ECONOMIC SOVEREIGNTY IN INTERNATIONAL LAW: THE STATE OF THE ART

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Prof. Wolfgang Freidman has aptly described the profound historical transition in the structure of international law when he elaborated on the historical movement from an "international law of co-existence" to an "international law of cooperation."[1] Contemporary international law is based, more and more, on values whose satisfaction cannot be achieved other then through cooperation, including the creation of global conditions for making expanding cooperation possible. This idea of an emerging "international law of cooperation" indeed provides a satisfactory framework for the identification and analysis of principles and norms in international economic law[2] -- a field in the discipline of international law whose crucial importance and outstanding significance to individuals and states alike cannot be overemphasized.

An international law of cooperation is even made more necessary upon consideration of the on-going demand by the majority of states to establish a New International Economic Order[3] (hereafter, referred to NIEO), a new world order which seeks to correct the existing imbalances,

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[1] W. FRIEDMAN. THE CHANGING STRUCTURE OF INTERNATIONAL LAW (London, 1964).

[2] International Economic Law is defined as "those rules of public international law which directly concern economic exchanges between the subjects of international law." I. SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 1.

[3] *See* UNGA Res. No. 3201 (S-VI) Declaration on the Establishment of a New International Economic Order (1974) [" NIEO Declaration"] and UNGA Res. No. 3202 (S-VI) Programme of Action for the Establishment of a New International Economic Order (1974) ["NIEO Programme of Action"].

injustices and inequities between the "haves" and the "have-nots" in the community of nations. To be sure, many ingredients of the NIEO have already been articulated and practiced since a few years after the Second World War;[4] seen from this perspective the working out of a NIEO would hence coincide with the reconstruction of international relations based on the requirements of an evolving international law of cooperation. But the NIEO and an International Law of Cooperation may not only be viewed as simultaneous developments but also as establishing a causal relationship. If the NIEO is to be regarded as the most convincing modality or formula to achieve the objectives of a just international economic law serving the purposes of an International Law of Cooperation,[5] the challenge that lies ahead consists in making the principles and norms of NIEO become an integral part of the *corpus iuris* of international society.

In the historic process of molding a NIEO, postulated on the realization of an international law of cooperation, it is indispensable to take note of the corollary processes involved in the creation, modification and/or abandonment of legal norms and principles that govern the relations among states defining the nature and scope of their respective rights and duties. Attention should also be given to the expansion or redefinition of concepts (like "sovereignty", "subjects of international law", "sources of international law", and "equity") which provide the justification and meaning of, or reflect the contemporary efforts to transform, a world legal order or its fundamental aspects heretofore operating within the folds of an increasingly questioned "international law of co-existence."

In this paper, I shall outline the meaning of sovereignty, specifically economic sovereignty, within the context of the NIEO or a emerging International Law of Cooperation. Elaborating the concept of economic sovereignty in the light of the NIEO, as has been done elsewhere,[6] not only clarifies the contrast between an international economic law under

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[4] J. MAKARCZYK. THE PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER 349 (1988).

[5] Prof. Seidl-Hohenveldern, *supra* note 2, at 9, states:

> We thus come to the conclusion that the New International Economic Order, or at least its entirety, is not yet part of international economic law and that some of the demands figuring therein may not even count on general acceptance *de lege ferenda*.

[6] *See e.g.* MAKARCZYK, *supra* note 4, and UNITAR Analytical Study on "Progressive Development of the Principles and Norms of International Law relating to the New International Economic Order" found in A/39/504/Add.1 (1984).

the regime of the classical International Law of Co-existence and an international economic law under the auspices of an International Law of Cooperation. This method also elicits the various issues and concerns that have been and are still dramatized in and out of the United Nations by those who advocate a NIEO.

