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COMMODITY AGREEMENTS AND THE EMERGING LEGAL PRINCIPLES FOR A MIEO
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COMMODITY AGREEMENTS AND THE EMERGING LEGAL PRINCIPLES FOR A NIEO

The study has so far sought to understand and describe the economic and political, the legal and institutional content and context of commodity agreements. In the present chapter the analysis proceeds to another plane, that is, to considering the commodity agreements in the context of the progressive development of the principles and norms of international law relating to the NIEO. While the individual commodity agreements are mutually independent treaty regimes, which introduce international cooperation in the realm of commodities they also, as integral components of the endeavour to establish a NIEO, evidence state practice which is relevant to the formulation and crystallisation of the emerging principles and norms of the NIEO. To put it differently, since the present study views commodity agreements from the broader perspective of a NIEO, it is important, inter alia, to examine the principles and norms the commodity agreements give rise to in the context of efforts in the United Nations to progressively develop the principles and norms of international economic law. The chapter also seeks to clarify, in this context, some features of ICAs which have already been examined - the nature of obligations and the system of weighted voting
The ensuing discussion is divided into five parts. In the first part reference is made to the preamble and objectives of commodity agreements in order to show that the members of these agreements recognise them as a component of the programme to establish a NIEO. The significance of such an exercise is that in as much as commodity agreements take cognisance of this material fact they would appear to manifest state practice directly relevant to the evolving principles and norms of the NIEO. The second part traces the endeavour within the United Nations to evolve principles and norms of a NIEO, with particular reference to commodity law. The third part considers, in the context of emerging principles of NIEO, the theoretical debate around the concepts of "hard" and "soft" law, as well as examines the basis of international customary law. The fourth part, in the background of the theoretical considerations, attempts to briefly evaluate the contribution of commodity agreements to the evolving principles and norms of international commodity law. The fifth part considers, in the context of the NIEO, the institutional implications of incorporating the principle of weighted voting in the decision making process. The final part contains a broad appraisal.

I. ICAS INTEGRAL COMPONENT OF NIEO

All programmes concerned with measures to bring about a NIEO recognise the significance of commodity agree-
ments. This fact needs no reiteration. That the commodity agreements as well evidence this fact perhaps deserves attention. Firstly, the preamble of a number of contemporary agreements explicitly recall the Declaration and Programme of Action on the Establishment of a New International Economic Order as also the Integrated Programme for Commodities.1 Others emphasise the importance of the objectives of commodity agreements to the economies of developing primary commodity exporting countries. For example, the ITA, in four of the six paragraphs of its Preamble recognises the following:

(a) The significant assistance to economic growth, especially in developing producing countries, that can be given by commodity agreements in helping to secure stabilisation of prices and steady development of export earnings and of primary commodity markets;

(b) The community and interrelationship of interests of, and the value of continued cooperation between, producing and consuming countries in order to support the purposes and principles of the United Nations and the United Nations Conference on Trade and Development and to resolve problems relevant

1. See the preambles of INRA, ICCA, IAJJP and ITTA.
to tin by means of an international commodity agreement, taking into account the establishment of a new international economic order;

(c) The exceptional importance of tin to numerous countries whose economy is heavily dependent upon favourable and equitable conditions for its production, consumption or trade; and

(d) The importance to tin producing countries of maintaining and expanding their import purchasing power.

The preamble to an agreement is essentially a statement of motivating ideas and purposes. They are therefore not immutable. Successive agreements can embody different preambles reflecting the historical context in which the agreement was arrived at. The tin agreements in the post-1945 period well illustrate this point. The preamble to the First Tin Agreement, 1954 closely followed the language and spirit of the aborted Havana Charter which perceived commodity agreements as a "necessary evil". The preamble was modified in the next three agreements till in the International Tin Agreement, 1975 —

in contrast to the first agreement - the UNCTAD conception of a commodity agreement was codified. The preamble to the 1975 Tin Agreement is repeated in the ITA. In fine, it is submitted that members of commodity agreements have come to accept the changed conception of commodity agreements and view it as an instrument which seeks to contribute to the establishment of a NIEO. This conclusion is endorsed by the fact that the positive conception has been translated into concrete objectives and obligations, in the former case most often with specific reference to the Integrated Programme for Commodities. 3

Two implications follow from the conclusion which may be noted: firstly, the commodity agreement is not to be viewed merely as a contract between exporter and importer countries but from the broader perspective as a means to promote the economies of developing primary commodity exporting countries. Secondly, in so far as state practice is more relevant than policy pronouncements, contemporary commodity agreements embody the practice of affected countries so necessary to the formulation of principles and norms of international law.

3. See article 1 of ISA; article 1 of INRA; article 1 of ICOA; article 1 of ICCA; article 1 of IAJUP; and article 1 of ITTA.
II. UNITED NATIONS AND COMMODITY LAW

In recent years, in the background of the Declaration and Programme of Action on the New International Economic Order and the Charter of Economic Rights and Duties, the General Assembly has recognised the urgent need for a systematic and progressive development of the principles and norms of international law to govern international economic relations. In December 1975, the General Assembly, at its thirtieth regular session, took note of a draft resolution on the "consolidation and progressive evolution of the principles and norms of international economic development law" which noted that "there are already principles and norms in the field of economic development that are politically relevant, legally sufficient and timely for consolidation". At its thirty-second session, the General Assembly called upon the United Nation's Commission on International

Trade Law (UNCITRAL) to take into account the resolutions which laid down the foundations of a NIEO, keeping in view the need for United Nations organs to participate in the implementation of those resolutions. At its thirty-fourth session it requested the Secretary-General, in collaboration with the United Nations Institute for Training and Research (UNITAR) and in co-ordination with UNCITRAL, "to study the question of the consolidation and progressive development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order, with a view to embodying them in one or more instruments, as appropriate". The approach of UNCITRAL and UNITAR to the requests of the General Assembly, their consideration of the legal issues relating to commodities, and the work done by UNITAR in the direction of the progressive development of commodity law are the subject of the ensuing discussion. The purpose is, at first, to be acquainted with certain developments taking place within the United Nations system to progressively develop commodity law.


