International Control Over the Pricing of Resources: A Configuration Approach

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A. Introduction

Demand for a new definition and function of pricing more compatible with changing community goals has increased during the past few years. The ongoing battle between the developed and the developing countries about reconstructing a pattern of world trade for a more equitable distribution of values challenges traditional pricing theory. That theory appears to be increasingly inadequate as an instrument of contemporary policy, fostering a system which makes the rich richer and the poor poorer. The new demands require a more comprehensive conception of the function of pricing and a reevaluation of the factors to be taken into account in price determination. Pricing cannot remain as an isolated economic theory, considered relevant only to a few problems, with objectives separated from the larger general community policies. Pricing theory should be compatible with, and where possible contribute to and support, all recommended general community policies as an aspect of overall fiscal policy. It should be made to perform a much broader and more constructive role in protecting common interests. To this end, we define pricing as a process of decision precipitating multiple value effects throughout all the communities affected. It is a process for allocating the benefits and costs arising from use and enjoyment of resources and for effecting a more general distribution of values. The newer demands require that pricing perform the function, not merely of allocating the benefits and costs arising from the immediate exploitation of particular resources, but also of securing a preferred distribution of values not necessarily arising from the resources carrying a particular "price-tag."

The strategy of control over use and benefits of resources by pricing has a long history. Pricing does in fact

*This article is a part of a larger project in progress, on the international management of national resources.

The author is deeply grateful to Professors Myres S. McDougal and Michael Reisman for reading the manuscript and making many valuable comments and suggestions. The author, of course, bears sole responsibility for the contents.

significantly influence every aspect of resource exploitation, including production, processing, distribution and consumption. The conception of pricing as related to particular resources is not new. While definitions, functions and structures have of course undergone changes, the basic elements of this conception have existed from the beginning of human economic interaction; it has at times been influenced by religious ideology and later developed by, and expressed through, the secular specialist languages of economists and political scientists. The great bulk of theories about pricing have, happily, always had some relation to the totality of community policy; less happily, however, some of the more important theories have had transempirical elements.

The narrow conception and limited function of pricing in the Middle Ages, associated only with resource exchange, has been replaced by much broader concepts affecting the whole complex global process of value distribution. The ideology of the Middle Ages influenced by Christianity and Aristotle, looked at economic activities as a process by which goods and services were provided for the community to insure each of its members security and freedom. The concept of profit making, and the use of market opportunities to change prices at the expense of the majority, was condemned morally and socially. This ideology, in a way compatible with Islamic economic concepts, held that individuals were entitled only to that reasonable share of goods and services which satisfied their needs. Any surplus belonged to the whole community. In that period every resource had, in theory, a "just price" or justum pretium which was equal to its cost of production. The just price was not necessarily an economic but an ethical and social concept; indeed, it concomitantly supported a policy against "unjust enrichment." The manifest and ostensibly exclusive purpose of the just price was to ensure equality as between producers and consumers.

With the transformation of the social structure in the

late Middle Ages and the development of specializations, new technologies, new markets and new social configurations, the pattern of resource use and distribution changed. With the expansion of the influence of the merchant groups and a new ideology of economic activities, classical capitalism considered pricing the outcome of a so-called "free market" regulated by an "invisible hand." The theory of laissez-faire posited that the law of free market would determine the real price of resources. To Adam Smith "[t]he real price of everything, what every thing really costs to the man who wants to acquire it, is the toil and trouble of acquiring it, and who wants to dispose of it or exchange it for something else, is the toil and trouble which it can save to himself, and which it can impose upon other people." In the free market system, resources will eventually be available to those who offer the highest prices. Nevertheless, this laissez-faire theory does not answer, or gives a negative answer, to the questions of whether the ones who pay more are the ones who deserve to consume and whether this system is consistent with the goals of a fair and equitable distribution of values. Moreover, it ignores problems of resource scarcity, ecological deterioration and militates by its terms against a planning function.

Using a totally different perspective and promoting the interest of a different class, Marxian theory was built upon the metaphysical notion of materialistic determinism. Marx and Engels replace the capitalist term of "pricing" with "value" and define the "value" of each commodity as "determined by the quantity of labor expended on and materialized in it; by the working time necessary, under given social conditions for its production." Marx's concept of "value" or "pricing" is thus close to the Christian and Islamic notion of just price. It denies interest employed by the "bourgeois" society. For Marx the "value" of a commodity is "[t]he objective from the social labor expanded in its production," and is determined by "[t]he quantity of the labor contained in it." The concept of pricing, as demonstrated in an abundant literature, has been the great battleground of most inherited