The main issue involved in the notion of economic sovereignty, which will be given summary emphasis in this paper, is the question of "Permanent Sovereignty over Natural Resources." I would subscribe to the view that this principle of permanent sovereignty constitutes the "substratum" of economic sovereignty encrusted in the NIEO;[7] the other component legal principles of the NIEO, like Preferential Treatment or Participatory Equality, are supported or enriched by this norm of central importance. The discussion will be set in the background of a brief formal description of economic sovereignty and a survey of the preeminent literature on the subject.

SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW

The temporal movement from "absolute sovereignty" to "relative sovereignty"[8] proves the necessity if not inevitability of interdependence between and among states. It is important to recall that as this interdependence is intensified, especially in public sector economic interactions, rules in international economic law are multiplied proportionately,[9] or at least the demand for more responsive public international economic law norms[10] is heightened. Economic interdependence

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[7] Chowdhury, *Permanent Sovereignty Over Natural Resources: Substratum of the Seoul Declaration* in INTERNATIONAL LAW AND DEVELOPMENT 59 - 85 (De Waart, *et al.* eds. 1988).

[8] Seidle-Hohenveldern describes "relative sovereignty," thus : "Any state now is said to be sovereign if its acts are not subject to any other rules *than those of international law*." (emphasis supplied). *Supra* note 2 at 22.

[9] G. Schwarzenberger. *The Principles and Standards of International Economic Law*. 117 (I) RECUEIL DES COURS 8(Hague Academy of International Law, 1966).

[10] Schwarzenberger defines International Economic Law as:

> [T]hat branch of public international law which is concerned with (1) the ownership and exploitation of natural resources; (2) the production and distribution of goods; (3) invisible international transactions of an economic or financial character; (4) currency and finance; (5) related

therefore affirms the concept of relative sovereignty. And it has become clear[11] that the areas of economic interdependence, or the modalities and expressions of this interdependence, give rise to the different dimensions of relative economic sovereignty which still is premised on the doctrine of sovereign equality of states.

An examination of economic sovereignty in a materially interdependent world entails viewing state activity from the standpoint of states' rights and obligations founded upon an international economic law of cooperation. In a general sense, the basis of these rights and obligations could be traced in Articles 55 and 56 of the UN Charter,[12] which provisions implement the purposes of the UN stated in Article 1 paragraphs 2 and 3 of the Charter.[13] It is obvious that the "international law of cooperation"

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services and (6) the status and organization of those engaged in such activities.

Id. at 7. *Cf.*, the definition of Seidl-Hohenveldern, *supra* note 2, which focuses on "economic exchanges" rather than "functional" areas in international economic law.

[11] *See* UNITAR Study, *supra*. note 6.

[12] Articles 55 and 56 of the UN Charter state:

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the the Organization for the achievement of the purposes set forth in Article 55.

[13] Article 1 paragraphs (2) and (3) of the Charter provide for the following purposes:

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

flavor is germinally evident in these norms enunciated in the UN Charter. How these principles were eventually interpreted and made operational, directly or indirectly, indicates the degree to which the norms involved have become more precise in formulation, thereby revealing in exact terms the progress achieved towards an international law of cooperation.

For instance, the principle of self-determination in the UN Charter was defined in more concrete terms in Art 1 of both the International Convention on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights.[14] Earlier, through UNGA resolution no. 1514,[15] the principle was specified and applied to the question of decolonization. A reiteration of self-determination in the context of a widespread conviction to restructure international economic relations was made in the NIEO Declaration[16] and the Charter on Economic Rights and Duties of States.[17] Then, in a giant leap reformulation of the principle in 1986, the implications of which are still being contemplated, the International Law Association, reckoning with the experience of the Group of 77 since UNCTAD I, declared the principle of self-determination in the language of "solidarity."[18] This clearly positioned the principle within the

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> 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .

[14] Conventions annexed to UNGA Res. No. 2200 (XXI) of 16 Dec. 1966.

[15] UNGA Res. No. 1514 (XV), "Declaration on the Granting of Independence to Colonial Countries and Peoples" (1960).

[16] NIEO Declaration, par. 4 (d).