A. UNCITRAL and Commodity Law

The UNCITRAL was established by the General Assembly on 17 December 1966 for "the promotion of the progressive harmonisation and unification of the law of international trade". The General Assembly called on the Commission "to take account of the relevant provisions of the resolutions of the sixth and seventh special sessions of the Assembly that laid down the foundations of the new international economic order, bearing in mind the need for United Nations organs to participate in the implementation of these resolutions". The Commission, in turn, at its eleventh session noted that "in order to implement the mandate given to it by the General Assembly in the above resolution(s), it (was) necessary... to determine the legal implications of the new international economic order". It also requested its Secretary-General to prepare a report setting forth "subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission". Consequently, the


Secretary-General invited governments to submit their views and proposals as to subject matters that are relevant in the context of the development of NIEO and that would be suitable for consideration by the Commission. Between October 1978 and April 1979, 13 replies were received by the Commission. The Report which the Secretary-General prepared subsequent to this also took account of the views expressed and proposals submitted at the eleventh session of the UNCITRAL, as well as the discussions in the Sixth Committee on the Commission's report on the work of its eleventh session. Under the head "Commodities", the Report dealt with two elements: (1) Commodity agreements, and (2) Producers' associations.

The perspective in which the Commission viewed its task was outlined in the context of all the subject matters of the NIEO. The report observed:

First, if the Commission's traditional approach to the unification and harmonisation of international trade law is used as a yardstick, the majority of the subject-matters listed there could be considered as falling outside the scope of its work. Secondly, if by another interpretation of its mandate, the Commission would take up certain of the subject-matters listed

11. Ibid.
in respect of which economic aspects are preponderant, it would probably be necessary for it to organise its working methods in such a way that the necessary consensus in respect of the broad content of the legal rules to be drafted is reached before the actual preparation of the texts.13

It concluded that the subject matters needed to be considered in the light of the fact that it was a legislative body.

The Report was examined in January 1980 by a Working Group set up by the Commission. The conclusion of the Working Group on the subject of "Commodities" was:

In the view of the Working Group, it would obviously not be for the Commission itself to deal with multilateral commodity agreements, which could best be left to other United Nations bodies such as UNCTAD. However, thought could be given to the drawing up of model clauses or guidelines on some legal aspects of commodity agreements.14

On the basis of the discussion on this subject as well as the other heads it made a list of topics which eventually included in its work programme "Legal aspects of multi-

13. Ibid., p.120.
lateral commodity agreements". Subsequent to the meeting of the Working Group on the New International Economic Order, the UNCITRAL Secretariat invited the UNCTAD to comment on the recommendations of the Working Group concerning subject-matters for inclusion into UNCITRAL's work programme.

The UNCTAD secretariat submitted a note entitled "Legal aspects of international commodity agreements", which concluded that "...it does not seem useful to us for UNCITRAL to include this aspect of international law in its work programme. It seems to us also that the 'drawing up of model clauses or guidelines on some legal aspects of commodity agreements' will serve very little purpose". It noted that "...although certain administrative and final clauses of international commodity agreements are similar in wording if not in substance, these agreements differ in their objectives and structure". Therefore, it concluded that "...the internal legal aspects of such international commodity agreements will no doubt differ".

15. Ibid., p. 120.
16. A/CN.9/193: Note by the secretariat - Legal Implications of the new international economic order, ibid., p. 135. See Annex Entitled "Legal aspects of international commodity agreements".
17. Ibid., p. 136.
18. Ibid., p. 135.
While there is a certain element of truth in these statements they do appear to exaggerate the differences in the broad objectives and structure of commodity agreements. For example, a broad objective of all commodity agreements (including those which incorporate no price stabilisation mechanism) is to stabilise prices. This could suggest, along with a host of other evidence, the emergence of a principle of stabilisation of export earnings as part of international commodity law. Yet if the UNCTAD secretariat did not even allude to the cumulative impact of these agreements on the progressive development of international law, it is perhaps because it viewed the entire matter in the light of UNCITRAL's practice by which it essentially sees itself as a legislative body. In that context, perhaps, a model commodity agreement would not serve any great purpose. If only to underline the perspective in which it gave its opinion, the UNCTAD secretariat very briefly discussed the following legal aspects of international commodity agreements: (i) establishment of international organisations endowed with legal personality; (ii) the principle of equality of states; (iii) headquarters agreements; (iv) dispute settlement clauses; (v) force majeure clauses; and (vi) fair labour standards clauses.19

19. Ibid.
The UNCITRAL seems to have refrained from taking up certain subjects for consideration for several reasons, _inter alia_, that it was being considered by other international organisations; that its mandate was restrictive; and that the concerned areas were politically sensitive. Moreover, the developed countries were not in favour of such an exercise. According to Jamison Selby of the Office of the Legal Advisor, US Department of State, the development of UNCITRAL concerning itself with topics of NIEO "raised the unappealing vision of UNCITRAL's becoming yet another forum for difficult and highly politicised debate. UNCITRAL's particular history and reputation as a competent specialised body capable of important achievements in the field of private international trade law added both gravity and cautious optimism to this concern... the United States and other western countries strongly expressed the view that UNCITRAL's province is private law". 20

Whether UNCITRAL's mandate is limited to the province of private law is debatable. In fact it can address matters of public law if supported by functional interpretation of the Commission's mandate. Furthermore, as Bulajic has pointed out, "The fact is that - in contemporary international law - there is no clear line

of demarcation between international public and private law. For that matter the Legal Council of the Secretary-General has informed the Commission that there is no decision limiting the field of the Commission's activities. Should it, however, address issues which have a high political and economic content? The earlier cited UNCITRAL secretariat view seems to say a cautious 'No'. The Commission appears to approach its task through Kelsenian blinders and consequently hesitates to deal with issues of high economic content and political sensitivity. It projects its task as somewhat limited to the legislative sphere. There could be two ways to look at the issue: (a) to see it in the context of a healthy division of labour in which UNCITRAL has been assigned certain specific objectives to which it could be left alone to achieve; and (b) that it should concern itself with all matters of international economic law, in particular those arising out of the endeavours of the developing countries to establish a NIEO. Both these approaches have some validity. Even if the former interpretation is accepted, the UNCITRAL can still play a useful role as it has, for