3. K. Marx, Capital in 50 Great Books of the Western World 89-90 (1952), see also K. Marx I Capital pt. III.
4. K. Marx, at 264.
economic theories since the eighteenth century, when economics became an independent social science. Some of the modern theories regard pricing as a technique of fiscal control of consumption. For these theories, pricing becomes of potential importance in directing the use of resources.\(^5\) When decision makers address the problem of resource scarcity, pricing is viewed as a strategy to regulate the magnitude of resource consumption and to control the timing of resource use. In this process the price level becomes one scheme for control of resource use to fulfill the policies of the decision makers. While the limited function of the medieval notion of pricing as a system of resource exchange has been recognized and employed, the potentially larger function of pricing as a scheme of value distribution has never been fully developed. A later theory of progressive taxation\(^6\) as a modality of income redistribution indicates the recognized need for a reallocation of values and supplies, a technique comparable to pricing for securing such reallocation.

The difficulties inherent in all these theories emphasize the importance both of establishing a more modern conception of pricing and of outlining a contextual approach which will include the various factors which should affect pricing policy.

B. **Factual Background**

In the present world order, the structure and processes of international trade have a close relationship with the stability and growth of national economies and have been "a regular and important feature of domestic politics."\(^7\) A part of this world trade structure is the process of pricing, which can be seen more substantially to affect the income of developing countries and primary producers than that of de-

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6. Progressive taxation is defined as "one that takes a larger proportion of high incomes than of low." P. Samuelson, *Economics: An Introductory Analysis* 127 (4th ed. 1958). Progressive taxation is the opposite of regressive taxation, which regressive tax is one that takes larger proportion of low incomes than high incomes. Income taxes, death and gift taxes are examples of progressive taxation. Taxes on employment or payroll taxes are regressive.

veloped countries. This high impact is the result of the dependency of the developing primary producers on a single commodity or a few commodities for their major export earnings. Primary products in the early 1970's accounted for 80% to 90% of the export of developing countries. According to an UNCTAD study, primary products, excluding oil exports, account for two-thirds of the export earnings of developing countries. An IMF and IBRD study shows that the exports of these countries have grown slowly relative to the growth of world trade and relative to the increase in imports necessary to sustain a satisfactory rate of development in these countries. Among commodities only petroleum, timber, iron ore and bauxite have had major growth; for most commodities demand has increased slowly and the prices of such commodities have been subject to much wider fluctuation than the export prices of industrial countries. Exports of developing countries have been in agricultural raw materials and foodstuffs and have generated decreasing amounts of revenue for the exporting countries. The most rapidly expanding commodities have been fuels and manufactured goods, followed by metals and minerals. In the 1960's the foodstuffs and agricultural raw materials accounted for more than half of the total primary products exports of developing countries, while in the 1950's their share was almost two-thirds. The decline in the value of exports of primary


9. See UNCTAD, supra note 8.

10. The Problem of Stabilization of Prices of Primary Products, supra note 9, at 1.

11. Id.

12. Exports of foodstuffs grew at a rate of 2.6% a year and exports of agricultural raw materials at 1.1%. The decline in demand has increased the downward pressure on the overall export growth rate of developing countries. See UNCTAD, "Recent Developments and Long Term Trends in Commodity Trade," TD/9, Nov. 1967 in The Problems of Stabilization of Prices of Primary Products, supra note 8, at 15.
products in comparison to the increase in the export of manufactured products becomes more dramatic. Between the 1950's and the mid-1960's the value of exports of developing countries grew at a compound rate of 4.7% a year. During the same period the value of the exports of developed countries rose at an annual rate of 7.2%. While the prices of primary products declined, the prices of manufactures which predominated the exports of developing countries tended to increase. As a result of slow growth in the demand of exports of developing countries and the decline in the prices of primary products in relation to manufactured goods, the share of developing countries in world trade has steadily declined. In the early 1950's the share was 27% but by the mid-1960's it had fallen below 20%.

The effects of price fluctuations on primary producers are much more severe than on industrial producers. On the surface, however, it may seem to be the reverse. One may argue that trade depression manifests itself in developing countries on farmers, while in industrial countries it does so on unemployed workers. It is sometimes assumed that a farmer may still be able to feed his family and himself even if depression results in low production, but that unemployed workers do not have even that opportunity. Yet experience in recent years suggests a different outcome: "[m]ass unemployment has not threatened the industrial countries and the income fluctuations they have suffered have been rather fluctuations in the rate of increase of real income than alternating periods of increase and decrease. The primary producing countries on the other hand have suffered from time to time significant declines in income ...." No matter how refined this argument becomes there is no doubt that high prices and wide fluctuations in price of manufactured goods have tremendous negative effects on international trade in general and the development process of developing countries in particular. Even if increases in prices of food, fertilizers and fuels are ignored, and export power measured only by the prices of manu-