[17] UNGA Res. No. 3281 (XXIX) Charter of Economic Rights and Duties of States (1974) [CERDS] Art. 1, Ch. I. *See also* Par. 47 of UNITAR Study for an examination of the principle of self determination in the CERDS. *supra* note 6 at 44.

[18] The Seoul Declaration states the principle of "solidarity" as follows:

> The principle of solidarity reflects the growing interdependence of economic development, the growing recognition that States have to be made responsible for the external effects of their economic policies and the growing awareness that underdevelopment or wrong development of national economies is also harmful to other nations and endangers the maintenance of peace. Without prjudice to more specific duties of cooperation, all States whose economic, monetary and financial policies have a substantial impact on other States should conduct their economic policies in a manner which takes into account the interests of other countries by appropriate procedures of consultation. In the legitimate exercise of their economic sovereignty, they should seek to

categorical confines of a NIEO. Whether or not this restatement makes its specific content expressive of international law on the matter is subject to discussion.[19] However, it cannot be denied that the extent of clarification of rights and duties achieved in this formulation has gone very far. Indeed, economic sovereignty and its more detailed principles have increasingly been refined and systematized as a fundamental principle in international law. What is evident is that the thrust of the modification or refinement of the principle leans towards the direction of an international law of cooperation. Economic sovereignty, while presupposing the classical rule of sovereign equality, acknowledges the material or economic inequalities among states and therefore inspires a refashioning or reorientation of international law to rectify the injustices brought about by these inequalities. In the language of the NIEO, legal rules must prescribe a preference for the developing countries, and the principle of economic sovereignty must accommodate these preferences or "compensating inequalities" (to use a term ascribed to Prof. Virally).

If the meaning of economic sovereignty is evaluated according to the movement of international law principles (like self-determination) and norms towards more specificity in legal elements and clarity in relation to

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avoid any measure which causes substantial injury to other States, in particular to the interests of developing States and their peoples.

The break with the classical rule in the "international law of co-existence" is clear. On the question of extraterritorial effects of the exercise of economic sovereignty, Scharzenberger, *supra* note 9 at 28-29, states:

In principle, no *legal* duty exists under international customary law to recognize any legal effects of the exercise of such [actual] jurisdiction by other subjects of international law. The only exceptions to this rule are situations in which the application of rules of international law necessitates the incidental recognition of foreign municipal law or its application, or such recognition is necessitated by the minimum standard of international law in favor of foreign nationals. ....Conversely, subjects of international law are free under customary international law to enact legislation with extraterritorial effects.... Similarly, they may, if they wish, recognize any foreign law or act under such law. Nor is there any general principle of law recognized by civilized nations which would limit this discretion.

MAKARCZYK, *supra* note 4, observes that the principle of solidarity is expressed in earlier UNGA resolutions, like in art. 17, CERDS.

[19]According to MAKARCZYK, *supra* note 4, at 179-181, the binding nature of the solidarity principle is not apparent.

basic objectives of international law, the prospects of approximating an ideal "international law for cooperation" are not far fetched.

DIMENSIONS OF ECONOMIC SOVEREIGNTY

The adoption of the CERDS in 1974[20] marks a highpoint in the evolution of principles pertaining to the NIEO,[21] or aspects of economic sovereignty viewed from the emerging international law of co-operation. It purports to enumerate economic rights and duties of states in an exhaustive manner[22] under the conviction that "there is an urgent need to evolve a substantially improved system of international economic relations."[23] Chapter I of the document, which partially[24] lists general principles, and Chapters II and IV (also declaring more principles), blended in interpretation with the the specific rights and duties of States (in Chapter II) formulate the codified whole of a legal basis respecting the possibilities and prospects of economic sovereignty in a new world order.

Perhaps because of the chaotic structure of the CERDS,[25] reflecting the character of the negotiations and discussions that went with it, further initiatives were undertaken to clarify and schematize more intelligibly the rights and duties of states under a NIEO. The UNITAR study of 1984 on the Progressive Development of the principles and Norms of International Law relating to the NIEO, and the ILA Seoul Conference of 1986 precisely achieved this aim.