22. Ibid.
instance, done in the area of international commercial arbitration. If the latter approach is accepted, it can help concretise and progressively develop the principles and norms relating to an NIEO which collectively would seek to establish a just world economic order. This approach is evidently more fruitful, in particular, if it is combined with its legislative task. If it does not adopt this approach all that can be said is that the ambit of international trade law cannot be limited to the mandate of UNCITRAL. The General Assembly has itself endorsed this view in assigning the important broader task to the UNITAR.

B. UNITAR and Commodity Law

At its thirty-fifth session, the General Assembly adopted a resolution entitled "consolidation and progressive development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order". By operative para.1(a), the General Assembly requested the UNITAR "to prepare a list of the existing and evolving principles and norms of international law relating to the

new international economic order concerning the economic relations among states, international organizations and other entities of public international law, and the activities of transnational corporations", as contained, inter alia, in a number of specified international instruments. Further, the General Assembly requested the UNCTAD, in para. (1)(b) of the resolution "to prepare an analytical study... on the progressive development of the principles and norms of international law relating to the new international economic order". Indeed, under para.1(c) the UNITAR was further requested to "complete

24. The instruments mentioned were:

(i) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625(XXV), annex);

(ii) Declaration and Programme of Action on the Establishment of a New International Economic Order, (General Assembly resolutions 3201 (S-VI) and 3202 (S-VI));

(iii) Charter of Economic Rights and Duties of States, (General Assembly resolution 3281 (XXIX));

(iv) General Assembly resolution 3362 (S-VII) of 16 September 1975 on development and international economic co-operation;

(v) International Development Strategy for the Third United Nations Development Decade (General Assembly resolution 35/56, annex);

(vi) Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (TD/RBP/CONF/10); and
the study... in time for the Secretary-General to submit it to the General Assembly at its thirty-sixth Session". In pursuance of this resolution, the Secretary-General presented to the thirty-sixth session his report together with a Compendium prepared by the UNITAR constituting the first part of its study.

The UNITAR's primary task under para.1(a) of the resolution was "to prepare a list of the existing and evolving principles and norms of international law relating to the new international economic order". In order to carry out this task, it found it necessary to prepare a Compendium which eventually took the form of a list of the specific articles, sections, paragraphs etc. of the instruments that were relevant to each topic or issue covered by the study.25 The broad topics and sub-topics were enumerated under five major heads: international trade, international monetary issues, international development financing, industrialisation, and global commons. Under the head "Commodities" it enumerated the following sub-topics:

cont...


(i) Special arrangements needed for improved export earnings and the prices of goods imported from DCs - General Principles: The Stabilisation of export earnings at fair and remunerative prices.

(ii) Commodity Agreements.

(iii) Common Fund.

(iv) Producer's Associations.

(v) The adverse effect of synthetics.²⁶

Despite the inherent limitations and failings of a UNITAR study, the Compendium constituted a significant step forward in the progressive development of the law relating to the NIEO. It painstakingly identified and collated under classified topics all the relevant material which lay dispersed and fragmented. At its thirty-sixth session, the General Assembly requested the UNITAR "to complete the study by preparing the analytical study" as enjoined by para.1(b) of the earlier cited resolution.²⁷

In March 1982, UNITAR convened a meeting of experts to make recommendations on the structure and content of


the analytical study. The experts emphatically recommended that, given time and financial constraints, this phase of the study should focus its attention on two topics. The two broad heads identified were "international trade" and "industrialisation". Thereafter, it made a selective analysis of the most important items identified in the Compendium "eliminating instruments of limited application and those adopted by bodies of restricted membership". It considered (a) resolutions of the General Assembly; (b) bilateral and multilateral agreements; and (c) decisions of international tribunal. This analysis helped the UNITAR to identify the following principles or cluster of principles which either exist or are in the process of evolution:

1. Preferential treatment of developing countries;
2. Stabilisation of export earnings of developing countries;
3. Permanent sovereignty over natural resources;
4. Right of every state to benefit from science and technology;
5. Entitlement of developing countries to development assistance;

29. Ibid.
30. Ibid., p. 7.
(6) Participatory equality of developing countries in international economic relations; and

(7) Common heritage of mankind.\(^{31}\)

It is significant that the UNITAR identified 'stabilisation of export earnings of developing countries' as a principle or a cluster of principles which may either exist or is in the process of evolving.

At the thirty-seventh session of the General Assembly, analytical papers on three topics were placed before the Sixth Committee of the General Assembly. They were: the principle for preferential treatment for developing countries; the principle of stabilisation of export earnings of developing countries; and the principle of permanent sovereignty over natural resources.\(^{32}\) Accompanying each analytical paper was an analysis of the relevant sources.\(^{33}\)

31. For these papers see UNITAR/DS/5, 15 August 1982: Progressive development of the principles and norms of international law relating to the New International Economic Order - Analytical Papers and Analysis of Texts of Relevant Instruments.

32. The paper on principle of stabilisation was written by Wolfgang Benedek.

33. It is interesting to note the heads which were to be analysed in the case of principles of stabilisation of the export earnings of developing countries. Since it makes "it possible to see norms which are, or may be evolving in the direction of law:

(1) Effective management of commodity markets and stabilisation of export earnings of developing countries. 1.1 Buffer stocks; 1.2 The need contd...../-
III. SOME THEORETICAL CONSIDERATIONS

Before seeking to examine the conclusions of the paper on 'stabilisation of export earnings of developing countries and evaluating the contribution of commodity agreements to the emergence of the principle, it is only appropriate to consider, albeit briefly, the criteria and process by which a principle and norm can be said to have crystallised. In this context, the issue of "hard" and "soft" law is considered followed by an examination of the question whether the emerging principles and norms of NIBO are part of international customary law. A final question that is touched upon is whether the entire ongoing exercise is premature.