14. Id.
15. Id.
16. S. Cane, Prices For Primary Producers 19 (1966) [hereinafter cited as Cane].
factured goods, a study by UNCTAD shows that a substantial number of developing countries recorded an increase in real export earning of less than 7% (the minimum requirement for development estimated by the International Development Strategy for the 1970's) from 1970 to 1974.\textsuperscript{18} Studies by UNCTAD and the World Bank show an annual decline of close to 2 percent (2.0 percent by UNCTAD and 1.7 percent by the World Bank) in the trade of developing countries.\textsuperscript{19} Thirty-nine of the developing countries accounted for one-third of the aggregate export earnings of non-OPEC developing countries in 1970 but for more than 1/2 of the total population of these countries.\textsuperscript{20} The maximum average increase in terms of purchasing power of thirty-nine developing countries excluding OPEC countries over imports of manufacture was only 1.7% in 1970.\textsuperscript{20}

One negative characteristic of contemporary world trade is the unequal distribution of the total economic benefits from the enjoyment of resources, as between producers and consumers. With respect to oil, which has had the highest increase in value, before the 1971 Tehran agreement royalties and taxes were about $1 per barrel of refined oil for producer countries while the share of the oil importers in Western Europe in the form of taxes was about $4.50 per barrel, which was sold for about $8.00 in Europe.\textsuperscript{21} Such inequitable value distribution was observable in a number of other commodities as well, particularly through the economic activities of multinationals. For example, one of the practices of these corporations is price determination of goods and services traded between the

\textsuperscript{18} Id., table 1, at 4.

\textsuperscript{19} TD/184/Supp.2, Mar. 5, 1976 at 6-9.

\textsuperscript{20} Id. See Reports by UNCTAD Secretariat, on 'World Economic Outlook,' TD.186. This study shows that virtually all developing countries experienced severe falls in their real export income in 1975 as a result of the economic recession in the industrialized countries. In 1976 and 1977 only a modest recovery is expected.

\textsuperscript{21} Fortune, Mar. 1971, at 30. Although these figures do not distinguish between "intercountry balance of payments considerations and intracountry income distribution effects, they are indicative of the wide scope within which income transfers could have taken place between countries." Vaitsos, "Power, Knowledge and Development Policy: Relations Between Transnational Enterprises and Developing Countries," in G. Helleiner (ed.), A World Divided: The Less Developed Countries in International Economy 113, 128 (1976).
corporation and its affiliates located in different countries. Such price fixing affects the distribution of the benefits of their activities between countries, as well as sometimes paralyzing local competition.\footnote{22} Intracorporate trade in goods within multinationals contains more than one quarter of the value of all international trade in goods,\footnote{23} and the possibility for price manipulation is obviously quite extensive.

The size of the market also discriminates against developing countries which must import. In comparison oil-importing developing countries pay about 20\% more to oil companies than oil-importing developed countries, because of the smallness and underdevelopment of their market.\footnote{24} The so-called fourth world, with a population of 900 million, 35\% of the population of the entire non-communist world, suffered more from the high prices of oil\footnote{25} than the first world of developed countries.

The lack of adequate inclusive competence in control of pricing has been another characteristic of the international market. Decisions regarding pricing have primarily been the outcome of exclusive competences through monopoly or oligopoly, and only occasionally of partially inclusive competences. The latter is the more current practice. The earlier practices dominated by the multinationals were more in the nature of oligopolistic or monopolistic control through their several joint ventures.\footnote{26} Exclusive control over pricing of resources

\footnote{22} UN Dept. of Economic and Social Affairs, "The Impact of Multinational Corporations on Development and International Relations," UN Doc. E/5500/Rev. 1, ST/ESA/6, 88 (1974).

\footnote{23} Id. at 88.

\footnote{24} "The developing countries are handicapped by the smallness of their market which makes them stand at the end of the consumer line for supplies and transport facilities; furthermore they lack access to up-to-the-minute information which is crucial in an industry characterized by fast changes and secrecy." "Energy Crisis: Freezing the Poor," 1 Development Forum (Geneva) No. 9, Dec. 1973, at 12 cited in Z. Mikdashi, The International Politics of Natural Resources 69 (1976) [hereinafter cited as Mikdashi].


