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International Law's Response To The New International Economic Order: An Overview*

by John King Gamble, Jr.**
and Maria Frankowska***

I. INTRODUCTION

The New International Economic Order [hereinafter the NIEO] has received a substantial amount of scholarly attention especially in the last decade. Important features of the NIEO, such as the way it can bear on almost any aspect of international law or international relations, are indistinct. One must exercise extreme care lest discussions and analyses be imprecisely focused and completely open-ended. A principal way the article attempts to overcome this tendency is to concentrate on the *international legal* aspects of the NIEO.¹ Due regard is given to the views of Western states, Socialist states, and the Less Developed Countries (LDCs). The NIEO as a developing global regime² can be created only with the consent of these three major groups of actors on the international scene.

A. *Are There Historical Antecedents of the NIEO?*

Only since 1970 has the NIEO come to the fore in international law and relations. Nevertheless, it is important to the understanding of the NIEO to ask about its historical roots. But caution must be exercised. It is common for the literature to attribute NIEO significance to classical (pre-World War II) actions when often it is problematical whether such intent existed. One must remain cognizant of the fact that only very recently have the LDCs enjoyed the political power necessary to press their case for an NIEO. After all, most LDCs did not

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¹ K. HOSSAIN, LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER (1980); LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES (N. HOHN, ed. 1980).

² For an intriguing discussion of regimes, see Young, *International Regimes: Problems of Concept Formation*, 32 WORLD POLITICS 331 (1980); 36 INT'L ORG. (1982) (entire issue devoted to *International Regimes*).

exist as independent states until after 1950. Ellis in his recent study *begins* his discussion of the NIEO's history with the end of World War II.³

In this discussion, only the inter-war period will be dealt with, since there was little NIEO activity before 1914 and the post-1945 period is better known and dealt with elsewhere in this piece. Meagher⁴ provides an excellent treatment of the history of the NIEO. Although the League of Nations Covenant makes few specific references to economic matters,⁵ a number of the agencies set up under the auspices of the League had important (and unexpected) economic implications.⁶ While it is true that the creation and development of the International Labour Organisation (ILO) are significant achievements in international economic cooperation, most of the work of the ILO does not bear *directly* on the NIEO.

During the inter-war period, the World Economic Conference, held in May, 1927, was the impetus behind important changes in the international economic system:

The effect of the Conference recommendations on members' policy was twofold. First, a number of bilateral treaties committing the signatories [sic] to the reduction of tariff barriers were concluded. Second, a Conference on Import and Export Prohibitions, specifically concerned with the elimination of trade barriers, was held in October 1927. Unlike the earlier Conference in May, this was an official meeting aimed at the drafting of a formal treaty. By July 1928, 29 states had signed the Convention for the Abolition of Import and Export Prohibitions, obliging them to abolish existing prohibitions and restrictions on exports and imports and to refrain from imposing new ones. However, the Convention failed to receive a sufficient number of signatories for ratification.⁷

This points out a very important feature of most of these precursors of the NIEO, to wit, most are primarily attempts to develop the original or "old" international economic order to which the NIEO is a reaction. One must have an order before having a new order, but it may be unrealistic to look for *direct* antecedents to the NIEO. The NIEO, after all, could not gain momentum until the basic issue of special treatment for the LDCs was ripe politically. This did not occur until about 1970.

³ Ellis, *The New International Economic Order And General Assembly Resolutions: The Debate Over The Legal Effects Of General Assembly Resolutions Revisited*, 15 CAL. W. INT'L L.J. 651 (1985).

⁴ R. MEAGHER, *AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER — A STUDY OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES* (1979).

⁵ *Id.* at 9.

⁶ *Id.*

⁷ *Id.* at 11.

The United Nations Conference on Trade and Development (UNCTAD) of 1964 was the most significant event preceding the adoption of the NIEO "constitutional" documents of 1974. This Conference, which saw the emergence of the Group of 77, established UNCTAD as a permanent body directly responsible to the U.N. General Assembly and entrusted with promoting the economic interests of the LDCs. The establishment of UNCTAD urged by the LDCs, was opposed by the developed Western states, but supported by the Socialist bloc.⁸ The Final Act of UNCTAD I contained 15 General Principles and 13 Special Principles relating to economic cooperation and was supported by the Socialist states. Failure to focus the LDCs' demands for economic assistance solely on the West, however, resulted in the abstention of the Socialist states on many of the resolutions included therein.⁹

B. *Towards a Definition of the NIEO*

The current status of the NIEO can be better understood by examining the goals of the NIEO. Most scholars would agree with Kreinin and Finger who discern four main objectives: (1) increasing LDCs' control over their economic destiny; (2) accelerating the LDCs' growth rate; (3) tripling the share of global industrial production conducted in the LDC by the year 2000; and (4) narrowing the gap in *per capita* income between the developed and developing countries.¹⁰

Socialist doctrine on the NIEO provides a different set of goals emphasizing the political rather than the economic aspects. The Soviet scholar, B.S. Fomin, states that "[T]he NIEO movement reflects a new state in the world process of national liberation, characterized by the completion of the struggle of the developing states for political independence, and by the focusing of their efforts on the problem of gaining economic independence."¹¹ At the same time, Fomin stresses that the NIEO must be more than relations between the haves and the have nots. The specific interests of the Socialist states must be given just consideration.¹²

While both Western and Socialist sets of goals are helpful to an understanding of the NIEO, to say nothing of the methods that will be employed or, for that matter, about the role, if any, that international law might play in progressing toward these goals. There seems to be considerable uncertainty, perhaps even

⁸ For the explanation of the Socialist position, see *Proceedings of UNCTAD I*, vol. II, at 535 (1964). See also *infra* note 145.

⁹ *Id.*, vol. I at 80.

¹⁰ Kreinin & Finger, *A Critical Survey of the New International Economic Order*, 10 J. WORLD TRADE L. 493 (1976).

¹¹ B. Fomin, *The New International Order as Viewed in the CMEA Countries*, in EAST EUROPE AND THE NEW INTERNATIONAL ECONOMIC ORDER 7 (E. Laszlo & J. Kuntzman, eds. 1980).

¹² *Id.* at 7. See also Makarczyk & Wasilkowski, *Le nouvel ordre économique international en tant qu'instrument de transformation du droit international*, XII POLISH Y.B. INT'L L. 41-55 (1983).

uneasiness, about how international law relates to the NIEO. Some scholars would give international law a secondary position. For example, Correan wrote, "International law plays only a secondary role in this new economic order because of states' sovereignty."¹³

Often, the primary importance of international law is assumed, but specific attempts to apply international law raise doubts. Professor Lillich's discussion is a good example:

Basic to the creation of a new international economic order — an objective receiving near-unanimous support at the Sixth Special Session of the UN General Assembly held in the spring of 1974 — is international law. Surprisingly, in the welter of economic, social and political claims during the past year, legal considerations have had little impact. What does international law say about economic coercion? What substantive norms and procedural devices can it recommend as models for the restructuring process now going on so haphazardly and at such cost? Does it have any role to play at all?¹⁴

In the context of the NIEO, Third World doctrine challenges the fundamental premises of international law. The Algerian author and, presently, judge on the International Court of Justice, Mohammed Bedjaoui, put the matter this way: "[t]he establishment of a new economic order . . . calls for changes in legal techniques, since these techniques have shown that they frequently serve only to perpetuate economic domination by a minority of States and make the possibility of transformations remote."¹⁵ Although one would expect Western scholarship to take issue with Judge Bedjaoui, the Socialist view as expressed by a leading Soviet scholar, G. Tunkin, is not receptive to the doctrine either. The Soviets reason that contemporary international law, created with the participation of the Socialist states, is progressive and well-equipped to accommodate the reforms envisaged by the NIEO.¹⁶ One of the most lucid explanations of the Third World perspective of the NIEO is provided by F.V. Garcia-Amador. Dr. Garcia-Amador believes that tracing the roots of the NIEO to the European bases of international law has been overdone.¹⁷ More important is the fact "that economic and political conditions have changed so substantially in recent de-

¹³ Correan, *Le nouvel ordre économique international*, 104 J. DU DROIT INT'L 595 (1977).

¹⁴ R. LILICH, *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* 75 (1976).

¹⁵ M. BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 134 (1979).

¹⁶ Tunkin, *O mezhdunarodno-pravovykh principakh novogo mezhdunarodnogo ekonomicheskogo poriadka*, 9 SOVETSKOJE GOSUDARSTVO I PRAVO 95 (1980) [On International Legal Principles of the New International Economic Order (Soviet State and Law, Moscow)]. *But see* Makarczyk & Wasilkowski, *supra* note 12, at 45-50.

¹⁷ Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 5 (1980).

ades that the traditional principles and rules are no longer relevant to their way of life."¹⁸

Formulating a definition of the NIEO is complicated by the fact that the term itself may be misleading; the NIEO is surely not exclusively economic in nature.¹⁹ The political and emotional dimensions of the NIEO are well known and expressed succinctly by Ali Mazrui's description that the LDCs are "caught between the indignity of charity and the ambition of economic justice."²⁰ A route to definition taken by Professor Gillian White dissects the component words of the New International Economic Order in order to arrive at its meaning. Having many shades of meaning, the word "order" can be a description of the "way things normally happen."²¹ Citing Schwartzenger, White states: "[Order is] a state of affairs, characterized by the effective control of those subject to such a system by an essential factual rather than normative . . . apparatus of force and power . . ."²² Using a rigorous definition of "order" may lead to the conclusion that the NIEO is more an ideology or "pseudo-order," not actually a *de facto* or *de jure* order.²³

The interpretations given to the words "economic," "international," and "new" are less varied, but are still open to several interpretations. "Economic" as generally used in NIEO discussions is far different from the narrow, academic denotative definition of the word. In effect, the term can include almost any economic activity.²⁴ "International" is also used in the broadest possible sense including both regional and global aspects.²⁵ Furthermore, "international" is broader than "inter-state," because it pertains to a whole range of relations at many different levels²⁶ and includes many thorny questions attendant with private foreign investment in developing countries. The word "new" is both subjective and relative. Certain aspects of the NIEO do seem genuinely new while other components are traceable to the inter-war period.