A. Hard and Soft Law

In recent years a distinction has been posited between "hard law" and "soft law". With reference to

for adequate financing; 1.3 Producer's associations; 1.4 Measures against the adverse effect of synthetics; and 1.5 Equitable relationships between export earnings and import payments of developing countries.

(2) Elimination of restrictive business practices.

It may be noted that the topics which have been identified differ from the sub-topics which had been listed in the Compendium. The sub-topic 'Commodity Agreements' is apparently substituted by sub-principle 'buffer stocks'. This sub-principle could also possibly cover the first window of the Common Fund. There is an important addition 'elimination of restrictive business practices. Ibid., p. 278.
commodity agreements the discussion is relevant for two different reasons: it helps clarify the legal nature of obligations undertaken by states in ICAs, as well as allows a proper perspective on the contribution of ICAs to the evolving legal regime governing international economic relations. There is a need to examine the distinction from two points of view: firstly, in order to see whether the distinction is legitimate, and secondly, if the distinction is accepted then what are the consequences. That is to say, what does it mean to characterise a norm as belonging to the realm of "soft law".

Two conceptions of "hard law" may be said to coexist depending on the perspective of the individual scholar. It may firstly be viewed as being made up of norms creating precise rights and obligations. Secondly, the requirement of sanctions may be added to the formulation. "Soft law", has been defined thus:

there are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between states but do not create enforceable rights and duties. They may be described as "soft" law, consisting of treaty rules which states expect will be carried out and complied with.34

According to Weil, "soft law" would mean norms "whose substance is so vague, so uncompelling, that A's obligation and B's right all but elude the mind".\textsuperscript{35} Seidl-Hohenveldern appears to hold the same view.\textsuperscript{36} It is "soft law" which Judge Dillard appeared to be defining when he wrote in his separate opinion in the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan) that

Multilateral treaties establishing functioning institutions frequently contain articles that represent ideals and aspirations which, being hortatory, are not considered to be legally binding except by those who seek to apply them to the other fellow.\textsuperscript{37}

To Joseph Gold "the essential ingredient of soft law is an expectation that the states accepting these instruments will take their content seriously and will give them some measure of respect".\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{37} \textit{I.C.J. Reports} (1972), p. 107, n. 1.
\end{itemize}
Without going into the differences in the formulations with respect to soft law it may be asked whether the distinction between "hard" and "soft" law is valid. The distinction, it must have been noticed, is in the first place based on the content of the norm in question. Norms which are equivocal or vague in their content are termed "soft law". In this context it may be pointed out that even those scholars who contend that the proliferation of soft law weakens the international normative system admit that "whether the rule is 'hard' or 'soft' does not... affect its normative character. A rule of treaty or customary rule may be vague, 'soft'; but... it does not thereby cease to be a legal norm". 39 Yet, it is felt that the increasing resort to soft law dilutes the normative character of the international legal system, and any attempt to introduce a graduated normativity only makes matters worse. Such developments, according to Weil, would tend to challenge the basic functions which international law seeks to perform. 40 It is, however, difficult to attach a premium to "hard" as opposed to "soft" law for it is precisely "hard" law of which the developing countries have been a victim in the not so recent past, not to mention its often oppressive nature even today. In the final analysis, therefore the debate, it

40. Ibid., pp. 418-23.
would appear, boils down to one's understanding of the present state of world order and the contribution or function of international law in such an order.

The second basis on which a distinction is posited is whether a particular norm is backed up by sanctions. In this respect Bedjaoui has correctly pointed out that “sanction and obligation must not be confused” because “sanction does not represent a condition for the existence of obligation but only for its enforcement.” Even those who want to maintain a distinction between “hard” and “soft” law find it difficult to sustain the Kelsenian viewpoint regarding the nature of international law. Well therefore does not, for instance, lay too much stress on this factor for as he observes that “the sanction visited upon the breach of a legal obligation is sometimes less real than that imposed for failure to honor a purely moral or political obligation.”

While there were obvious problems in trying to distinguish between “hard” and “soft” law the distinction may be accepted for the moment in order to see what are the implications of categorizing a norm as "soft" law. It is


42. Well, n. 35, p. 415.
readily admitted by the proponents of the "hard" and "soft" law distinction, that it is not entirely without consequences for the conduct of states. According to Weil "they do create expectations and exert on the conduct of states an influence that in certain cases may be greater than that rules of treaty or customary law". 43 Gold spells out the following implications: "First, a common intent is implicit in the soft law as formulated, and it is this common intent, when elucidated, that is to be respected. Second, the legitimacy of the soft law as promulgated is not challenged. Third, soft law is not deprived of its quality as law because failure to observe it is not in itself a breach of obligation. Fourth, conduct that respects soft law cannot be deemed invalid". 44

Baxter formulates the impact of soft law relatively more precisely, and makes the following assertions:

1. If some sort of written norm has been consented to by the States involved, the future course of discussions, negotiation, and even agreement will not be the same as they would have been in the absence of the norm.

2. Once a matter has become the subject of such a norm, the matter can no longer be asserted to be one within the reserved domain or domestic jurisdiction of the state. As the Permanent Court said in its advisory opinion on Nationality

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43. Ibid.
44. Gold, n. 38, p. 443.
Decrees Issued in Tunis and Morocco,
"The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations". And one way in which international relations develop is through agreement.

3. The norm will establish new standards of relevance for the negotiations between the parties. Certain arguments will be ruled out. Economic considerations, under Article 5 of the Definition of Aggression adopted by the General Assembly after so much travail, are ruled out as a possible justification for the use of force against a State. That clearing of the ground is helpful, even though the definition may not be of material assistance in determining whether an act of aggression has taken place.