\footnote{26} Oligopoly is referred to as a market of a "few sellers, each supplying a large part of total output, each be-
could be exercised by a small group of corporations or a single state. For example, the world depends on the United States for approximately 90% of its soybeans.27 A United States decision to cut back production of exports of soybeans will affect the price of this product dramatically. Partially inclusive competence has been exercised through different forms of producers' associations. The closest approximation to inclusive competence over pricing has been achieved through commodity agreements. They are, in theory, representative of both producers' and consumers' interests. The impact of these practices on external and internal value processes will be examined later.

In the international market a functional conception of pricing includes taxes, royalties, participation or any techniques by which values are distributed. This wide range of strategies available to major participants in the pricing process, nation-states and multinational corporations has contributed to the politicization of this process.28 While international trade has always had political implications, this aspect has increased tremendously as the result of demands for mobilization of all forces for the implementation of exclusive community policies.

Although nation-states have always played a decisive role in pricing or influence price by an increase or decrease in the amount of goods it offers for sale. W. Leeman, The Price of Middle East Oil: An Essay in Political Economy 8 (1962). On oligopoly practices see generally Maldashi, supra note 24, at 66-67; R. Low, The Economics of Antitrust: Competition and Monopoly 4-9 (1968); Hopkins, "Money, Monopoly and the Contemporary World Order," 2 Denver J. Int'l L. & Pol. 66 (1972); J. Bridge & P. McGregor, Pricing Policies 5-8 (1974); P. Sylos-Labini, Oligopoly and Technical Progress (1962); M. Shubik, Strategy and Market Structure; Competition, Oligopoly, and the Theory of Games (1959); Sweezy, "Demand under Conditions of Oligopoly," 47 J. Pol. Econ. 508 (1939); E. Penrose, The Large International Firms in Developing Countries 175 (1968); and F. Machel, The Political Economy of Monopoly (1952).

role in the pricing process, either directly or through their corporations, at the present time their role takes on a new importance. The effective participation of nation-states is apparent not only in developing countries; but even in developed countries the trends point toward their domination. Canada and Australia are examples of such developed countries. Similar trends characterize the British, Scandinavian and Dutch governments with respect to the operation of the North Sea oil enterprise. The increase in state participation has been recognized by multinational companies themselves. The president of Exxon, in the 1971 annual shareholders' meeting stated that "[I]n the future, we will see more of the government oil company, sometimes as a competitor and sometimes as a partner . . . We recognize this development as an element of changing times. We have learned to live with such government policies and such government entities." Nevertheless, the important role of multinational companies cannot be ignored. The major oil companies are still responsible for approximately 80% of the world's oil production outside the communist bloc, own and control 70% of the total refining capacity, and through long-term charter, control over 50% of the tonnage of international tankers.

While U.S. government policy in 1974 promoted the establishment of the International Energy Agency as a means of cooperation among major consumer countries, Secretary of the Interior, Rogers Morton in an August 1973 address to the petroleum industry stated that "[o]ur mission is to serve you, not regulate you . . . I pledge to you that the Department is at your service." The strength of multinational companies is based on their size, resources, "capacity to exploit economics of scale, advanced technology, and know-how; their superior organizational and managerial ability and their unity of com-

29. For more on this trend see Mikdashi, supra note 24, at 20 n.3.
30. Id., at 20. See also "When Are the British Like The Arabs? When it Comes to Developing a Major Natural Resource," in Forbes, June 15, 1973, at 88. Similar concern has also been shown by European countries by restricting foreign capital, see Mikdashi, supra note 24, at 21, nn. 5, 6 and 7.
32. A few years ago these figures were even higher. P. Odell, Oil and World Power 11 (1975).
mand; their extensive market outlets; their close interrelatedness in partnerships and in other respects; and their negotiating skills. But this strength of multinationals, which formerly operated in their favor in bilateral agreements with developing countries in the pricing process, is being offset by the growing effective control of host governments over the process of resource use, and by the host-state officials' improved skills in negotiation.

One may predict that in the future the role of the oil companies will be limited primarily to providing the service, organization, expertise necessary for exploitation, processing, and perhaps transportation and marketing. 'The role once played by the companies in negotiating price and supply must now devolve on the governments of the consuming countries.' One knowledgeable observer considers some of these changes, such as conservation control, managerial training and production quotas, to be effective in providing more equitable value distribution.

