stressed in the Preamble that the general aims of the charter are international cooperation, finding solutions to international problems, particularly in the economic sphere, and urging that the new economic order be based, *inter alia*, on the close interrelationship of the interests of all states.⁵⁸ After specifying the duty to cooperate in the conduct of international economic relations,⁵⁹ the charter asserts that all states are juridically equal and that each therefore has the right to participate in decision-making processes geared to the solution of world economic, financial and monetary problems.⁶⁰ The effect of this provision is to limit the exclusive power of any one state to set commodity prices which would have such an impact on the world economy as to cause a monetary problem or a shortage crisis.

The Charter of Economic Rights and Duties specifically imposes on every state, in addition to the duty of cooperation,

54. G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8082 (1970).

55. *Id.* at 123.

56. *Id.*

57. G.A. Res. 3281, 29 U.N. GAOR Supp. 31, at 50, U.N. Doc. A/9631 (1974).

58. *Id.*, Preamble

59. *Id.*, Articles 8 and 9.

60. *Id.*, Article 10.

the duty to contribute to the development of international trade. One of the means it recommends is the creation of long-term multilateral commodity agreements in which the interests of the producers are taken into consideration. In such negotiations, all states have the responsibility to see to it that the natural flow of trade is promoted, that the parties are reasonable and conscious of the interests of the two sides involved, and that equitable and remunerative prices are agreed upon.⁶¹

The Charter is replete with appeals for consultation and negotiation between the parties concerned before a final price is determined on any commodity.⁶² It makes clear that the oil producing countries cannot remain indifferent to world concern in the determination of oil prices. However, interdependence, a reality firmly set in the present world economic order, deserves a larger role than that assigned to it in the Preamble to the Charter. It would be placed more appropriately with the fifteen principles enumerated in the first chapter, entitled "Fundamentals of International Economic Relations."⁶³ Since this list of principles was not intended as an exhaustive treatment of the fundamentals of international economic relations, interdependence should be added to take a dominant position among them.

All of the foregoing declarations refer to the need to cooperate, to take into consideration the interests of the world community in general, and, by implication, to give special consideration to the possibly harmful effects of independent economic action. In the matter of oil price determination, these principles mandate consultation and negotiation. Once mechanisms for consultation and negotiation are instituted, either bilaterally or multilaterally, the final determination of price would be left to the country or countries which own the oil. This latter step is a logical one in a world composed of independent, sovereign states.

It should be noted, however, that the action of the oil producing states in November of 1973 cannot be considered the type of action to which these principles apply. In the first place, that action was not a "determination *de novo*" of the price. Rather, it was an adjustment of inequitable prices which had long prevailed through the sheer monopolistic power of the concessionaire

61. *Id.*, Article 6.

62. *Id.*, Preamble, para. 4.

63. *Id.*, Chapter 1.

oil companies. The increases sought, as well as those sought by the Teheran Agreement of 1971, were meant, as Minister Yamani wrote:

to redress the economic inequity that was inherent in the original concession and subsequent related agreements.⁶⁴

The oil companies themselves, in their concerted offer to OPEC representatives on January 16, 1971, during the Teheran Negotiations qualified those increases as a *revision* of the posted prices.⁶⁵ Second, those increases were introduced only after lengthy and painful negotiations. Indeed, the two increases which preceded the unilateral act of price determination in November 1973, were, despite the pressure and threats, agreed to by the oil companies.⁶⁶

In addition, the unilateral price determination was made within the context of the producing countries' relations with the concessionaire oil companies. The consuming nations, not involved in the negotiations, acted on the premise that oil pricing was a private activity to be handled by the producing countries and the concessionaire companies, making gestures of mediation or support only when the need arose. Only when negotiations for those increases were stalled in Teheran did the consuming nations become so concerned with the prices that they actually met in Paris in January, 1971.⁶⁷ At that time, President Nixon sent a high-level government emissary to Saudi Arabia, Iran and Kuwait with the object of urging those countries — presumed to be friendly to the United States — to adopt a reasonable attitude that might produce reasonable oil prices.⁶⁸ A member of the U.S. Senate, commenting on the visits of those emissaries to the three oil producing countries, said that the U.S. Government was "working hand and glove with officers of the big international oil companies to force OPEC to sell their single resource

64. The producer countries sought to enlarge their share of the profits of the oil production enterprise inasmuch as this was thought to be fair and equitable given the historical context in which the concessions were made. Yamani, *supra* note 6, at 394.

65. See *Text of Oil Companies' Message to OPEC States*, 10 PETROLEUM INTELLIGENCE WEEKLY, No. 4. Jan. 25, 1971, at 6.

66. *Id.*

67. See *OPEC Faced with Collective Bargaining and Nixon Moves to Aid Foreign Oil Talks*, 69 OIL AND GAS JOURNAL, Jan. 25, 1971, at 82-85.

68. See *Is Cartel Next for Oilmen?* BUSINESS WEEK, 23 January 1971, 70-71.

for bargain basement prices.”⁶⁹ The attitude of the U.S. Government demonstrates the failure of the consuming countries to perceive their right to have a say in the determination of oil prices. Since this is a right called for and protected by principles of international law, it belongs to States alone and not to private parties.

It is unfortunate that, perhaps as a result of the failure of the consuming countries to recognize their rights, at the time the oil producing countries took action there was no international forum set up to deal with problems of oil pricing. It was only as a result of those price increases and the world outcry against them that the consuming nations rallied in Washington and formed the International Energy Agency.⁷⁰ Similarly, a dialogue between the producing and consuming countries was not begun until an exchange of recriminations left the parties at an impasse.⁷¹ Even then negotiations went slowly and remained outside the framework of any U.N. mediation. In the future one hopes that a permanent forum for dealing with the exercise of these rights to negotiate oil prices can be instituted *within* the framework of the United Nations. The sovereign rights of producing states and the vital interests of the industrial consuming nations must be provided a legal-diplomatic forum of regulation in the interests of world economic stability. The rights of all sides are dictated by the principles of global coexistence and should be afforded the protection of international law in an international forum.⁷²

69. As reported in 69 OIL AND GAS JOURNAL, 15 Jan. 1971, at 35, Senator Henry Bellmon (R-Okla.) said “. . . our Government should help OPEC to sell oil ‘at good prices,’” and further that “. . . ‘the U.S. should ‘help, not harm these nations’ efforts to help themselves.’”

70. See, *Communique of Washington Energy Conference, Feb. 13, 1974*, 13 INT’L LEGAL MATS. 462 (1974).

71. The Sixth and Seventh Special Sessions of the General Assembly reflect these recriminations. See, for example, Address by Mr. William R. Tolbert, President of the Republic of Liberia to the Sixth Special Session of the General Assembly, 2209th Plenary Meeting, U.N. Doc. A/PV 2209.

72. As one expert expressed it: “What is required is an entirely new legal-diplomatic effort, of the same magnitude as the on-going law of the Sea Conference. The importance of *pricing* to the world’s economic stability is evident from the state of Italy’s economy as well as that of numerous other nations, both industrialized and non-industrialized.” Muir, *The Changing Legal Framework of International Energy Management*, 9 INT’L LAW. 613 (1975).