4. The norm will establish the legal framework within which the dispute about its application may be resolved. It will establish presumptions, indicate the prevailing trend of opinion, provide a guiding principle which may have a certain inherent appeal for the parties, and channel negotiation and settlement into legal and orderly paths.45

In sum, even if a norm is termed a "soft" law it is not devoid of legal content, but, on the contrary, has certain definite consequences.

B. International Customary Law and Norms of NIEO

At this juncture a second, and more relevant, question needs to be considered, that is, the process

through which principles and norms of the NIEO are to evolve? The contention of traditional lawyers, particularly western lawyers, is that they should either (a) be incorporated into a law making treaty, or (b) should have become part of international customary law. In so far as the latter source of norm making is concerned it would be required to fulfill the twin requirement of repetitive practice (the material element) and opinio juris (the consensual element).

Is, however, the traditional notion of custom relevant to the evolution of principles and norms of the NIEO. In this regard a distinction has been made between those provisions of the NIEO which have been corroborated by state practice and those which have not been followed by any particular conduct of states. In the former case western scholars are relatively more willing to examine whether a particular provision has emerged as a norm of international law.46 However, be that as it may, the initial question is whether the traditional concept of custom with its dual components must necessarily be satisfied before a principle of norm can be said to have emerged. It is submitted that in contemporary international law, given the rapid changes it needs to adopt to,
the traditional notion of custom, in its rigid form, is not fully relevant.

Firstly, "it is obvious that the speed necessary for the adoption of the rules of international development law squares uneasily with the need to wait for repeated acts to bestow their sanction. In fact, the developed countries are perfectly aware that this material element can only work in their favour". In the North Sea Continental Shelf judgement the International Court of Justice considering the transformation of a conventional rule into a rule of general international law explained how "it might be that even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected". Elsewhere in the judgement the Court observed that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule". In so far as the number of states which need to participate before a norm could said to have

47. Bedjaoui, n. 41, p. 136.
49. Ibid., p. 43.
formed, the Court only required state practice to be 'extensive'. Therefore, all states whose interests were specially affected did not need to participate: "the Court, indeed, referred to state practice, including that of States, not of all States, whose interests were so affected".50

The consensual element could be the subject of conflicting interpretations. One possible view is that the consent of states is necessary before a customary rule of international law can be said to have evolved i.e. customary rules are to be viewed as tacit conventions. The other view, which is more sound, is that what is required is not the tacit consent of states but rather consensus for the formation of customary rules of international law. The former view can perhaps be supported by the International Court's judgement in the Asylum case in which it observed that:

The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party.51


However, the view that customary rules are to be considered as tacit conventions is rejected by most publicists as well as by the Court.

Article 38 of the Statute of the International Court of Justice which enumerates the "sources of international law" lists in para. (1)(b) "international custom, as evidence of a general practice accepted as law". Interpreting it, Falk has pointed out that "the language of this subsection says nothing about consent being a prerequisite of the coming into being of a customary norm or that practice be universal or that states in their individual capacity accept the practice as law. In fact, the language of the provision accords with the view that a consensus or preponderant majority of states can generate a customary norm". 52 Falk cites Higgin, Kelsen and Lauterpacht in favour of this interpretation. 53 Other writings confirm this view. 54 In so far as the opinion of the International Court is concerned Aeschaga has noted that the Court has sounded "the deathknell of the

53. Ibid., pp. 154-61.
voluntarist concept of custom". After reviewing the relevant decisions of the Court he has observed:

All these findings and pronouncements of the Court, especially when taken together imply a complete abandonment of the doctrine of the tacit agreement; customary rules are the product of general consensus, not of individual state consent, express or implied.55

Furthermore, if the consensual element is to mean the tacit consent of states it would paralyse the process of the formation of a custom. In this respect Charpentier has aptly noted that "This is as good as saying that many of the claims that the new states would like to set up as rules of law have no more chance of succeeding by the customary channel than by the conventional way".56

In brief, for the formation of a rule of customary law what is required is a consensus of states, in particular of those states which are specially affected, but not necessarily of all the affected states.

C. Is the Exercise Premature

A final question which may be considered is whether the exercise of the progressive development of interna-


56. Cited by Bedjaoui, n. 41, p. 137.
tional law relating to the establishment of a NIBO is premature? To borrow the words of Jenks, “There is no warrant for writing these innovations off as misconceived or premature; they all correspond to vital needs the immediacy of which the law could no longer ignore without becoming wholly marginal to the life of society”.57 Further, as Bedjaoui points out, in this period of transition, “normative development will probably be faster than its institutional development, and perhaps the first will dictate the second”.58 In other words, the international legal process has an important role to play in creating an environment conducive to the establishment of the NIBO. The role entails the formulation and crystallisation of principles and norms which facilitate the process of transition, and thereby the peaceful resolution of economic conflict between states.

IV. CONTRIBUTION OF ICAs TO THE DEVELOPMENT OF COMMODITY LAW

In the matrix of the theoretical considerations, the contribution of commodity agreements to the development of the principles and norms of the NIBO may now be


58. Bedjaoui, n. 41, p. 249.
evaluated. Two preliminary observations are however in order. Firstly, in assessing whether a particular principle or norm of international commodity law, as evidenced by commodity agreements, has crystallised or not it must be borne in mind that in the present instance the provisions of the NIBO are backed by state practice both in the pre and post-NIBO phase. Therefore, even were it to be accepted that resolutions and programmes relating to a NIBO are to be supported through the conduct of states it would not affect the conclusions to be preferred.