C. Basic Community Policies

1. Preferred Outcomes

In the contemporary interdependent world, in which most important public decisions and private choices have multiple value effects, policies regarding the pricing process must take into account the impact upon the much larger canvas of value productions and distributions. From the standpoint of a disengaged observer, the pricing of resources may be one strategy for the fulfillment of a broader policy of the optimum production and fair and equitable distribution of human dignity values. Pricing must be conceived, therefore, as an integral part of an overall strategy for the protection of common interests in the management of resources. While the major value most immediately at stake in this process is wealth, the production and distribution of other values are also ultimately and importantly at stake. For this reason,

34. Mikdashi, supra note 24, at 36; see also id. at 37-40.
36. Id. See also Levy, "World Oil Cooperation or Economic Chaos," 52 Foreign Affairs 690, 693-98 (1974).
36a. For the relation of wealth value to other values see Polanyi, supra note 2, at 46.
economic factors cannot be the only reference points for pricing. In this respect, the theories about pricing, both capitalist and Marxist, are too narrow, for they do not take into account the new demands and expectations about the role of pricing.

With the increasing threat of resource scarcity, one goal of pricing should be to secure an appropriate rate of exploitation and conservation of resources at any particular moment and through time. This goal raises important issues that are ignored by the "classical capitalist" concept of pricing. An appropriate concern for the future world supply of resources may interfere with a free market economy. For example, it is predicted that in the future the climate is going to deteriorate with effects on agricultural production and particularly on grain production. This may require that the United States resort to a policy of stockpiling of grain in good harvest years against the inevitable bad years, especially since 90 percent of the global grain supply consumed out of its continent of origin comes from North America. Stockpiling is, however, against the United States policy of a free market, since it tends to stabilize prices and control profits.37

The effect of pricing policy on the distribution of resources, and on the benefits of resource exploitation, must be explicitly considered. Pricing policy should not be permitted adversely to undermine the interests of a large group of participants, especially the developing countries. Thus, with respect to pricing policies concerning oil and wheat it is generally acknowledged that the two groups of producers of these commodities do not adequately take into account the interests of other countries.38 The governments of many oil-

37. See Schneider, "The Genesis Strategy" book review by D. Sharpey, N.Y. Times "Book Review," July 18, 1976 at 3, col. 4. One can also argue that sometimes even monopoly may be necessary to make competition workable. Because in a purely competitive market firms will have deficits when demand fell below capacity and this would bankrupt many industries. Therefore, a degree of "inelasticity" in demand (identified by some other writers with monopoly power) is needed to make competition workable by allowing leeway for a flexible price policy to cope with depressions." Clark, "Towards a Concept of Workable Competition," 30 Am. Econ. Rev. 250 (1940), quoted in C. Muller, Light Metals Monopoly 12 (1946).

consuming developing nations believe that the oil pricing system has operated only to transfer wealth to oil producers, with adverse impact on their own economies. They see a gap growing between oil-exporting developing countries and oil-consuming developing countries. Oil-consuming developing countries argue that the pricing policy of oil exporters has adversely affected the consumption of oil necessary for internal development. Energy consumption has most rapidly increased in Latin America, Southeast Asia, and recently in Africa. In Malaysia and Brazil, the average annual rate of growth of energy consumption over the last twenty years has been approximately 12 percent. The need of developing countries for energy in the early stages of growth is obvious. Brazil, with a population of 100 million in 1972 used only 50 million metric tons of coal, compared with the United Kingdom's population of 50 million and 325 million metric tons of coal equivalent. In 1972 the developing nations outside the communist bloc, and the major oil producers excepted, consumed approximately 900 million metric tons, which was about 40 percent of the amount used in the United States in the same year. The present oil pricing policy thus importantly affects both the present distribution of benefits and the potentialities of future growth.

Assessment of the costs of resource exploitation should be comprehensive; the distribution of these costs should be made in conformity to overall policy goals. This approach requires the taking into account of such factors as damage to the environment, injuries to workers, and all the other social and other costs borne in production. When production imposes costs upon non-consenting individuals and groups who are not directly engaged in the process of production, a rational pricing will assess and provide accommodation for such costs. One important goal in pricing policy is that of balancing the need for stability in expectations with that of

39. See Odell, supra note 32, at 93-137.
40. Id. at 147.
41. The process of rapid increase in energy consumption in the early stages of economic development is not new. The experience of the United Kingdom, Germany, France, the United States and other currently industrialized countries shows such trends. These countries generally satisfied their energy requirements by domestic coal, in contrast with present developing countries which have to import their energy needs. Id. at 144.
42. Id.
promoting appropriate changes toward preferred public order goals. The stability of expectations to which we refer is necessary for the encouragement and maintenance of economic and other activities. The process of pricing must, however, be kept flexible enough to adapt to changing circumstances. With respect to primary products, "stability" in pricing is too often referred to as prevention of decline in prices, without regard for the potentialities that might inhere in a raise in prices.