A more thorough examination of the NIEO must explore its international legal elements, a task undertaken in various reports prepared by the United Nations Institute for Training and Research (UNITAR). These reports have dealt comprehensively and rigorously with problems of definition. UNITAR's studies, not surprisingly, look to United Nations General Assembly Resolutions

¹⁸ *Id.*

¹⁹ *Id.* at 14.

²⁰ A. Mazrui, *Panel Discussion on the New International Economic Order*, in *THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE* 371 (J. Bhagwati, ed. 1977).

²¹ White, *A New International Economic Order?*, 16 VA. J. INT'L L. 325 (1975-76).

²² G. SCHWARZENBERGER, *INTERNATIONAL LAW AND ORDER* 6 (1971), cited in G. White, *supra* note 21, at 325.

²³ *Id.* at 326.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 327.

as the bases for the NIEO. The central document, the General Assembly's Declaration on the Establishment of a New International Economic Order, adopted by consensus, states:

[The order] shall correct inequalities and redress existing injustices [and] . . . eliminate the widening gap between the developed and developing countries [The order will give] preferential and non-reciprocal treatment for developing countries, in all fields of international economic cooperation wherever feasible, whenever possible [.]²⁷

The working definition adopted by UNITAR on this basis is a good one:

Thus, NIEO law might tentatively be defined as: the *agreed* set of principles and rules on the basis of which a more just and equitable international economic order should be pursued.²⁸

Problems occur when one attempts to apply this definition. This is evident even in the UNITAR work itself which often takes an expansive view of what constitutes agreement to a "set of principles." Additionally, there is considerable state-to-state variation in perceptions of justice and equity. Nonetheless, UNITAR's working definition provides a useful benchmark against which the legal aspects of the NIEO can be analyzed.

C. *Organization Adopted Here*

The influence of the NIEO is so pervasive in treaties, United Nations resolutions, and declarations that it is impossible to deal with more than a small fraction of law contained in these instruments. UNITAR's exhaustive study of the subject found that:

[D]uring the ten-year period of the Second UN Development Decade and the first two years of the Third one, the UN General Assembly has adopted 826 provisions, incorporated in 135 resolutions, calling for preferential treatment of developing countries in 12 major areas of economic cooperation.²⁹

UNITAR's approach was to concentrate on the following four main sources (manifestations) of practice: 1) treaties and other written instruments; 2) interpretations or applications of treaty provisions; 3) decisions of intergovernmental

²⁷ Declaration on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3201, 29 U.N. GAOR Supp. (No. 1), *reprinted in* 13 I.L.M. 715, 716, 718 (1974).

²⁸ "Analytical Papers and Analysis of Texts of Relevant Instruments," *Progressive Development of the Principles and Norms of International Law Relating to the New Economic Order*, UNITAR/DS/5, 15 Aug. 1982, p. 11 (emphasis added) [hereinafter cited as UNITAR].

²⁹ *Id.* at 9.

organizations; and 4) multilateral decisions taken outside the framework of an intergovernmental organization.³⁰

In order to accommodate the variety of modes through which the NIEO may be advanced, this Article focuses on the following documents: (1) the Charter of Economic Rights and Duties of States (1974); (2) the Lima Declaration and Plan of Action on Industrial Development and Cooperation (1975); (3) the LOMÉ II (1979) and LOMÉ III (1984) Conventions; and (4) the United Nations Convention on the Law of the Sea (1982).

These documents were selected because (1) each addresses substantively important NIEO-relevant issues; (2) the documents represent various legal modes and operational levels; and (3) the documents span the epoch during which the NIEO has been developing most rapidly. These documents will provide a framework for a broader, more theoretical discussion of the relationship between the NIEO and international law.

In Part II of this Article, each of the documents is analyzed from several vantages. First, the relevant NIEO passages are summarized. Second, the legal force of the documents is assessed both in terms of breadth and authority of application. It is important to note the degree to which these represent mature law (*droit mur*) as opposed to immature law (*droit vert*).³¹ Where possible, views of Western, Socialist, and developing states are assessed. In Part III, the Article analyzes the international legal substance of the NIEO, discussing in particular the three principal sources of international law: treaties; custom; and general principles of law recognized by civilized nations. Moreover, a scheme to evaluate the obligations created by NIEO-related documents is presented. Finally, in Part IV, the authors conclude that although international law should play a positive role in assisting LDCs under the rubric of the NIEO, it should do so cautiously and subtly.

II. NIEO DOCUMENTS

A. *The Charter of Economic Rights and Duties of States*

1. Background and Context

It is generally acknowledged that the Charter of Economic Rights and Duties of States³² [hereinafter cited as the Charter] is the most important document dealing with the NIEO; some compare it to a constitution of the NIEO. The Charter was adopted by the U.N. General Assembly on December 12, 1974 by

³⁰ *Id.* at 15.

³¹ *Id.*

³² G.A. Res. 3281 (XXIX), 29 U.N. GAOR, Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974) [hereinafter cited as Charter], reprinted in 69 AM. J. INT'L L. 484 (1975) and 14 I.L.M. 251 (1975).

a vote of 120 for, 6 against, and 10 abstentions.³³ The exact origin of the Charter is difficult to trace. The development of a large group of politically-aware LDCs was surely a necessary prerequisite. Reduced bipolarity in the international system³⁴ and a new international situation where economic power takes precedence over military power also contributed to the creation of this document.³⁵

There is no doubt that Mexico was the prime mover behind efforts to create the Charter. President Luis Echeverria was involved personally in the matter. In addition, some of the basic documents were drafted by the Mexican Ministry of External Affairs.³⁶ Mexico's Jorge Castaneda, subsequently Mexican Foreign Minister, was the most important person in the conduct of the negotiations that produced the Charter. As chairman of the Charter Working Group he intended that the Group "formulate an instrument setting out genuine authentic rights and duties of a juridical nature arising in economic relations between States."³⁷

As expected, developed countries found much lacking, both in the procedure and the resulting document. During the negotiations there were recurring and fundamental disagreements. Ambassador John Scali of the United States said the Group of 77 was "ramming through" its proposals and in the process might ruin the U.N. as a productive forum.³⁸ The LDCs' participants intended that the Charter be a legally binding document, but the U.S. expressed grave doubts about the "advisability, possibility or feasibility of making the rights and duties formulated in a draft Charter legally binding on States."³⁹ These were also doubts shared by other Western countries.⁴⁰ The Socialist states, with the exception of Romania, opposed a legally binding document.⁴¹

Early in the discussions, the exact wording of the title of the Charter was debated, with some states favoring "recommendation" and others "resolution."⁴² Most states agreed that the Charter should be declarative of customary international law, but divergence existed about whether the Charter should break

³³ Those voting against were Belgium, Denmark, Germany (FRG), Luxembourg, the United Kingdom, and the United States. Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain abstained. See 14 I.L.M. 265 (1975).

³⁴ E. McWhinney, *The International Law-Making Process and the New International Economic Order*, 14 CAN. Y.B. INT'L L. 58 (1976).

³⁵ *Id.* at 60.

³⁶ R. MEAGHER, *supra* note 4, at 37.

³⁷ See the opening statement at the First Session of the Working Group on the Charter of Economic Rights and Duties of States-TD/B/AC.12/1 at 4. See also White, *supra* note 21, at 333.

³⁸ J. Scali, U.N. Doc. A/PV/2229 (1974), reprinted in 70 DEP'T OF STATE BULL. 569 (1974).

³⁹ *Id.*

⁴⁰ Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 300 (1975).

⁴¹ See Bulgaria's and Hungary's position, TD/B/AC.12/1 at 5. Romania joined the Group of 77 in 1964 and shared the Group's values on NIEO issues.

⁴² Rozenal, *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 16 VA. J. INT'L L. 309, 314 (1975-76).

new legal ground. The LDCs maintained that the Charter should not only codify existing law but also contribute to its progressive development.⁴³ While stating this goal before the Working Group on the Charter, at the beginning of the negotiations, Ambassador Castaneda was pragmatic enough to stress the need for the universality of the Charter. He was aware that in order to be a success "the Charter should be an instrument fundamentally acceptable to, or at least tolerated by, all the main groups of States."⁴⁴ In addition, the LDCs generally believed that the Charter should have the development of new rules responsive to present and future needs of the international community as its primary objective.⁴⁵

In spite of the overwhelming approval of the Charter, an assessment of the document is difficult. The fact that more than two-thirds of the provisions were accepted by *all* participating states⁴⁶ suggests a remarkable exercise in international consensus building, but the importance of that other one-third can loom large. Among the most systemic of the issues is whether a NIEO necessarily implies a new international *legal* order, a position which the LDCs asserted emphatically. Most developed states rejected any such suggestion. At a more basic level, experts have remarked that the Charter fails to indicate which economic rights and duties of states are subject to international law.⁴⁷

2. *The Content of the Charter and Nature of Obligations Created*

An unavoidable first blush reaction to the Charter is that it creates relatively few firm obligations. The most prevalent syntactical strategy used in the Charter was to state a general, open-ended principle with which no one could disagree and then to modify the operation of that principle with the phrase, "especially developing countries."⁴⁸ The *raison d'être* of the Charter is given in the Preamble:

[I]t is a fundamental purpose of this Charter to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and cooper-

⁴³ As stated by Castaneda in his opening statement, *supra* note 37.