Secondly, likewise, even if the distinction between “hard” and “soft” law could be justified, it is not in any case applicable to those obligations undertaken under commodity agreements which are backed up by sanctions. In this context it is to be pointed out that not all obligations relating to objectives other than price stabilisation are ambiguous or imprecise in nature. The proposition that hard law is that which precisely states the rights and obligations of parties is a relative proposition. There is no particular or standardised mode in which hard law is formulated. As Schacter puts it, "If one were to apply strict requirements of definiteness and specificity to all treaties many of them would have all or most of their provisions considered as without legal effect". 59

A. **Principle of Stabilisation of Export Earnings of Developing Countries**

In the backdrop of the theoretical analysis and these preliminary observations it is to be considered whether the principle of stabilisation of the export earnings of developing countries has evolved. First, however, the conclusion of Benedek's paper submitted to the Sixth Committee may be summed up.

It has been noted elsewhere in this study that in order to effectively stabilise the export earnings of developing countries, commodity agreements need to be supported, *inter alia*, by compensatory financing facilities because price stabilisation does not necessarily mean income stabilisation. In other words, what is required for effectively stabilising the export earnings of developing countries is a pincer attack on the stabilisation problem constituted of two elements - commodity agreements and compensatory financing facilities.

The paper submitted by Benedek to the Sixth Committee confines itself to an analysis of the latter element alone i.e. to the compensatory financing facilities established by the IMF, the STABEX and SYMINE schemes established under the successive Lome Conventions and the UNCTAD secretariat's proposal for commodity-related short-
falls in export earnings. In examining the evolution and emergence of the principle of stabilisation, Benedek's paper did not take into account any trend or evidence derived from the several commodity agreements as well as the Fund Agreement. This was a crucial omission, and in view of its limited treatment, the UNITAR was to expand the paper to take cognisance of "buffer stocks". The second part of the study has not yet been produced although there is little doubt that unless studies are completed in these areas and the entire evidence collated, it would be difficult, if not impossible, to come to any firm conclusion about the existence or emergence of principles relating to the stabilisation of the export earnings of developing countries. In the background of the present study, some attempt can be made towards ful-

60. The study itself notes that it "has been the objective of this study to deal with the principle of stabilisation of export earnings only in regard to compensation for fluctuations of export earnings. Commodity agreements and producer associations which have to be regarded as other important elements of a general principle of stabilisation of export earnings are not included in this analysis. Therefore a continuation of this study in regard to other elements of the principle of stabilisation of export earnings like, in particular, mechanisms of price stabilisation i.e. commodity agreements appears to be pertinent to allow for a comprehensive analysis of the progressive development of the principle", n. 31, p. 256.
filling the gap. First, however, a brief reference may be made to the conclusion’s of Benedek’s paper.

Benedek first notes the fact that there has been (a) a consistent call for stabilisation of export earnings of developing countries; (b) acceptance by governments of the need for stabilising the export earnings of developing countries from commodities; and (c) its concretisation at both the "universal" (the IMF’s facility) and on the "inter-regional" level (STABEX and SYSMINE). He then concludes that "a principle of stabilisation of export earnings in particular as regards compensatory financing is in the making".61 At another point, the study goes further and states that the "analysis of the different legal schemes leads to the conclusion that there is a particularly high measure of international commitment towards the stabilisation of export earnings from commodities resulting in a tendency towards a legal obligation to compensatory financing of shortfalls in export earnings of developing countries from commodities".62 The paper, however, indicates that the present arrangements can only be regarded as a partial and limited realisation of the principle of stabilisation of export earnings. It notes that several improvements can be made in the operation of the existing facilities:

61. Ibid., p. 260.
62. Ibid., p. 263.
In the context of the legal conclusions of Benedek's paper, it is submitted that if it had reviewed holistically the entire evidence relating to the emergence of the principle of the stabilisation of the export earnings of developing countries, it could not but have arrived at the conclusion that such a principle has emerged as a legal principle and is one of the pillars of the evolving international commodity law which in turn is an element of the emerging new international legal order.

B. Contribution of ICAs to the Development of the Principle

It is generally accepted that a treaty can contribute to the formation of a customary norm. In fact, way back in the twenties, in the *S.S. Wimbledon* case, J. Basdevant spoke of a rule possessing "the dual quality of being both a conventional rule and customary rule". To put it differently, apart from creating rights and obligations for states which are parties to it, commodity agreements can also give rise to customary principles or norms. One such principle is that of stabilisation of the export earnings of developing countries.

A number of commodity agreements, it has been seen, have price stabilisation as their principal objec-

63. 1923, P.C.I.J., Ser. C. No. 3-1, p. 182.
ctive, along with other commodity development objectives, which directly or indirectly seek to stabilise the export earnings of developing primary commodity exporting countries. Agreements which have the long term development of the commodity as their chief objective also have as a parallel goal the stabilisation of export earnings. Towards achieving these objectives commodity agreements place legal obligations on members, both on the international and the domestic plane. These obligations are enforced through persuasive as well as coercive measures. In other words, commodity agreements give concrete legal content to the principle of stabilisation of the export earnings of developing countries.

While it was seen that the material and the consensual requirements for the formation of a customary norm are not to be interpreted rigidly, in so far as the principle of stabilisation is concerned the two tests are satisfied even if the traditional approach is accepted. Commodity agreements became common in the 1930s and have since been used as instruments to regulate trade in primary commodities. In as much as both exporter and importer countries participate in them, commodity agreements evidence the conduct of states which are specially affected. They, in fact, reflect a clear consensus on the principle of stabilisation of the export earnings of developing countries. The adoption of the Fund Agreement reinforces this view.
C. Cluster of Associate Principles

The principle of stabilisation as evidenced in commodity agreements encompasses a cluster of associate principles which go, directly or indirectly, to give substance to it. In other words, for the realisation of the principle of stabilisation it is imperative that certain other principles, in the specific context of commodity agreements, are recognised as associate principles. These include: (i) the principle of financial burden sharing; (ii) the principle of increased market access; (iii) the principle of increased processing in developing countries; (iv) the principle of mitigation of adverse effects of synthetics; (v) the principle of preferential treatment of developing countries; and (vi) the principle of fair labour standards.\(^6^4\) It is these associate principles, among other measures, which need to be injected with a progressive content if the principle of stabilisation is to be effectively realised in practice.