This policy of striking the balance between the needs for stability and change finds expression in international prescription. Principle 10 of the Stockholm Conference states: "For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management since economic factors as well as ecological processes must be taken into account." This concern has been expressed further in the 1967 Resolution 239 of the International Bank for Reconstruction and Development:

Considering the decisive importance of the stabilization of prices of primary products at a remunerative level for the economic advancement of the developing countries and the improvement of the standard of living of their populations, the Governors' meeting in Dakar request that an R10 study be made of the conditions in which IMF, IBRD and IDA could participate in the elaboration of suitable mechanisms involving balanced commitments on the part both of the producing and of the consuming countries, and devote the necessary resources thereto.

43. For the history of price fluctuation over some 700 years, see Brown & Hopkins, "Seven Centuries of the Prices of Consumables, Compared with Builders' Wagerales," Economica, Nov. 1956, cited in Cane, supra note 16 at 10. For the decline of price of commodity products through 1962 see Cane, supra note 16, at 9.

44. The Stockholm Conference, 9 Int'l Legal Mat. 1419 (1972).

45. IMF & IBRD, The Problem of Stabilization of Prices of Primary Products 1 (1969). Similarly IMF Resolution 22-9 recognized the importance of price stabilization of primary products. This concern led to a joint study by these two international organizations as to stabilization problems. Id.
A joint study by IMF and IBRD has demonstrated that because of the heavy dependence of developing countries on primary products for their earnings, the range of prices and trading opportunities in the world commodities markets have important consequences for all of their internal value processes. The joint study examining the market structures shows that while the prices of some of the commodities have been slow to increase, or have been decreasing, there has been a tendency for the over-production of a number of commodities, such as coffee, cocoa, tea, sugar, bananas, cotton and hard fibers. The study emphasizes, furthermore, that serious fluctuation in the price of commodities from developing countries has been two and a half to three times larger than those from industrial countries. The demand of developing countries for stabilization in the price of commodities has been attacked by some developed countries. Nevertheless, the developed countries themselves have taken measures to support or stabilize their own markets. Before the UNCTAD meeting of 1964 the Economist described the trade crisis in the third world:

The underdeveloped countries, poor as they are, have been contributing, involuntarily, to western prosperity. Since the early fifties the volume of food and agricultural products exported has risen by about a third. But in value they have increased by only a sixth and the rise in the price of manufactures has wiped out even that small gain.

46. Id. The problem with the world market, however, is that its capacity for using these materials has grown slowly. Any increase comes at the expense of low prices. Furthermore, there are wide fluctuations in the prices of commodities. The decrease, or slow increase, in demand for primary products is a result also of technological development in synthetics and changes in consumption patterns. The study indicates that world trade in agricultural products has been held back because of the policy of industrialized countries to protect their own products. The joint study further showed that trends in the increase of some primary commodities are, however, divergent. Markets for some primaries such as petroleum, timber, iron ore and bauxite have shown rapid growth since World War II. Some other commodities such as rubber, cotton, wool, jute and hard fibers have been facing serious competition from synthetics.

47. See UNCTAD Proceedings: Commodity Trade Vol. 111 at 81.

48. The Economist, Jan. 12, 1963, at 131, cited in
Whether or not the price fluctuations of commodities damage the growth of developing countries has caused some debate among economists. MacBean argues that the damage from short-term instability of price of commodities in developing countries has been over-emphasized. There is not much evidence, he asserts, to show an interrelation between price fluctuation and damage, or that changes in the income of developing countries clearly relate to price fluctuations in commodities. Similarly, another observer, studying the Chilean economy, notes that he could not find any clear relationship between stability of export earnings and growth. Yet, contrary to these arguments and findings, a number of economists have observed a negative impact of price fluctuation on under-development. Professor Myrdal, for example, observes that:

The basic causes of export instability and the reasons it is so significant lies essentially in the nature of under-development itself. Under-developed countries have only a limited ability to adjust supply to demand, an export list composed of one or a few major products, often a relatively high ratio of exports to national income, and a rapidly growing total of import needs; thus they are sensitive and extremely vulnerable to variations in export proceeds.

The latter argument has been supported by most economists. The adverse effects upon the growth of the developing countries would often appear to be functions both of a relative decline in the price of primary commodities and of a


51a. See note 51 supra.
relative increase in the price of manufactured goods. Because of such interdependency, the pricing of all commodities should be contextually interrelated. The concept of an indexing system embodies this policy. Where the prices of a large number of important commodities, primary and manufactured, are important to both developed and developing countries, an appropriate indexing may promote pricing in the common interest. This policy rejects the concept of case-by-case (single-item) pricing as a general guide. The case-by-case system tends to neglect the function of pricing as a strategy of allocating values; its emphasis is only upon economic factors such as the costs of production, efficiency, etc. In other words, the case-by-case system approach to pricing is too restrictive for today's required function of pricing.