⁴⁴ *Id.*

⁴⁵ Rozenal, *supra* note 42, at 314.

⁴⁶ *Id.* at 321.

⁴⁷ Brower & Tepe, *supra* note 40, at 302.

⁴⁸ Charter, *supra* note 32, at Preamble. This approach is used at many points in the Charter, including these:

The promotion by the entire international community of economic and social progress of all countries. *Id.* at Preamble.

[P]romote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy *Id.* at art. 6.

[C]o-operate in the economic, social, cultural, scientific and technological fields for the promotion of economic and social progress throughout the world *Id.* at art. 9.

ation among all States, irrespective of their economic and social systems[.]⁴⁹

One cannot imagine this sort of statement causing any difficulty for any state; neither does it create any concrete obligation.

Article 2 of the Charter deals in specific terms with the economic rights and duties of states. Its subsection (2)(c) has created the most interest in foreign offices and the academic community alike. It provides that each state has a right:

To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation *should* be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State *considers pertinent*. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.⁵⁰

This section accounts for most of the abstentions and negative votes received by the Charter. Much of the disagreement stems from the omission of an "adequate, just and prompt" compensation standard within the Charter.⁵¹ Furthermore, no mention is made of the public purpose doctrine which contends that, in the absence of public utility or necessity, foreign property, rights and interests cannot be "taken."⁵²

Other reactions have been stronger. Brower and Tepe termed this clause an "utter rejection of international law . . ." ⁵³ It is clear that the developed, market economy states would be extremely chary of the combination of optional compensation ("should be paid") and leaving disputes about compensation exclusively to the domestic jurisdiction of the host state. Article 2(2)(c) gives expression to ideas long advocated by the Socialist states.⁵⁴ The Socialist doctrine does not consider the relevant provisions as an innovation but rather an interpretation properly enlarging the principle of the sovereignty of states, an interpretation consistent with general international law.⁵⁵

⁴⁹ *Id.* at Preamble.

⁵⁰ *Id.* at art. 2(2)(c) (emphasis added).

⁵¹ UNITAR, *supra* note 28, at 335.

⁵² Weston, *The Charter Of Economic Rights And Duties Of States And The Deprivation Of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 439 (1981).

⁵³ Brower & Tepe, *supra* note 40, at 305.

⁵⁴ See in particular UNITAR, *supra* note 28, at 330-40.

⁵⁵ Tunkin, *supra* note 16, at 91.

It is interesting to examine the widespread use of the nonobligatory word "should" throughout the Charter. Although such wording in Article 2(2)(c) is disadvantageous to the developed countries', in the majority of cases it is beneficial. Listed below are several of the developed countries' obligations to the LDCs which have been tempered (or eliminated) by the use of the word "should":

1. promote international scientific and technological cooperation and the transfer of technology⁵⁶
2. extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries⁵⁷
3. promoting increased net flows of real resources to the developing countries from all sources⁵⁸

Since so much of the Charter is diluted by the use of "should," considerable significance accrues by default to those passages that create firmer obligations and rights. There are very few provisions that establish obligations or rights that are both firm and tangible. Article 5 assures that "[a]ll States have the right to associate in organizations of primary commodity producers"⁵⁹ In addition to Article 2 (which has already been discussed), Article 14 is the best example of these obligations:

State[s] shall take measures aimed at securing additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade, taking into account their development needs⁶⁰

Even though the language adopted mandates action, the nature and extent of that action is left almost completely to the discretion of individual states, that is, the obligation is firm, but not very tangible. It is unlikely that this Charter provision would motivate states to alter their behavior. A likely result is lip service to Charter objectives, but little concrete effort.⁶¹

On balance, several things stand out about the Charter. While 120 states voted in favor of it, the nonbinding nature of U.N. resolutions coupled with the fact

⁵⁶ Charter, *supra* note 32, at art. 13.2.

⁵⁷ *Id.* at art. 18.

⁵⁸ *Id.* at art. 22.

⁵⁹ *Id.* at art. 5.

⁶⁰ *Id.* at art. 14.

⁶¹ The case of Canada is typical:

That Canadian response to the NIEO divides into theory and practice is not unusual — all states act differently from their promises — but with respect to the NIEO the divergence is particularly striking. Few industrialized countries have taken public stances as sympathetic to LDC positions as Canada, or have failed as badly to live up to them.

M. Wignor, *Canada and the New International Economic Order: Some Legal Implications*, 20 CAN. Y.B. INT'L L. 167 (1982).

that many important economic powers did not support the Charter, creates an anemic result. The situation is compounded by the vague and general nature of most of the obligations created by the Charter, obligations which tend to be neither firm nor tangible. In fact, it is arguable that the Charter creates no firm, tangible obligations for any state. Article 2(2)(c) perhaps comes closest to creating a firm right. That right, however, is one-sided and was rejected by most of the principal economic powers.

B. *The Lima Declaration and Plan of Action on Industrial Development and Cooperation*

1. Background and Content

The Lima Declaration⁶² was adopted on March 26, 1975, by the Second Conference of the United Nations Industrial Development Organization. As a declaration produced by an international conference, the Lima Declaration has less legal force than a treaty, but the exact degree of its legal force is debatable. A delicate way of dealing with this issue is seen in Dorsey's assessment that the Lima Declaration "add[s] to the normative authority of previous statements attesting to the existence of a developing international law of cooperation in the sphere of economic rights and duties of states."⁶³ Dorsey's point suggests a continuum of legal obligation with unqualified acceptance of a treaty at one extreme of the continuum. The Lima Declaration represents some movement *toward* the treaty end of that continuum.

The Declaration was accepted by the vast majority of participating states. Eighty-two voted in favor; only the United States cast a negative vote. Belgium, Canada, Germany (FRG), Israel, Italy, Japan, and the United Kingdom abstained.⁶⁴ The United States felt it was premature to speak in terms of legal rules governing economic relations and, hence, could not support the Declaration.⁶⁵ Without the support of many prominent economic powers, the extent of the Declaration's effect and influence is questionable. White provides a pragmatic assessment, stating, "[r]ather, the virtue of these instruments lies in the fact that they have brought both the plight and the power of the developing countries to the attention of the Western industrial States."⁶⁶

⁶² United Nations Industrial Development Organization: Lima Declaration and Plan of Action on Industrial Development and Cooperation (Mar. 26, 1975), *reprinted in* 14 I.L.M. 826-44 (1975) [hereinafter cited as Lima Declaration].

⁶³ Dorsey, *Preferential Treatment: A New Standard for International Economic Relations*, 18 HARV. INT'L L.J. 111 (1977).

⁶⁴ White, *supra* note 21, at 340.

⁶⁵ *Id.* at 341.

⁶⁶ *Id.*

2. The Content of the Lima Declaration and Nature of Obligations Created

While the Lima Declaration flows directly from the Charter of Economic Rights and Duties of States, its focus is far more narrow. The Declaration is intended to address one area, industrial development, wherein the goals of the NIEO could be advanced. The initial paragraph of the document sets the stage for establishing the main principles of industrialization and defining the means by which the international community as a whole might take action of a broad nature in the field of industrial development within the framework of new forms of international cooperation, with a view to the establishment of a new international economic order.⁶⁷

The Declaration has the *potential* to add specificity to the general principles laid down by the Charter. The introductory section, however, suggests that this potential will not be realized.

At the time, the political climate obviously was charged. The Lima Declaration condemned *apartheid* and neocolonialism⁶⁸ in a way that bore little effect on the supposed focus of the conference. Further, an anti-Western bias is especially evident in the section dealing with transnational corporations:

[T]he situation in the developing countries has become aggravated by the persistent and marked tensions to which the present international economic situation is subjected and that to these must be added as well the unacceptable practices of those transnational corporations that infringe [sic] the principles of sovereignty of developing countries⁶⁹

Beginning with section 23 of the Declaration, a "common position and line of action" is spelled out. An interesting feature of this section, and much of the balance of the Declaration, is the concern expressed for the "least developed countries." Thus, three strata are acknowledged: developed; developing; and least developed.⁷⁰ Often, a general principle is stated in the Declaration about the treatment that the developing countries should receive. This is then modi-

⁶⁷ Lima Declaration, *supra* note 62, at para. 1.

⁶⁸ *Id.* at para. 9.

⁶⁹ *Id.* at para. 10.

⁷⁰ In the context of such discussions, countries are labeled as "developed", "developing", and "least developed". The degree of economic sophistication of each country may be represented by a sliding scale although often it is difficult to clearly delineate between developing and least developed countries. This latter term (and arguably, the middle term) refers to Third World countries of diverse political structures which share unfortunate characteristics such as widespread poverty, slow industrial growth coupled with low technology and capital levels, excessive population growth, uneven income distribution, and low agricultural production. See NEW INTERNATIONAL ECONOMIC ORDER: A THIRD WORLD PERSPECTIVE 3 (P. Ghosh ed. 1984); MANSFIELD, PRINCIPLES OF MACROECONOMICS 512-21 (2d ed. 1977). See also *infra* note 87.

fied with "in particular the least developed countries."⁷¹ This parallels the approach taken in the Charter except that fewer gradations are stipulated.