But can such associate principles be posited to have evolved. Two general objections can be envisaged to any assertion that such principles have evolved, as embodied in the commodity agreements. Firstly, it could

\(^6^4\). The basis of these principles in contemporary commodity agreements need not be reiterated here since they have been examined in the present study at one point or another.
be pointed out that some of these principles, as incorporated in commodity agreements, are manifestations of "soft" rather than "hard" law. And that, it is difficult to see manifestations of "soft" law, however numerous, give rise to a "hard" law principle. This objection has already been looked into and it was noted that the distinction itself is not a particularly logical one, and since anyway, the "soft" law norms, it is not denied, have legal consequences, the distinction would not affect the general rule that a provision of a convention can give rise to a customary rule. A second objection could relate to the fact that the practice with regard to these principles is not uniform or extended. In this context it is to be pointed out that there appears to be in the case of most of these associate principles a practice which is reasonably uniform in so far as the recognition of the several principles and their relationship with the principle of stabilisation is concerned. Moreover, these associate principles, as is the principle of stabilisation, are evidenced by state practice outside the framework of commodity agreements, be it in conventions or in the resolutions of the General Assembly and other international institutions. The latter manifestations of state practice, though they cannot be gone into here, are equally relevant to the formulation and concretisation of these
associate principles. In other words, there is a dialectical unity of evidence which suggests that the cluster of associate principles have evolved.

D. Implications of the Principle and Associate Principles

If the principle of stabilisation of export earnings of developing countries has emerged as a legal principle then what are its implications for the conduct of states. This is a rather complex question, and one which the UNITAR study or the Sixth Committee has not really addressed. In fact, there is an urgent need to spell out the legal paradigm which will govern the determination and consequences of the several principles which have been singled out. In particular, there is the necessity to clarify the nature of obligations which will be cast upon the international community of states if a principle can be said to have evolved. Is it to have the status of the number of general principles which the Charter of Economic Rights and Duties of States has listed as fundamental principles to govern international economic relations. Or are they to have a more "specific" content, as they should have, in view of the fact that particular principles have been picked out for consideration. If so, what are to be the implications of the evolution of any
principle to the practical conduct of states. In the absence of a systematic response to such queries only a few tentative remarks can be offered here.

In the context of establishing a NIEO, the principle of stabilisation would appear to place an obligation upon the developed states to effectively participate in endeavours to stabilise the export earnings of developing countries. Where schemes already exist to achieve this end - for instance, the several compensatory facilities and ICAs - it would cast an obligation to consider ways and means to improve their operation and impact. Such an understanding dictates that the developed importer countries show greater willingness and political will in concluding more and effective commodity agreements. The implications for the conduct of states in the negotiation of commodity agreements has been discussed elsewhere. It may only be added that the emergence of the principle of stabilisation provides a legal basis to the positive conception of commodity agreements; they are to be considered as instruments which seek to rectify some of the inequities of the extant international economic order. In this light the developed countries must be willing to assume obligations which help in giving full effect to the principle. For example, they should accept concrete
obligations to promote the processing of primary commodities in developing countries. The general commitment now incorporated in commodity agreements must be rendered more specific through spelling out precise measures which need to be taken to promote processing of primary commodities in developing countries. In brief, the emergence of the principle could require the developed countries to assume obligations which they are otherwise unwilling to do at present. The exact nature of the obligations they assume will, of course, need to be worked out during commodity negotiations. But there would appear to be a minimum obligation to incorporate at least some measures which are not included in contemporary ICAs.

E. Principle of Managed World Economy

While commodity agreements concretise the principle of stabilisation of export earnings of developing countries and its associate principles, they also evidence the broader principle of a managed world economy. Underlying the entire concept of a NISO is the felt need for international management of the world economy, in particular to correct the "severe economic imbalance in the relations between developed and developing countries". Such a conception implies the rejection of the principle of free trade as advocated by the developed countries which, where it suits their interests, want the market mechanism to govern
international economic relations. Commodity agreements reject in practice the principle of free trade as an organizing principle of international economic relations. In the words of Kapteyn,

The post-war concept of non-interference with economic relations between states as the penultimate goal has lost ground to the idea of establishing a certain degree of managed economy as exemplified in the field of trade of commodity agreements....65

Commodity agreements intervene in commodity markets to regulate prices and other aspects of commodity trade. They take cognisance of the indisputable fact that "the market mechanism is a highly inefficient regulator for securing continuing adjustment between the growth of availabilities and the growth in requirements for primary products in a manner conducive to the harmonious development of the world economy".66

However, the contrary opinion continues to be expressed. For instance, Carlson observes that "The


market place is effective and should be utilised rather than international commodity agreements..."67 This is essentially an ideological position and is not in consonance with reality. As Franck has pointed out, "There is much about the current 'free' market in international commodities which violates the ideological ideal".68 The principle of free trade, for instance, conjures away the entire role of transnational corporations in commodity trade. It also overlooks the domestic policies followed in developed countries which are contrary to any principle of free trade. Keeping these in view, and the role of ICAs, it might be said that they evidence the principle of a managed world economy as opposed to the principle of free trade.


68. Thomas M. Franck, "Minimum Standards of Public Policy and Order Applicable to Collective Commodity Negotiations", Recueil Des Cour, Vol. II (1978), p. 410. Earlier, Franck notes that "[s]ome to the ideological commitment, it should be pointed out that the free market operating within, and between, Western developed states has already been significantly moderated by government regulation, support payments, production restrictions, quotas, and subsidies. Even in that hypothetical bastion of laisser-faire, the United States, we find that agricultural production, transportation, and other facets of industrial production and services only to a very limited extent operating according to free market rules". Ibid.
V. WEIGHTED VOTING IN ICAs AND NIEO

Article 10 of the Charter of Economic Rights and Duties of States affirms:

All states are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making in the solution of world economic, financial and monetary problems, inter alia, through the appropriate international organisations in accordance with their existing and evolving rules, and to share equitably in the benefits resulting therefrom.