The overall policies we recommend may require price differentiation when it contributes to optimum internal value processes. Price differentiation is a part of the General Scheme of Preferences (GSP). The practice of granting preferences in trade is not new to international commercial activities. Historic examples include the Commonwealth Imperial Preferences, French Union Preferences, the Benelux Union of Preferences, the United States Preferences with the Philippines, etc. These bilateral preferences were continued after World War II, later being replaced by multilateral trade agreements such as Article I of GATT, EEC practices and the Lome Convention. A system of preferences was promoted by UNCTAD in 1968 in a resolution that requested UNCTAD to

Establish to this end, a Special Committee on Preferences, as a subsidiary organ of the Trade and Development Board, to enable all countries concerned to participate in necessary consultations . . . [and]

Requested that the aim shall be to settle details of the arrangements in the course of 1969 with a view to seeking legislative authority and required waiver in GATT as soon as possible thereafter.54

53. Supra note 52, at 294.
In practice, however, this system was not received favorably by the oil-producing developing countries. OPEC members refused to establish price differentiation between oil-importing developing and developed countries because of the difficulties of sealing markets and the possibility of black markets. OPEC tried to compensate and replace price differentiation by grants and credits, which proved to be insufficient.

Dumping is one mode of price differentiation. With regard to industrial goods, contemporary policy against dumping as between industrial competitors has been effected by use of countervailing duties. Dumping as a strategy for incapacitating primary producers does not appear, however, to have stimulated appropriate inclusive prescription. From the standpoint of goal clarification, optimum community order would appear to be secured by a more supple set of guidelines. The recommended policies promote the contextual use of price differentiation to secure all more fundamental community goals. As consistently emphasized, we recommend a disciplined, configurative consideration of the consequences of different prices at different times in different contexts. This policy would prohibit differential pricing which weakens or destroys inclusively demanded development; yet it would promote differential pricing which contributes to the realization of demanded development plans.

One important function of pricing, as mentioned earlier, is the distribution of values not necessarily arising from some particular exploitation of resources. This function may require pricing practices whose effects can only be assessed contextually. In general, it is suggested that alternative pricing practices be evaluated in terms of their aggregate value and public order effects. These alternative pricing modalities may involve varying degrees of "economic coercion," implemented through high prices of commodities and goods, boycott, cutbacks in production, or embargo. These practices are available not only to producers but also to consumers. While general community prescriptions oppose these alternative pricing systems, there has been a long history of such practices. The position we take, however, is that the ultimate outcomes of alternative pricing systems on aggregate value distribution and public order goals is the appropriate test of the legitimacy of such pricing policies.

2. Allocation of Competence

The most important--i.e., urgent and controversial--issue in a constitutive process about pricing relates to the participants in the pricing process. The most general policy we recommend is that all who are affected by the prices of re-
sources and commodities should both have competence to participate in the pricing process, and be made responsible to the more inclusive community decision. This means that both producers and consumers be made responsible participants. Categorization of participants in these terms is, however, rather artificial; most communities are both producers and consumers, the producers of some commodities being the consumers of other commodities and vice versa. In the present practices of international trade, countries tend to categorize themselves into these two groups on different commodities in the hope of better securing their interests.

The policy we recommend is for wider representation of both producers and consumers in the pricing process. With respect to vital resources, that is, resources whose use has wide inclusive impact, the competence to appraise prices should be as inclusive and representative as possible. This policy would promote the participation not only of governments but also of private associations such as corporations in the pricing process. Private associations can perform useful and important functions in terms of intelligence, promotion, and even application of pricing policies.

With respect to primary products, primary producers might be accorded an initial competence to set prices subject to review. This initial competence for primary producers might be honored because of their total or high dependence on a single commodity. This preliminary preference for primary producers may also be justified because they can have no control over a number of other factors related to the ultimate value of their commodities in developed countries. Such factors include the future real growth of production and income in the industrial countries, changes in taste of consumers, competition by synthetic materials, etc., which affect the demands for and the prices of their commodities.

The policies we recommend promote the effective participation of those most affected by the pricing process. Sometimes, to make their participation more effective, participants with little power may organize as groups in an effort to deal more as equals with market forces. Such participation has been promoted in the practices by developing countries as well as in the search for new international and national prescriptions. Some of these groups are referred to as producers' associations. While such associations in formal and organized form have been established by producers of raw materials for several decades, consumer countries are also familiar with comparable practices through their corporations and informal arrangements between governments. The establishment of opposing associations by consumers has been condemned by producers.
Producers justify their own associations as the only strategy that can put them on a more equal footing with the consumers in pricing processes. They regard, therefore, any attempt by consumers to organize themselves as destroying fair representation.