Of course, the points made in this "common position" section vary greatly; some are vague or irrelevant. Other points, however, do create obligations (both firm and tangible):

That countries, particularly developed countries, *should* undertake an objective and critical examination of their present policies and make appropriate changes in such policies so as to facilitate the expansion and diversification of imports from developing countries and thereby make possible international economic relations on a rational, just and equitable basis.⁷²

[The LDCs' share of world industrial production] should be increased to the maximum possible extent and as far as possible to at least 25 percent of the total world industrial production by the year 2000, while making every endeavor to ensure that the industrial growth so achieved is distributed among the developing countries as evenly as possible.⁷³

Both of the above statements are diluted by the oft-found "should." The first statement amounts to little more than a call for soul-searching, especially on the part of the developed countries. The second provision is more significant. The desired increase to 25 percent in the LDCs' share of world industrial production is huge. It implies either a very large growth in total production or LDCs' gains at the expense of present producers. One wonders how the even distribution sought here can be reconciled with other provisions seeking preferential treatment for the "least developed countries." These goals seem wildly optimistic. Surely, they have not been approached since the Declaration was approved.

Several important provisions in this section caused difficulty for developed states. Nationalization of foreign-owned property is expressly *permitted* with no mention of an international legal standard for compensation.⁷⁴ The needs of the least developed countries are specifically addressed, although with the ever present "should." For example, paragraph 35 states that the least developed countries "should enjoy a net transfer of resources from the developed countries in the form of technical and financial resources as well as capital goods. . . ."⁷⁵ Similarly, paragraph 36 provides that "[those] developing countries with sufficient means at their disposal should give careful consideration to the possibility

⁷¹ Lima Declaration, *supra* note 62, at para. 23-24.

⁷² *Id.* at para. 27 (emphasis added).

⁷³ *Id.* at para. 28.

⁷⁴ *Id.* at para. 32.

⁷⁵ *Id.* at para. 35.

of ensuring a net transfer for financial and technical resources to the least developed countries."⁷⁶

One of the most straightforward sections of the Declaration concerns producers' associations. The motivation here is the LDCs' belief that they have been abused by the developed countries. The LDCs "must undertake joint action to strengthen their negotiating position . . ."⁷⁷

For this purpose, the developing countries must consider *all possible means* of strengthening the action of producers' associations already established, encourage the creation of other associations for the principal commodities exported by them, and establish a mechanism for consultation and cooperation among the various producers' associations . . .⁷⁸

In an OPEC-weary world, such provisions generate mixed feelings.

The second half of the Declaration purports to set forth a "Plan of Action." The first subsection, entitled "Measures of National Scope," is a curious lecture to the developing countries telling them how to industrialize. For example, "[s]ound economic policies to assure economic stability and facilitate adequate domestic savings rates commensurate with industrial development objectives" are encouraged.⁷⁹ Of course, there can be no argument that this should be done. The real issue is how to accomplish it.

Along these same lines, section 59 lists those actions that *should* be taken by the developed countries. Some of the more important provisions of section 59 are: progressive elimination, or reduction, of tariff and nontariff barriers;⁸⁰ increased financial contributions to international organizations, government and credit institutions in the developing countries to promote or finance industrial development;⁸¹ expanded technical assistance programs to benefit developing countries;⁸² and assistance to developing countries in raising the competitiveness of their production from natural raw materials.⁸³ In general, such provisions are not startling. The provisions create obligations that are fairly tangible, but their firmness is diluted in many ways.

The subsequent section of the Declaration deals with cooperation among developing countries. A number of measures that "should" be adopted are discussed. Direct trade is to be promoted "in order to substantially improve the

⁷⁶ *Id.* at para. 36.

⁷⁷ *Id.* at para. 47.

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.* at para. 59(j).

⁸⁰ *Id.* at para. 59(a).

⁸¹ *Id.* at para. 59(e).

⁸² *Id.* at para. 59(f).

⁸³ *Id.* at para. 59(i).

share of developing countries in international trade in finished products”⁸⁴ It is suggested that “main producers and exporters of basic raw materials” among the developing countries grant “favorable conditions” to the least developed countries. Similarly, the more affluent developing countries are admonished “to share in the economic and social development efforts of the least advanced countries.”⁸⁵ Finally, the “industrialized developing countries” are supposed to give “preference” to imports from the less industrialized countries.⁸⁶ Two impressions stand out here. First, the effort to get the developing countries to assist the least developed countries is weak, probably reflecting the feeling that the developing countries simply do not have the resources to provide significant assistance. Second, such provisions depend heavily on firm definitions of the subcategories of developing countries. These definitions have not been formulated comprehensively; instead they change markedly according to context.⁸⁷

Part III of the Plan of Action deals with cooperation between developed and developing countries and, not surprisingly, is more meaningful. The entire section sets forth the various kinds of preference that the LDCs are seeking. The hope is that there will be “[a]pplication, expansion and improvement of the schemes under the generalized system of preferences. . . .”⁸⁸ It is the goal of this provision that the LDCs will experience a “substantial increase in their foreign exchange earnings”⁸⁹ The remainder of these provisions generally are less significant, but several stipulations are notable. The developed countries are expected to increase their “actual transfer of resources” so that the LDCs can “sustain the growth effort essential for accelerating their social and economic development.”⁹⁰ Perhaps the height of naiveté in the document is the following:

The credits granted by the financing institutions of the industrialized countries and international organizations to the developing countries must be completely free of any kind of political conditions and should involve no economic conditions other than those normally required of borrowers.⁹¹

Finally, this section repeats the call for “an international code of conduct” for the transfer of technology.⁹² A code has been drafted by UNCTAD but it has

⁸⁴ *Id.* at para. 60(a).

⁸⁵ *Id.* at para. 60(g).

⁸⁶ *Id.* at para. 60(l).

⁸⁷ For a discussion of LDC subcategories, see UNITAR, *supra* note 28, at 24–35, and Annex I, at 161.

⁸⁸ Lima Declaration, *supra* note 62, at para. 61(a).

⁸⁹ *Id.* at para. 61(b).

⁹⁰ *Id.* at para. 61(e).

⁹¹ *Id.* at para. 61(f).

⁹² *Id.* at para. 61(m).

no legal force.⁹³ Such a document has great potential because it would have to confront certain issues that have been side-stepped in a more general context.

The final two sections of the Declaration deal with the least developed countries and with institutional arrangements. "The least developed, land-locked and island developing countries present a set of problems which require special measures"⁹⁴ Concrete measures listed include:

- Specific, urgent measures to establish the necessary conditions for industrialization [;]⁹⁵
- The establishment and financing of complete industrial estates and pilot plants[;]⁹⁶
- The creation of integrated production units such as agricultural machinery plants[;]⁹⁷
- Preferential treatment within the context of international agreements for industrial products and processed commodities from these countries [;]⁹⁸
- Special aid and assistance to the least developed, land-locked and island developing countries in the establishment and development of adequate means of transport and communications[.]⁹⁹

These provisions are some of the most tangible found in such documents. Still lacking, though, are adequately firm commitments and better definitions of subcategories of developing countries. For example, the "should" remains in most cases. It is easy to envision a scenario where a developing country avoids a commitment simply by contending that it is not an "industrialized developing country."

The final section deals with institutional arrangements. It was suggested in the Declaration that the United Nations Industrial Development Organization play the lead role in NIEO activities within the U.N. As requested in the Declaration, UNIDO should be provided with the resources and autonomy needed to do this job,¹⁰⁰ and should become a specialized agency of the U.N.¹⁰¹ A proposed structure of UNIDO as a specialized agency is outlined.¹⁰²

⁹³ UNCTAD, Draft International Code on Conduct on the Transfer of Technology of 12 May 1981, TD/CODE TOT 33.

⁹⁴ Lima Declaration, *supra* note 62, at para. 69.

⁹⁵ *Id.* at para. 62(a).

⁹⁶ *Id.* at para. 62(b).

⁹⁷ *Id.* at para. 62(c).

⁹⁸ *Id.* at para. 62(h).

⁹⁹ *Id.* at para. 62(i).

¹⁰⁰ *Id.* at para. 68.

¹⁰¹ *Id.* at para. 69. The Socialist states opposed specialized agency status on the grounds that it would weaken its effectiveness as a control coordinating body and upset the balance within the U.N. system. See Report of the 2nd General Conference, UNIDO, I.D./Conf. 3/31, at 40.

¹⁰² United Nations Conference on the Establishment of the United Nations Industrial Development

The final section of the Declaration can be viewed in two ways. It may be seen as a genuine attempt to address important problems by creating the proper organizational framework within the U.N. system. The cynic might argue, however, that NIEO functions could be handled equally well in other fora. Rather than furthering the Declaration's goals, the creation of a specialized agency might be yet another example of a bureaucracy trying to increase its power, size and influence.

C. LOMÉ Conventions

1. Context and Background

There have been three Lomé Conventions joining the states of the European Economic Community and a group of African, Caribbean and Pacific Countries [hereinafter the ACP states]. Lomé I entered into force in 1975¹⁰³ followed by Lomé II in 1980¹⁰⁴ and Lomé III in 1985.¹⁰⁵ The Lomé II and III Conventions and accompanying protocols are very detailed and intricate. For the purposes here, only a few of the more significant provisions from the Conventions will be discussed. The importance of these treaties is clear, since they obligate a large number of states¹⁰⁶ to concrete NIEO-relevant conduct; the obligations are both firm and tangible.¹⁰⁷

Organization as a Specialized Agency, adopted on April 8, 1979, in Vienna, the Constitution of UNIDO. See U.N. Doc. A/CONF.90/19, *reprinted in* 18 I.L.M. 667 (1979). The Constitution entered into force on June 21, 1985. See 24 I.L.M. 1748 (1985).