The UNITAR Study lists eight "principles and norms relating to the NIEO," which are grouped into two more encompassive principles, as follows:

I. PRINCIPLE OF SOVEREIGN EQUALITY

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[20] The CERDS is the primary document of the NIEO. Makarczyk, *supra* note 4, at 9-10.

[21] In the second preambular paragraph of UNGA Res. No. 3362 (S-VII) on Development and International Economic Cooperation (1975), it is asserted that the NIEO Declaration, the NIEO Programme of Action and the CERDS "lay down the foundations of the NIEO."

[22] CERDS, esply. Chapter II.

[23] CERDS, last preambular paragraph.

[24] The *inter alia* qualification is used.

[25] MAKARCZYK, *supra* note 4, at 112.

1. Right of States to choose their economic system

2. Permanent sovereignty over natural resources

3. Participatory equality of developing countries in international economic relations (full and effective participation of developing countries in international economic decisions)

II. DUTY TO CO-OPERATE

4. Preferential treatment for developing countries

5. Stabilization of export earnings of developing countries

6. Right of every state to benefit from science and technology

7. Principle of entitlement of developing countries to development assistance

8. Principle of Common Heritage of Mankind.

The ILA Seoul Declaration of 1986, taking into account the UNITAR Study aforementioned, outlines the principles of public international law relating to the NIEO, as follows:

(a) The Rule of Public International Law in international economic relations

(b) Pacta sunt servanda

(c) The principles of equity and solidarity and the entitlement to development assistance.

(d) the duty to co-operate for global development

(e) Permanent sovereignty over natural resources, economic activities and wealth

(f) The right to development

(g) The principle of common heritage of mankind

(h) The principle of equality and non-discrimination

(i) Participatory equality of developing countries in international economic relations

(j) Principles of substantive equality, including preferential and non-reciprocal treatment of developing countries in international economic relations

(k) The right of every state to benefit from science and technology

(l) The principle of peaceful settlement of disputes.

These sets of enumerated principles indicate the complexity of the issues and the variety of closely interconnected dimensions of economic sovereignty from the standpoint of a new world order based on an international law of co-operation. It will be noticedp that both instruments speak of "progressive development of international law" respecting the establishmenet of the NIEO. This implies that the struggle, competition, or cooperation among states in defining and allocating their rights and obligations aligned to the dictates of a NIEO is far from finished. But the analysis of the various identifiable principles made in the UNITAR Study reveals the inherently interwoven aspects thereof if appreciated with the backdrop of an international law of cooperation.

From among the identified principles, it has been maintained that the most contentious is the principle of full permanent sovereignty of a state over its natural resources, wealth and economic activities[26] (hereafter, Permanent Sovereignty). This principle is thus at the "epicenter"[27] of the emerging new order, or, makes up the "substratum" of the Seoul Declaration being "at the core of a cluster of principles of public international law relating to a NIEO."[28] Therefore it may be asked: What role does the principle of Permanent Sovereignty play in the conscious effort to bring about an international law of cooperation?

ECONOMIC SOVEREIGNTY AS PERMANENT SOVEREIGNTY

[26] *Id.*, at 352.
[27] *Id.*
[28] Chowdhury, *supra* note 7, at 80.

The legal status of the principle of permanent sovereignty is not settled. On the one hand, it is claimed, upon noting intrinsic and extrinsic contradictions, that "the claim to permanent sovereignty does not appear to be fully supported by the actual practice even of the countries which voted for resolution 3281 (XXIX) [CERDS]."[29] On the other hand, it is also maintained that "the right to permanent sovereignty of a state over its natural resources, economic activities and wealth is a well established principle in international law:"[30]

> [Permanent Sovereignty] is a principle which represents the progressive development of international law in response to the felt need for a legal principle by reference to which traditional concessions or similar arrangements for exploitation of natural resources could be replaced by more equitable arrangements.[31]