This provision which embodies the principle of participatory equality of developing countries in international economic relations reflected the urgent need for developing countries to safeguard their interests through fully and effectively participating in the decision-making process of important international institutions, like the IMF, which rely on the system of weighted voting. Given this position of the developing countries the fact that ICAs adopt a system of weighted voting appears to be a practice which is opposed to their principled stand. However, as is presently argued, a closer look reveals that this practice is not in contradiction to the general position but only presents its affirmation under a different form.
The principle of participatory equality of states cannot be viewed in the abstract, in isolation from the specific problems faced in each sphere of international economic relations. In other words, it cannot be embodied in a single formula which can be applied to diverse areas which may require that features peculiar to it be accommodated. Neither can a single formula - one state, one vote - be a practical solution in view of the present structure of international economic relations. Moreover, the principle has a functional content which dictates that developing countries are able to take more active part in the consideration of existing economic problems and in the adoption of appropriate decisions. It is this functional content which must be respected even if different ways and means are adopted to implement the principle.

As Sahovic puts it in a recent writing on the subject:

In the process of implementation, one must take into account the real possibilities and specific conditions of the matter at hand. In order to identify the concrete forms, ways and means of implementation of the principle of participatory equality of developing countries, it is necessary to analyse every case thoroughly, consistent with the nature of the particular problems involved.... It is very important to endorse and follow such an approach in the efforts to implement the principle of participatory equality, particularly because of the very different nature of the various fields of economic law. Appropriate diversification of the forms, ways and means of application
of this principle is a direct reflection of that situation. Thus although
the claim of participatory equality
be in principle uniform, its implementa-
tion in practice must be adapted to
the particular areas to which it is
being applied.69

Factors which need to be taken into account will
include the nature of the institution, their role in the
contemporary world economy, and the needs of the developing
countries. There is a difference, it was pointed out,
between institutions which seek to reinforce the existing
order (for instance, IMF) and institutions which seek to
reform it (for instance, ICOS). Further, the peculiar
features of a particular sphere of economic life may
require that the equality of states be reflected in a
collective manner rather than with respect to each in-
dividual member. This is the situation in ICOS where the
exporting and importing members collectively possess
equality of voting powers. In so far as the developing
countries are usually exporter members, their interests
are safeguarded through exporters possessing an equality
of voting powers with the importer members, although the

69. UNITAR/DS/6/Add.1, 25 September 1984, The principle
of participatory equality of developing countries
in international economic relations: analytical
paper and supplementary notations and amendments
to analytical compilation of texts of relevant
internal distribution is carried out in accordance with the principle of weighted voting. In the words of Sahovic,

In the search for effective ways to implement the principle of participatory equality of developing countries, its collective character should unfailingly be taken into account. It is important to take cognisance of this aspect not only from the practical point of view but also in order to more fully appreciate the true parameters of the legal nature of the principle. Taking aim to proceed regularly, whenever the occasion calls for it, to incorporate in international agreements and other acts the collective position of developing countries is an approach which can play an important role in their affirmation as a special group of states as well as in the effort to achieve consistent consideration of their interests as regards the solution of problems concerning the development of international economic relations, especially on the lines of the NIEO. 70

Continuing, he makes a particular reference to the structure of commodity agreements:

The situation in that respect will be more or less the same as is the case with commodity agreements which regularly group producers and consumers as collective partners interested in normal growth in production and consumption of particular commodities. As can be seen from the texts of such agreements, the pattern of obligations assumed thereunder, as well as the pattern of their organisational

70. Ibid., p. 46.
and implementation aspects, are based
on the separate and collective determi-
nation of the rights and duties of the
respective States parties. 71

In examining the disputes settlement procedures in commo-
dity agreements, it was noted, that the narrow concept of
'party' does not fully prevail but rather the bipartite
nature of ICAs is the controlling factor. It is true
that the internal distribution of votes is made according
to the principle of weighted voting but this does not
hinder the developing primary commodity exporter countries
from safeguarding their interests. At the same time the
principle of weighted voting allows cognizance to be
taken of the different interests within the group. In
other words, commodity agreements seek to accommodate in
a practical manner the principle of participatory equa-
ity, a solution which while retaining the essence of
the principle, is also realistic.

Yet it may be argued that in so far as the deve-
loping country is a consumer country its voice is bound
to be overlooked. In this context attention may be drawn
again to the differential and remedial provision in commo-
dity agreements under which developing importing members
and the least developed countries whose interests are
adversely affected by measures taken under the agreement,
can apply to the Council for relief.

71. Ibid., pp. 46-7.
Finally, the conflict within the group of exporters - between small, emerging and large exporters - it has been seen, is sought to be resolved, at least partially, through adopting different ways and means which attempt to adjust to the changing conditions of production and trade.

VI. APPRAISAL

In recent years the international community has taken the initiative to progressively develop the principle and norms of international law relating to the NIEO. However, unfortunately, the purpose of the exercise has not been spelled out with the clarity it deserves. While the UNITAR has conducted studies, and singled out certain principles which have evolved or are in the process of evolving, it has not attempted to dilate upon the legal framework of the exercise. There is an urgent need to spell out the basis on which the determination is to be made that a particular principle or cluster of principles have evolved. There is also the need to spell out the possible implications for the conduct of states if a certain principle can be said to have evolved.

Considering the contribution of commodity agreements to the evolution of the principle of stabilisation
of export earnings of developing countries it can be said that they provide hard evidence, which, coupled with other relevant evidence, can be said to have concretised a legal principle of stabilisation. They also evidence a cluster of associate principles which have evolved in recent years. The emergence of these principles has certain minimum consequences for the conduct of states. They require that developed countries show greater political will, overriding ideological and short-term interests, to implement the principles in practice. With respect to commodity agreements they need to participate more fully in the effort to make it an integrated instrument and turn into reality the positive conception of commodity agreements which views these instruments as means to promote the economic development of developing primary commodity exporting countries.

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