¹⁰³ European Economic Community — African, Caribbean, and Pacific countries: Lomé I Convention, done at Lomé, Togo, Feb. 28, 1975, *reprinted in* 14 I.L.M. 595-642 (1975) [hereinafter cited as Lomé I].

¹⁰⁴ European Economic Community — African, Caribbean, and Pacific countries: Lomé II Convention, done at Lomé, Togo, Oct. 31, 1979, *reprinted in* 19 I.L.M. 341-77 (1980) [hereinafter cited as Lomé II].

¹⁰⁵ European Economic Community — African, Caribbean, and Pacific countries: Lomé III Convention, done at Lomé, Togo, Dec. 8, 1984, *reprinted in* 24 I.L.M. 571-652 (1985) [hereinafter cited as Lomé III].

¹⁰⁶ The following are parties: (a) the European Economic Community (EEC) states — Belgium, Denmark, Germany (FRG), France, Greece, Ireland, Italy, Luxembourg, Netherlands, Spain and the United Kingdom; (b) the ACP states — Antigua and Barbuda, the Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Camoros, Cape Verde, Central African Republic, Chad, Congo, Djibouti, Dominica, Equatorial Guinea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea Bissau, Guyana, Ivory Coast, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Papua New Guinea, Rwanda, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Sao Tome and Principle, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somali, Sudan, Suriname, Swaziland, Tanzania, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Upper Volta, Vanuatu, Western Samoa, Zaire, Zambia and Zimbabwe. *Id.* at 574, 575.

¹⁰⁷ Provisions of Lomé I and Lomé II are analyzed by Hasenpflug, *The Stabilization of Export Earnings in the Lomé Convention: A Model Case?* in *THE NEW INTERNATIONAL ECONOMIC ORDER* (Sauvant & Hasenpflug, eds. 1977). See also Perrott, *EEC Attitudes and Responses to the New International Economic Order*, IIIA ST. LOUIS U. PUB. L.F. 115 (1984).

One is struck by the fact that Lomé provisions seem more definite and far less equivocal than is the case with most other documents dealing with the NIEO. This reflects several underlying factors including the unique political and economic cohesion of the European Economic Community, the former colonial status of many ACP states and the relatively smaller number of participants.

2. Provisions of Lomé II and III and Nature of Obligations Created

Since Lomé II is briefer and less intricate than Lomé III, it gives a clearer picture of the salient features of the Lomé system. This section focuses principally on Lomé II but also incorporates important changes occurring in Lomé III. The introductory portion of the Lomé II Convention sets both the tone and goals:

ANXIOUS to reinforce, on the basis of complete equality between partners and in their mutual interest, close and continuing cooperation in a spirit of international solidarity;¹⁰⁸

RESOLVED to continue and intensify their efforts to establish a model for relations between developed and developing States which is compatible with the aspirations of the international Community towards the establishment of a new, more just and more balanced international economic order;¹⁰⁹

DESIROUS of safeguarding the interests of the ACP States whose economies depend to a considerable extent on the export of commodities and of developing their resources.¹¹⁰

The first major section of the Convention, Title I, deals with Trade Cooperation. The stated goal of the Convention is to further trade between the ACP states and the Community, while considering their respective levels of development.¹¹¹ Significant concessions are granted to the ACP states. Where products originate in ACP states, they shall be imported into the Community free of customs duties and similar charges.¹¹² Furthermore, the Community shall not apply quantitative restrictions or similar measures to products imported from ACP states.¹¹³ Some protection is offered, however, lest certain imports create too much of a burden:

The provisions of Article 3 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds

¹⁰⁸ Lomé II, *supra* note 104, at Preamble.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at art. 1.

¹¹² *Id.* at art. 2.

¹¹³ *Id.* at art. 3.

of public morality, public policy or public security; the protection of health and life of humans, animals and plants; the protection of national treasures possessing artistic, historic or archeological value or the protection of industrial and commercial property.¹¹⁴

This article is curious. It seems completely reasonable except for the inclusion of "public policy" which can be construed to include all manner of things. Additional safeguards are provided.¹¹⁵ Overall, one has the impression that these are minor in nature and will not be abused. In the final portion of Title I, measures for promoting trade are enumerated. These are to be implemented "from the production stage to the final stage of distribution."¹¹⁶ Specific actions envisioned include management and vocational training, market research, trade data exchange, and greater cooperation between economic operators.¹¹⁷

The last portion of Title I is the first example of funding directed expressly at implementing the provisions.¹¹⁸ This is highly significant because it provides for the kind of tangible commitment lacking in many NIEO documents. Although the 40,000,000 EUA¹¹⁹ may be inadequate, it represents a quantum leap beyond most other "obligations."

The next section of the Convention, Title II, deals with export earnings from commodities. Again a specific and sizeable amount of money, 550,000,000 EUA, is set aside to cover all commitments incurred under the section.¹²⁰ An elaborate system is created whereby a reference level is calculated for each product's ACP state.¹²¹ A trigger mechanism is established so that ACP states can request payments if the money they earn during a year falls 6.5 per cent or more below the reference level.¹²² Article 41 provides less flexibility by requiring states receiving funds under this provision to explain "the probable use" to which the monies will be put.¹²³

Title III discusses Mineral Products. A separate section was necessary due to the current status of the ACP states whose economies are largely dependent on the mining sectors. In particular, ACP states need help coping with a decline in both their capacity to export mining products to the Community and in their export earnings.¹²⁴

¹¹⁴ *Id.* at art. 5.

¹¹⁵ *Id.* at art. 12.

¹¹⁶ *Id.* at art. 20.

¹¹⁷ *Id.* at art. 21.

¹¹⁸ *Id.* at art. 22.

¹¹⁹ Originally, the EUA was equal to about \$1.00 U.S., but its value has been allowed to fluctuate.

¹²⁰ *Lomé II*, *supra* note 104, at art. 31.

¹²¹ *Id.* at art. 36.

¹²² *Id.* at art. 37.

¹²³ *Id.* at art. 41.

¹²⁴ *Id.* at art. 49.

Again, money is provided to carry out the intent of this section. A "special financing facility" was established with the EEC contributing 280,000,000 EUA for its operation.¹²⁵ ACP states could seek assistance below a certain set level. Provisions also call for the Community to provide technical and financial assistance with mining operations in the ACP states.¹²⁶ There is, however, no specificity about the amount of that assistance, not unlike the "loose" obligations of other documents. Similarly, Title IV, Investments, calls on Community members to strive to implement measures that will encourage investment in industrial development.¹²⁷ It is unlikely that Title IV produced any action that would not have occurred without the Convention.

Titles V and VI deal, respectively, with industrial and agricultural cooperation. Both establish firm obligations for the Community, such as providing effective assistance in the evaluation of needs and the execution of appropriate schemes.¹²⁸ In the agricultural area, very specific measures are mandated. "Rural cooperation schemes" will be begun with the ACP states determining their priorities.¹²⁹ Also, a "Technical Centre for Agricultural and Rural Cooperation" with very specific functions is to be created.¹³⁰

Probably the most complex section of the Convention is Title VII, Financial and Technical Cooperation. "The objective of financial and technical cooperation shall be to promote the economic and social development of the ACP States on the basis of the priorities laid down by those States and in the mutual interest of the parties."¹³¹ The bulk of the Community's current financial assistance is allocated for activities described in this section:

2,928 million EUA in the form of grants;
504 million EUA in the form of special loans;
208 million EUA in the form of risk capital.¹³²

In some ways the most important provisions are contained in the innocuous-looking Title VII: General provisions concerning the least developed, land-locked and island ACP states. Here the "least developed ACP States"¹³³ are listed. This makes the entire Convention much more meaningful because it eliminates any misunderstanding about the applicability of certain provisions.

¹²⁵ *Id.* at art. 51.

¹²⁶ *Id.* at art. 57.

¹²⁷ *Id.* at art. 60.

¹²⁸ *Id.* at art. 68.

¹²⁹ *Id.* at art. 85.

¹³⁰ *Id.* at art. 88.

¹³¹ *Id.* at art. 91.1.

¹³² *Id.* at art. 95.1a. Lomé III provides for increased financial assistance, the relevant figures being: 4,860 million EUA in the form of grants, 600 million EUA in the form of special loans, 600 million EUA in the form of risk capital. Lomé III, *supra* note 105, at art. 194.

¹³³ Lomé II, *supra* note 104, at art. 155.3.

Thus, a loophole that often can thwart the operation of norms of conduct is avoided.

Lomé III represents an incremental change from Lomé II. At the most fundamental level, participation has somewhat broadened. There are now 64 ACP participants and the Republic of Greece is participating as a new member of the European Economic Community.¹³⁴ Since the three Lomé Conventions will extend for a period of 15 years (1975–1990), they do provide an opportunity to assess the development and maturation of the NIEO. A good example of this development is seen in Chapter 1 (Cultural and Social Dimension) of Lomé III. This section states in uncertain terms that development programs “shall be based on understanding of, and regard for, the cultural and social features of the milieu.”¹³⁵ Further in the Chapter, special social and cultural factors that must be considered in the implementation of *all* programs are enumerated. These factors include the “status and role of women . . . , types of social and interpersonal relationships,”¹³⁶ and the “adaptation to the cultural milieu and the implications of that milieu . . . , integration and enhancement of the local cultural heritage.”¹³⁷

Of course, one could argue that these provisions are nebulous and vague. Who is to say what the cultural milieu is? But such stipulations within a broader instrument acknowledge that a component of the NIEO is the right of developing states to influence not just the magnitude, but also the mode and characteristics of development assistance. It is to be expected that specific foci of Lomé Convention efforts will shift according to the most pressing needs. In Lomé III, fisheries¹³⁸ and transport and communications¹³⁹ have received more concentrated attention. The fisheries title is especially far-reaching. It acknowledges that the principles from the 1982 U.N. Convention on the Law of the Sea must be applied.¹⁴⁰ A careful balance is struck between the interests of ACP and EEC states. EEC states agree to pay “[p]articular attention” to “the training of ACP nationals in *all* areas of fisheries”¹⁴¹ In exchange for providing this technology and assistance, EEC members’ fishing vessels are assured “a role . . . operating lawfully in waters under ACP jurisdiction.”¹⁴² Additionally, it is acknowledged that ACP coastal states will be compensated for foreign fishing.¹⁴³

¹³⁴ See *supra* note 106.