Still, another author points out that the negotiations and discussions on the proper and acceptable legal content of permanent sovereignty are still on-going and in a precarious state. It is pointed out that:

> The present debate on the shape of the contemporary understanding of the permanent sovereignty of a state over its wealth, natural resources, and activities which is taking place with the participation of states, doctrine, and the judiciary, is trying to create just such law [i.e., "international law formulated and accepted by all parties and not by only one of them"].[32]

A last, but not the least, opinion on the notion of permanent sovereignty put forward before the NIEO debates in the UN commenced, solicits nothing else but its standing in customary international law:

> In the form in which the Resolution [i.e., UNGA Res. no. 1830 of 1962 on Permanent Sovereignty over Natural Resources] was actually adopted it is a result of a tug-of-war between capital-importing and capital-exporting members of the United Nations. It is amusing in its

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[29] SEIDL-HOHENVELDERN, *supra* note 5, at 49-54. Also in Seidl-Hohenveldern, *International Economic Law*. 198 (III) RECUEIL DES COURS 134, 1986)

[30] Chowdhury, *supra* note 7, at 80. The same stand is affirmed in the Seoul Declaration, *supra* , at 5-6; the Declaration states in item 5: "Permanent Sovereignty is a principle of international law."

[31] Chowdhury, *id.* , at 62.

[32] MAKARCZYK, *supra* note 4, at 353-354.

> self-contradictions and, if it puts anything on record, it is the inalienable character of sovereignty.
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> Actually, the position in international law is simple enough. Under customary international law, sovereign states are free to limit the exercise of their sovereignty or transform themselves into dependent States on the level of international or national law. In other words, international customary law lacks any rules of *jus cogens*, preventing the curtailment or abandonment of its sovereignty by any subject of international law.[33]

Considering the divergent views on the subject, it is perhaps safe to posit that the principle of permanent sovereignty has become a binding norm in international law, which however has not sufficiently been developed in its more specific component norms, and whose concrete features, in terms of laying down precisely delimited rights and duties of states, are still to be authoritatively specified.[34] It therefore remains to be asked what are the component sub-principles of the principle of permanent sovereignty. I think there are two approaches to this question. First, it is possible to discern the meaning of permanent soveignty by examining its relationship with other general principles of the NIEO and the international law of co-existence. Second, and closely related to the first, an analysis of its constitutive ingredients as a self-contained rule may be made.

In exploring the substance of the principle of permanent sovereignty in relation to the the NIEO and customary international law, it is worthy to note that the predominant orientation of the principle still relies on the international law of co-existence, the principle being made to rest on the doctrine of "absoluteness" and "inalienability." In its legal consequence, the principle calls for a passive obligation incumbent on all other states to respect the exercise of freedom of a state in using or disposing its natural resources, wealth and economic activities. "[This] is a fundamental characteristic in general of the obligations created within the framework of the 'international law of co-existence,' though under certain conditions, this law can also impose positive obligations of co-operation as in the case with

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[33] Scharzenberger, *supra* note 9, at 32.

[34] Akin to the principle or norm of the "Exclusive Economic Zone" in the International Law of the Sea which, although it has been accepted as part of the corpus of customary law, has specific regimes or elements whose contents, in the sense of specifying unambiguous rights and duties of states, are still vague. *See* B. KWIATKOWSKA. THE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 1989 and O. VICUNA, THE EXCLUSIVE ECONOMIC ZONE 1989.

the principle of full and effective participation."[35] Hence, the full significance of a "relative" economic sovereignty shaped by the closely linked principle of solidarity is yet to be completely understood. As to the connection between the principle and other principles under a NIEO (e.g, right to preferential treatment, participatory equality, or right to benefit from science and technology), what can be said at this juncture is that the process of elaboration has become more extensive and intensive, yielding very enlightening results as to the status of this principle of permanent sovereignty.[36]

Similarly, the elaboration of the principle of permanent sovereignty from an `intrinsic' approach can yield helpful results in terms of greater clarity of the normative rights and duties of states. This is especially crucial in the area of foreign investments where questions of accuracy or acceptability of legal norms are pervasive. Beyond the formalistic treatment of the problem,[37] other approaches for fuller understanding of the issues involved may be developed. In the resolution of these questions (*e.g.*, status of the "prompt, adequate and effective rule" in compensation disputes) it would suffice to state that the framework presented by the international law of cooperation is promising. On this point, appropriate reference may be made to the methodology for elaboration proposed by one author:

> The interrelationship of the principle of permanent sovereignty and the other NIEO principles requires further research on international responsibility and liability of states for injurious consequences arising out of exercising their

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[35] *See* UNITAR Study, esply. pars. 96-97, *supra* note 6 at 60-61.

[36] *See e.g.*, Shriver, *Permanent Sovereignty over Natural Resources versus the Common Heritage of Mankind: Complementary or Contradictory Principles of International Law*? in P. DE WAART, et al. *supra, op. cit.* note 7, pp. 87-101. *See also* "Analytical Paper and Analysis of Texts and Relevant Instruments on The Principle of Permanent Sovereignty over Natural Resources" in *Progressive Development of the Principles and Norms of International Law relating to the New International Economic Order*. pp, 291-465, UNITAR/DS/5 (15 August 1982). *See also* "Report prepared by the Secretary General" on *The Right to Development as a Human Right*, E/CN.4/1990/Rev.1 (26 Sept. 1990), p. 45:

> 161. Failure to respect the right of peoples to self-detemination, and their right to permanent sovereignty over natural resources is a serious obstacle to the realization of the right to development as a human right.

[37] *E.g.*, G. Scwarzenberger. FOREIGN INVESTMENTS AND INTERNATIONAL LAW, 1969.

> ***right* to regulate, exercise authority, legislate and impose taxes in respect of natural resources enjoyed and economic activities exercised and wealth held in their own territories by foreign interests subject only to any applicable requirements of international law.**
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> ***discretionary power to nationalize, expropriate, exercise eminent domain over or otherwise transfer property, or rights in property, within its territory and jurisdiction subject to the principle of international law requiring a public purpose and non-discrimination; to appropriate compensation as required by international law, and to any applicable treaty, and without prejudice to legal effects flowing from any contractual undertaking.[38]**

It may be mentioned in this connection as illustrative of the above-suggested approach, that an initial study on state treaty practice pertaining to foreign investments[39] may provide empirical bases for a better insight about the current status of the principle of permanent sovereignty in the emerging new economic order based on an international law of cooperation.

CONCLUDING NOTE

The concept of economic sovereignty in an interdependent and inequitable world has been continuously re-examined in the light of creatively pursuing an international law of co-operation. A conceived or conceivable legal order based on the tenets of a NIEO has become a powerful driving force in the inexhorable movement towards a regime of international law based on co-operation. But the magnitude of the work that lies ahead in the way of forging international legal relations based on the NIEO are quite considerable. The unresolved status of the principle of permanent sovereignty, a principle of paramount significance to the NIEO, exhibits the formidable difficulties in the 'legal engineering' of a more promising international economic law. Considering the tasks which lie ahead, it may

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[38] PJIM De Waart. "Implementing the Seoul Declaration" *Lecture at the Institute of Social Studies Studies.* 20/11/89.

[39] Peters. *Review of Latin-American Bilateral Investment Treaties in the Light of the Calvo Doctrine* (Unpublished paper , 14/8/89), and P. Peters. *Investment Treaties: An Updating A Contribution to the discussion of legal aspects of the NIEO* (Unpublished paper, 1/9/89).

well be that the case for a NIEO can only be viewed with a realistic sense of pessimism.[40] But bringing out the reality of an international law of cooperation, on the indispensable assumption of a NIEO, may prove to be the greatest challenge for those who care about establishing a more reasuring international economic order in an increasingly shrinking world.

[40] This cautious pessimism is a advocated by MAKARCZYK, *supra* note 4 in his Conclusions.