¹³⁵ Lomé III, *supra* note 105, at art. 116.1.

¹³⁶ *Id.* at art. 117.a.

¹³⁷ *Id.* at art. 117.b.

¹³⁸ *Id.* at tit. II, arts. 50–59.

¹³⁹ *Id.* at arts. 84–94.

¹⁴⁰ *Id.* at art. 50.

¹⁴¹ *Id.* at art. 53.

¹⁴² *Id.* at art. 55.

¹⁴³ *Id.* at art. 59.

The care with which the instrument was crafted suggests that both parties share a common expectation about what fair compensation will be. On balance, it seems that Lomé III is the most demonstrative and successful example of NIEO aspirations being put into practice.

No arrangements comparable to Lomé II and Lomé III have been established between Socialist and developing countries. The Council of Mutual Economic Assistance (CMEA), a Socialist counterpart of the EEC, lacks the supranational capacity to be a meaningful framework for the multilateral actions of the Socialist states *vis-a-vis* the LDCs. Socialist relations with the Third World are predominantly bilateral. Further, as a rule, the agreements on economic cooperation between CMEA and developing countries do not provide for preferential treatment but "are based on principles of equality and mutual benefit."¹⁴⁴ Such a practice reflects the Socialist position of non-responsibility for this underdevelopment, a position firmly established since UNCTAD I.¹⁴⁵ The fact that the Socialist states have been unwilling or unable to take similar steps¹⁴⁶ amplifies the significance of Lomé II and III in terms of tangibility and firmness.

D. *The Convention Adopted by the Third U.N. Conference on the Law of the Sea*¹⁴⁷

1. Background and Context

On April 30, 1982, the Third U.N. Conference on the Law of the Sea adopted the text of a new and comprehensive Convention on the Law of the Sea.¹⁴⁸ On December 9, 1984, the closing date for signature, 159 countries appended signatures.¹⁴⁹ Of course, the hurdle of ratification remains, along with strident U.S. resistance that may continue at least through the second Reagan administration. This document, however, provides an excellent example of the forces

¹⁴⁴ CMEA Secretariat, "Cooperation of the CMEA member countries and the CMEA with developing countries," (1982), UNITAR, *supra* note 28, at 46-48.

¹⁴⁵ During UNCTAD I, a Soviet delegate stated, "we are in no way responsible for the serious economic consequences which colonial domination or the policy of neo-colonialism has involved for the developing countries, . . . it is therefore unnatural and unrealistic to try to adopt the same approach to the developed capitalist countries and the Socialist countries." UNCTAD I, *supra* note 8, vol. II, at 535.

¹⁴⁶ As to the measures undertaken by the COMECON, see Butler, *Socialist International Institutions and the New International Economic Order*, IIIA ST. LOUIS U. PUB. L.F. 149 (1984); P. AGARWALA, *THE NEW INTERNATIONAL ECONOMIC ORDER: AN OVERVIEW* 208-15 (1983).

¹⁴⁷ Portions of this section are adapted from a longer version that appeared in 6 *LOY. L.A. INT'L & COMP. L.J.* 65 (1983).

¹⁴⁸ 19 U.N. CHRONICLE 3 (1982) (vote of 130 for, 4 against, and 25 abstentions). The Convention was opened for signature Dec. 10, 1982. *Reprinted in UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA*, U.N. Pub. Sales No. E.83.V.5 [hereinafter cited as *Convention*]. It was originally signed by 119 signatories. Their list appears in 21 *I.L.M.* 1477 (1982). An additional 15 signatories appear at 23 *I.L.M.* 235 (1984).

¹⁴⁹ 24 *I.L.M.* 268 (1985). States that signed included 51 from Africa, 30 from Latin America, 10 from Eastern Europe and 23 from Western Europe.

advocating for the NIEO manifested in an important international legal forum. The text adopted is massive, containing 320 articles and 9 annexes. Presented below is a classification of some of the treaty's textual material that bears on the NIEO.

2. Content of the Law of the Sea Convention and Nature of Obligations Created

The provisions of the Convention suggest five categories into which material dealing with the NIEO might be placed. These categories correspond to the means by which the NIEO can be advanced.¹⁵⁰ The five categories used here are: (1) general appeals, based on the moral right of the cause, but not mandating specific action; (2) provisions that penalize the more technologically advanced states; (3) provisions that give special preferences (usually economic) to developing states; (4) special privileges for certain subcategories of developing states; and (5) provisions on the transfer of technology from developed to developing countries.

3. General Appeals

It is problematic whether these provisions represent any victory for the NIEO. Such provisions do not carry the force of law; in fact, they fail even to list specific *desired* courses of action. One example is in the preamble to the Convention, which discusses the ideological balance that must be struck in dealing with the NIEO.

[T]he achievement of such goals will contribute to the realization of a just and equitable international economic order which would take into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.¹⁵¹

It seems that developing states were able to substitute "equitable" for "new" as the adjective describing the desired economic order. Consideration of the interests of humanity as a whole, along with special attention to the LDCs, seems comparable to the dilemma the United States is faced with when reconciling affirmative action and equal opportunity. It remains an open question whether

¹⁵⁰ Another approach, not adopted here, is to look at NIEO references as they apply to substantive areas of the Convention, for example, fisheries, scientific research, deep sea bed mining, etc., or to analyze the competing claims of developed and developing nations in various maritime zones. See Boczek, *Ideology and the Law of the Sea: The Challenge of the New International Economic Order*, 7 B.C. INT'L & COMP. L. REV. 1 (1984).

¹⁵¹ Convention, *supra* note 148, at Preamble.

this general expression of sentiments will be effected through the specific provisions of the Convention.

Part XI of the Convention contains several "general appeals" statements. For example, Article 155 establishes a review conference, the purpose of which is to assess the first 15 years of operation of the regime.¹⁵² A primary purpose of that review will be to determine whether the goals of the NIEO are being advanced:

The Review Conference shall ensure the maintenance of the principle of the common heritage of mankind, the international regime designed to ensure equitable exploitation of the resources of the area for the benefit of all countries, especially the developing States . . .¹⁵³

4. Provisions that "Penalize" Technology

Unlike the sweeping nature of the general appeals, the other four categories of materials represent variants on the same theme, to wit, if one accepts the general view that the NIEO must be supported, what specific methods are to be used? One approach is to penalize those countries with a technological edge, and in effect, neutralize some of the advantage they enjoy. A good example is transit passage through straits. The Convention provides that "foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering the straits."¹⁵⁴ Developing countries border the most straits, however, the developed states transit the straits most frequently. Thus, this provision can be viewed as an attempt to control the excesses of technology possessed by the developed countries, for it is the exploitative potential of these excesses which the LDC states fear.

An interesting set of compromises was reached in the Convention concerning rights to the sea floor adjacent to a state but at a distance beyond 200 nautical miles from the coast. Of course, it is almost exclusively the developed states that will have the technology to conduct such operations either off their own coasts or in joint ventures off the coasts of developing states. The Convention reads:

The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 percent of the value or volume of production at the site.

¹⁵² *Id.* at art. 155.

¹⁵³ *Id.* See also art. 150, which states that "[a]ctivities in the Area shall . . . be carried out . . . for the over-all development of all countries, especially developing states . . ." *Id.* at art. 150.

¹⁵⁴ *Id.* at art. 40.

The rate shall increase by 1 percent for each subsequent year until the twelfth year and shall remain at 7 percent thereafter.¹⁵⁵

Both of these examples call for concessions from those who have the technology to carry out sophisticated activities such as scientific research or petroleum extraction. Such "penalizing" provisions may inhibit the use of those technologies which, in the case of the sea floor example, would mean that no contribution would be made. Both provisions, however, are much less stringent than might have been the case.

5. Providing Special Economic Preferences for LDCs

The distinction between "taxing" technology and providing a special economic advantage to developing states may be hard to draw. It is the latter (and more positive) approach that is more common in the Convention. One of the clearest examples of giving an economic preference to the LDCs can be seen in the operative provisions existing when a state cannot harvest all the fish in its 200-mile exclusive economic zone. When a coastal state does not have the capacity to harvest all the fish in its zone, it shall "give other States access to the surplus . . . having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned herein."¹⁵⁶ The intent of the drafters is clarified later where it is enumerated that one of the specific criteria for granting access to excess catch is to be "the nutritional needs of the populations of the respective States."¹⁵⁷

It is to be expected that pollution control is an area where special economic advantages would be demanded by the LDCs. What is surprising is the degree to which the Convention states the case explicitly: "Developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects, be granted preference by international organizations in: (a) the allocation of appropriate funds and technical assistance; and (b) the utilization of their specialized services."¹⁵⁸

6. Special Treatment for Certain Categories of LDCs

It has been clear for decades that the LDCs are not a monolith; they differ greatly in size, resources and ideology. During the Third U.N. Conference on the Law of the Sea, this fact had to be accommodated, especially with regard to the Area (Part XI). Since the economies of certain developing countries are

¹⁵⁵ *Id.* at art. 82(2).

¹⁵⁶ *Id.* at art. 62(2).

¹⁵⁷ *Id.* at art. 70(3)(d).

¹⁵⁸ *Id.* at art. 203.

heavily dependent on the same minerals which are extracted from the deep seabed, the economic effects of mining could be disastrous. Thus, this group of LDCs is singled out for special treatment.

Upon the recommendation of the Council on the basis of advice from the Economic Planning Commission, the Assembly shall establish a system of compensation or take other measures of economic adjustment assistance including cooperation with specialized agencies and other international organizations to assist developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area.¹⁵⁹

Similar concern was *not* expressed for the economies of developed countries. This is, however, the fundamental purpose of the NIEO. Such special privileges are not limited to the Area. In regard to the continental shelf beyond 200 nautical miles, developing states may, under certain circumstances, be exempt from the tax that must be paid: "A developing State which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect to that mineral resource."¹⁶⁰ The fact that the diversity of LDCs was accommodated in these provisions shows a certain maturity among NIEO proponents, especially in comparison to some of the categories already dealt with.

7. Transfer of Technology

A basic assumption behind the NIEO is the notion that the LDCs do not want charity. These countries would prefer to be given the tools and the training needed to modernize and develop themselves. Since the mid-1960s, in the context of the law of the sea, these sentiments have been voiced under the rubric of the transfer of technology. It is, therefore, not surprising that many provisions of the Convention deal with technology transfer.

For example, the Authority that will manage the deep seabed is entrusted with significant responsibilities for transfer of technology both to the developing states and to the enterprise, the organ of the authority that will actually engage in mining. The Authority and States Parties will initiate and promote:

The transfer to developing States of such technology and scientific knowledge so that all States' Parties benefit therefrom.¹⁶¹

¹⁵⁹ *Id.* at art. 151(10).

¹⁶⁰ *Id.* at art. 82(3).

¹⁶¹ *Id.* at art. 144(1)(b).

... Programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area, including, *inter alia*, facilitating the access of the Enterprise and of developing States to the relevant technology, under fair and reasonable terms and conditions;¹⁶²

... [M]easures directed towards the advancement of the technology of the Enterprise and the domestic technology of the Enterprise and the domestic technology of developing States, particularly by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology and for their full participation in activities in the Area.¹⁶³

Similar provisions exist concerning the preservation and protection of the marine environment.¹⁶⁴

A somewhat less likely place to find technology transfer provisions is in Part XIII dealing with marine scientific research. Certain provisions here may interfere with scientists' ability to conduct research. For example, Art. 244.2 states that:

For this purpose, States, both individually and in cooperation with other States and with competent international organizations, shall actively promote the flow of scientific data and information and the transfer of knowledge resulting from marine scientific research capabilities of developing States through, *inter alia*, programmes to provide adequate education and training of their technical and scientific personnel.¹⁶⁵

It is not surprising that marine scientists object not so much to the spirit of such provisions but to the ways in which they may be interpreted. Scientists are understandably sensitive about research results being disseminated piecemeal, prematurely, or taken out of context. All of these events are possible, given various interpretations of these provisions.

An entire section of the Convention is devoted to the development and transfer of marine technology (Part XIV).¹⁶⁶ Of course, there are a number of

¹⁶² *Id.* at art. 144(2)(a).

¹⁶³ *Id.* at art. 144(2)(b).

¹⁶⁴ *Id.* at art. 202.

¹⁶⁵ *Id.* at art. 244(2).

¹⁶⁶ The umbrella for the rest of the section is this:

States should promote the development of the marine scientific and technological capacity of States which may need and request technical assistance in this field, particularly developing States, including land-locked and geographically disadvantaged States, with regard to the exploration, exploitation, conservation and management of marine resources, the protection and preservation of the marine environment, marine scientific research and other activities in the marine environment compatible with this Convention, with a view to accelerating the social and economic development of the developing States. *Id.* at art. 266(2).

different ways in which the general provisions in this section might be implemented. States are required to promote "the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data."¹⁶⁷ States are also required to "establish programmes of technical cooperation . . ."¹⁶⁸ An open question is how thorough and genuine such measures would be. It is possible to follow the letter of the provisions and still do nothing significant in the transfer of technology.

The length and complexity of this Convention provides the opportunity for numerous kinds of responses to NIEO issues within a context that was *not* focused principally on the NIEO per se. The range of provisions is great, from platitudes, neither firm, nor tangible, to the provisions dealing with the Area, both firm *and* tangible. A basic issue with this convention (and one that could be sidestepped with both the Charter and the Lima Declaration) is whether the Convention has been so demonstrative about NIEO issues that it will never obtain the required 60 ratifications and accessions to enter into force. The United States has already indicated firm opposition to the treaty.¹⁶⁹ Some West European states have similar feelings, albeit expressed with more subtlety. All of the Socialist states have signed the treaty.

III. ANALYSIS

This section first analyzes NIEO documents in terms of international law sources. Then, the need for change versus economic reality is addressed. Finally, a scheme for evaluating the *obligation* created by NIEO documents is offered.

A. *The Sources of International Law*

It is instructive to analyze the international legal substance of the NIEO in terms of the three principal sources of international law; treaties, custom, and general principles recognized by civilized nations. This provides a more objective and critical perspective, removed from the political aspirations that color much of the rhetoric about the NIEO.

1. "International conventions, whether general or particular, establishing rules expressly recognized by the contesting states."¹⁷⁰

The UNITAR study identified a huge amount of conventional international law dealing with the NIEO. Most of that law is bilateral or plurilateral, not

¹⁶⁷ *Id.* at art. 268.

¹⁶⁸ *Id.* at art. 269.

¹⁶⁹ The U.S. position on the subject is well explained by Morton, *The Law of the Sea and the New International Economic Order*, IIIA ST. LOUIS U. PUB. L.F. 13 (1984).

¹⁷⁰ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38.

general multilateral law. The provisions of the Lomé II and III Conventions are exceptional in their firmness and completeness. Because NIEO issues are so basic to the political climate of the 1970's and 1980's, they are present to some degree in many treaties. But not a single general multilateral treaty exists in force, that deals *principally* with NIEO issues.¹⁷¹ It is significant that the only firm and tangible rules relating to the NIEO occur in conventions between the Western states and the LDCs, e.g., Lomé II and III. The overall impact of conventional law on the NIEO is difficult to assess because it is diverse, fragmented, and even contradictory.

2. "International custom, as evidence of a general practice accepted as law."¹⁷²

While the LDCs feel a crying need for a customary international law dealing with basic NIEO issues, serious problems have arisen in trying to assess prospects for such law. If one looks at the negotiations that have produced many of the most important NIEO documents, the impression is that certain states, in particular the U.S., feel their national interest demands avoiding any impression that basic NIEO issues are part of customary international law. For example, when the Charter of Economic Rights and Duties of States was being drafted, the term "obligations" was changed to "provisions",¹⁷³ exactly the kind of change that thwarts the development of a rule of customary law.

UNITAR has described the dilemma exactly:

For, the most important . . . problem involved is the question of verifying *legally relevant* manifestations of practice; that of proving the existence of *opinio iuris* underlying *usus* — since lack of the former prevents the latter from evolving into *custom* and the emergence of a norm of *customary law*. What legal significance should one attach, for instance, to sudden exceptions to a hitherto consistent practice? Unless the reasons for the interruption are explained by the actor[s] in question, one may be left in doubt: just as even a highly consistent practice does not always have to result from corresponding *opinio iuris* Policy changes with respect to preferential treatment may result from purely political considerations, or be dictated by economic coercion¹⁷⁴

¹⁷¹ Arguably, however, the constituent instruments of certain international organizations may refute this.

¹⁷² STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 28(1)(b).

¹⁷³ Brower, *supra* note 40, at 301.

¹⁷⁴ UNITAR, *supra* note 28, at 23.

3. "The general principles of law recognized by civilized nations."¹⁷⁵

One could point to the vast number of references to NIEO principles made in a myriad of fora as evidence that general principles of law are now recognized relative to the NIEO. But do general principles mean very much in an area like the NIEO where specific actions, usually preferential treatment, are needed? On the one hand, one might argue, as Dorsey has done, that the climate is important since formulations like the Charter and the Lima Declaration "add to the normative authority of previous statements attesting to the existence of a developing international law of cooperation in the sphere of economic rights and duties of states."¹⁷⁶ By contrast, it is possible that general support assuages the need for specific action.

One of the most intriguing and controversial issues of law-making in the NIEO context is the character of resolutions of international organizations.¹⁷⁷ The LDCs, with their voting majority in the U.N. General Assembly tend to maintain that "these resolutions constitute at the very least the will of the international community"¹⁷⁸ and "always have compulsory value, with regard both to the organization and to the States."¹⁷⁹ The concept of the binding nature of some U.N. resolutions predates the NIEO¹⁸⁰ but has gained momentum during the NIEO debates. The argument advanced by many Third World authors, that consensus rather than consent is becoming the basis of obligation in international law,¹⁸¹ was inspired by Professor Richard A. Falk.¹⁸² Falk viewed this shift as a necessity if "international society is to function effectively . . ."¹⁸³ Not surprisingly, these ideas are generally opposed by both Socialist and Western authorities.¹⁸⁴

The NIEO is an area where the operation of the sources of international law should be examined carefully. It is possible that the accumulation of many treaties dealing with the NIEO will help to establish customary law on these issues.¹⁸⁵ This has been demonstrated in other areas, specifically status of forces

¹⁷⁵ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38.

¹⁷⁶ Dorsey, *supra* note 63, at 111.

¹⁷⁷ See generally Ellis, *supra* note 3.

¹⁷⁸ M. BEDJAOUTI, *supra* note 15, at 178-79.

¹⁷⁹ *Id.* at 179.

¹⁸⁰ See, e.g., O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE U.N. 66-67 (1966); Memon, *U.N. Special Committee and Decolonization*, 9 INDIAN J. INT'L L. 27 (1969).

¹⁸¹ See, e.g., Milan Bulajic and S.R. Chowdbury. See S. Chowdbury, *Legal Status of the Charter of Economic Rights and Duties of States*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 79, 84 (K. Hossain, ed. 1980).

¹⁸² Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 785 (1966).

¹⁸³ *Id.*

¹⁸⁴ Tunkin, *supra* note 16, at 89-90; Tunkin, *International Law in the International System*, 147 RECUEIL DES COURS 62-71 (1978).

¹⁸⁵ See generally Gamble, *The Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 309 (1981).

agreements.¹⁸⁶ It is clear that the NIEO is so politically charged that it will not spring easily and fully into the mainstream of international law as was the case, for example, with the continental shelf doctrine.

B. *The Need for Change v. Economic Reality*

It is maddeningly difficult to "get a fix" on the current status of the international law pertaining to the NIEO. Perceptions of the developing states are vastly different from those of the economic powers. Because such different perceptions exist, these two groups of countries are unclear about reality. One author illustrates the general conflict in the following terms:

Their [the LDCs] long suppressed frustration had bubbled to the surface and burst. This produced an understandably defensive reaction on the part of the developed countries, particularly in the United States. None of the developed countries was prepared to respond in depth to the detailed attack which cut so deeply into the established way of doing things.¹⁸⁷

Garcia-Amador's views on the matter are cogent. He discusses the "emerging law of development" while acknowledging that "some of the basic principles of traditional international law have never been subjected to such far-reaching challenges."¹⁸⁸

An important question often is overlooked: If the LDCs were able to secure most of the concessions they seek, would it have a significant effect on their underlying problems? As it stands now, the developed states can use three distinct arguments or tactics to counter the claims of the LDCs: first, it is illegal; second, it is not in our national interest; and third, it will not work. The first two alone often can be countered. The third used in *combination* with either of the other two makes the case much stronger.

Dorsey identifies three elements that make the LDCs' demands for preferential treatment less palatable to many developed countries:

1. The right to preferential treatment does not seem to carry with it a corresponding obligation to benefit from the use of resources diverted to a country.
2. Once preferential treatment is granted to a developing country, there are no standards beyond those which a developed country might try to impose as a measure of the effective utilization of its benefits. The only sanction would be the forfeiture of the right to preferential treatment for failure to meet such standards. Such

¹⁸⁶ See Jordan, *Creation Of Customary International Law By Way Of Treaty*, 9 JAG L. REV. 38, 43 (1967).

¹⁸⁷ R. MEAGHER, *supra* note 4, at 5.

¹⁸⁸ Garcia-Amador, *supra* note 17, at 17.

an imposition would probably run afoul of the provision of the Charter of Economic Rights and Duties of States

3. Less onerous to national sovereignty might be an obligation to work towards eventual disqualification from the beneficiary position of a developing country. The United States suggested the incorporation of such an obligation at the Lima Conference, but it was not adopted in the final declaration.¹⁸⁹

All of these ideas reduce to a disagreement about the degree to which the LDCs should be accountable for assistance they receive. In many ways such requests seem only reasonable, surely not too much to pay for the concessions. However, the LDCs often view this demand for accountability as an extension of the colonialist mentality that, in their view, created most of these problems in the first place. Above all, NIEO issues must be viewed in many contexts, not just economics. No doubt the recent conservative shift of several major Western governments has made things more difficult for the NIEO. To cite one example, a Carter-like administration in the U.S. would have supported the Law of the Sea Convention even with its NIEO provisions. Furthermore, it is clear that the LDCs are experiencing a doctrinaire period while they adjust to their newly-found power and status. It is tempting to speculate about the effect of the confluence of a less doctrinaire stance from the LDCs *and* more liberal governments in Britain, the United States, and elsewhere.

C. *A Scheme for Evaluating NIEO-Related Documents*

The vast number of legal documents having some bearing on the NIEO necessitates some system of classification. Otherwise it would be impossible to assess the overall status of law on the subject or to compare various documents. There can be great difficulty in agreeing on the definition of terms. UNITAR discussed rights, legal obligations, expectations, and political commitment.¹⁹⁰ Here, another approach is taken. The following can be used to assess the obligation created by NIEO documents:

The idea behind the scheme employed in the table is simple. The obligation created by NIEO instruments should be assessed according to the substance and duration of the obligations to whom those obligations apply. Separate dimensions are used for the obligation itself. The first dimension deals with the nature of the obligation: (1) What is the source of the obligations; treaty, custom, general principles or U.N. resolutions? (2) How definite is the text of the obligation, for example, does it say "shall" or "should"? (3) How specific and concrete is the obligation? and (4) How long does the obligation last? The second

¹⁸⁹ Dorsey, *supra* note 63, at 130.

¹⁹⁰ UNITAR, *supra* note 28, at 20.

dimension deals with the applicability of the obligation: (1) How many states are obliged to follow the terms of the instrument? (2) Are the states involved needed for the operation of the obligation, for example, are the states that can *give* preferential treatment involved? and (3) Is participation envisioned, either actively or passively, by international organizations, or multinational corporations?

A brief examination of the documents discussed earlier shows that each can be accommodated by this scheme. For example, Lomé II and III create very firm and tangible obligations for a group of 75 states from West Europe and the Third World and they do so through the most definitive source, a treaty. Each Lomé treaty created an obligation lasting for five years. In contrast, the Charter of Economic Rights and Duties of States (a resolution) created fairly firm obligations that tend to be intangible. These obligations may last for a long time but that matters little since they are intangible. The Charter has been accepted by most of the states in the world except for a few important ones, arguably *the* most important. The case of the 1982 U.N. Convention on the Law of the Sea is very complicated. The treaty addresses so many different topics in a myriad of ways; thus, the firmness and tangibility are highly variable. The Convention may never enter into force. While 159 states have signed the instrument, thus far only 17 states have ratified or acceded to the treaty.¹⁹¹ Since 60 parties are required for entry into force,¹⁹² the future is problematic.

IV. A FINAL WORD

Examining the current legal status of the NIEO leaves one with considerable disquietude. Demands are being made for rapid, substantial changes. It should be remembered that the "old" international economic system with its hallmarks of lowered (or no) tariffs, equal treatment, and most favored nation treatment, developed immediately after World War II.¹⁹³ That system was not yet firmly in place when the onslaught of demands for fundamental changes began. The following illustrates how perceptions occur on totally different planes:

Logically speaking, the foregoing construction of the old, almost venerable principle of the legal equality of States . . . does not seem to be sound rationale for advocating that unequal and preferential treatment be given to countries in certain states of development. Indeed, the problem is not whether or not such a claim is compatible with the principle of the legal equality of States; since the purposes

¹⁹¹ Up-to-date information kindly provided by the Treaty Division of the U.N. Secretariat.

¹⁹² Convention, *supra* note 148, at art. 308.

¹⁹³ Dorsey, *supra* note 63, at 113.

of this principle have nothing to do with those of NIEO's postulates, this problem cannot even be raised.¹⁹⁴

The basic question must be the degree to which international law can play a positive role in assisting the LDCs in realizing their legitimate aspirations as advanced under the rubric of the NIEO. International law can lead and shape public policy, but it must do so carefully and subtly. International law can coax, cajole, and prod states into new channels of behavior and thought. When law is called upon to engineer a fundamental break with the past, however, it will fail utterly; the tenets and procedures of international law are simply too fragile.

A good example is the Charter, where Article 2(2)(c), in its break with traditional international law, foreclosed the possibility that the United States would look favorably and flexibly on that document.¹⁹⁵ One wonders whether enlightened self-interest would have led the LDCs toward a different position on 2(2)(c). An ideal synthesis would be between the economic order developing after 1945, the thesis, and the understandable demand for changes pressed by the NIEO, the antithesis. But there are few signs for optimism unless (a) the world economy is healthy, (b) major Western powers become more sympathetic and flexible, and (c) the LDCs adopt a more reasonable posture about the changes they seek. In the view of many developed states, especially the United States, the demands of the LDCs are so extreme that they are beyond the pale of international law. Even if all three conditions are met, the NIEO will not become a global regime without Socialist participation. That participation is unlikely since the LDCs would want the same privileges granted by the Western states. Further, the Socialist states' desire to use the NIEO as a vehicle for revitalizing economic relations between East and West serves to complicate an already difficult political-legal situation.¹⁹⁶

It would be very instructive to examine all NIEO documents according to the scheme described here. Under this scheme, one could determine, for example, the relation between the type of obligation and its applicability. Intuition suggests that international political bargaining would require sacrificing tangibility and firmness in order to "buy" wider application. This leads to the quintessential normative question, is the sacrifice in the nature of the obligation a reasonable price to pay for greater participation?¹⁹⁷

¹⁹⁴ Garcia-Amador, *supra* note 17, at 19.

¹⁹⁵ *Id.* at 51.

¹⁹⁶ B. Fomin, *supra* note 11, at 7-9.

¹⁹⁷ A parallel point can be made about reservations to multilateral treaties. See Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372-94 (1980).