A preferred policy might be to promote the practices of producers' associations. The functions of these associations are quite extensive: they are not only a means for equalizing the power basis of producers and consumers in the present market structure, but also they perform useful intelligence, promotion, prescription and application functions among the producers, who have limited ability singly to reach these results. Questions about lawfulness or unlawfulness should, accordingly, be related not to the existence of the producers' associations as a totality, but rather to their particular practices in the exercise of their newly-found power.

The well-being of the people of the world cannot of course be left to the unilateral discretion of a single bloc of countries, whether they are developed or developing, producers or consumers. Freedom of choice and representation in the process of decision-making must be overriding goals in a preferred world public order of human dignity. Any hegemony which destroys this freedom must be condemned as latter-day imperialism, whether it is by producers or consumers. The traditional "free market" in world commodities has never adequately protected this freedom of choice. It is conceivable, however, that a contemporary global constitutive process might be able to achieve a balancing between inclusive and exclusive competences, as well as the procedures for careful, contextual evaluation in particular instances of decision, which could enhance that freedom.

D. Trends in Decision

Pricing, in the sense that we employ the term, is a technique of social control for regulating timing, location, etc. as well as allocating benefits and values in the exploitation of resources. This technique embraces a whole range of options from consensual to administered or coercive arrangements and exhibits many differing degrees of government involvement. It has always been used, though not always effectively or rationally, to promote the policies of the effective decision-makers in a community. The tolerance on the part of the effective participants in the world constitutive process in according differing degrees of exclusive or inclusive competence in states about pricing has varied with particular situations. The type of pricing policy protected
within communities commonly described in terms of "monopoly" and "competition," existed more than 4,000 years ago in Babylon. In practice, however, "monopoly" and "competition" seldom represent accurate descriptions of pricing practice; they express the extremes from the most limited to the widest participation. Pricing is an activity which, as indicated, may be left to "market" accommodation with varying degrees of governmental participation, or may be highly governmentalized within a community. Though private and governmental participation in pricing have varied greatly throughout history, today, on a global scale, governmental participation in pricing is increasing. Moreover, the more comprehensive constitutive process of authoritative decision is becoming increasingly explicit in its establishment and protection of exclusive, partially inclusive, and inclusive competences with regard to pricing.

1. Exclusive Competence Over Pricing

By exclusive competence as to pricing we refer to the competence of any particular nation-state to make and apply laws about the pricing of the goods and services which are produced through the exploitation of its internal resources.

55 Machlup, supra note 27 at 181.

55a. The terms inclusive and exclusive may be employed to refer to every feature both of the process of decision and of the process of use by which resources are exploited. For an exposition of this terminology see M. McDougal, H. Lasswell, & I. Vlasic, Law and Public Order in Space 153-157 (1963). The references are intended to be descriptive only, not preferential.

By inclusive competence we refer to a process of decision exhibiting multiple participants. When we add the adjective "partially," we note specialized characteristics of the participants which may preclude a full representation of interests. Thus, an organized process of decision, such as OPEC, though including multiple participants, may be constituted only of producers and not consumers. When an organized process of decision admits representation of all interests as in commodity agreements, the adjective "partially" is not employed.

It is recognized, of course, that while a process of decision may be inclusive in terms of the number of participants who play a role in the making and applying of law, the outcomes of the decisions taken may or may not be inclusive in their impact. They may be exclusive in their impact and even detrimental to larger inclusive interests, such as the in-
The officials of a nation-state may of course themselves directly participate in pricing activities either alone or in collaboration with various private participants. Conversely, private participants may play a role in the making of law through their cooperative activity which creates expectations about authority and control. In the relative absence of inclusive prescriptions limiting the exclusive competence of the state, it has commonly been assumed that the competence of particular states is comprehensive and largely unfettered. This assumption would appear to be confirmed both by historic practice and by contemporary inclusive pronouncements.

Yet, however broad their competence, nation-states have not effectively regulated the practices of their corporations and other enterprises in the pricing process. This lack of effective regulation has stemmed from a number of factors, e.g. conceptions about the relevance of governmental participation, economic activities, contending political and other ideologies and appropriate exercise of state competence. The actual decisions about price determination have been made mainly by private enterprise. Private corporations, commonly in groups, have effectively controlled the pricing process. Historically, their practices have been known as cartels.56

The word "cartel" was first used by the German Reichstag to refer to monopolistic activity, and the concept was later developed more comprehensively for opposing a policy of competition. While both "cartel" and "monopoly" generally refer to the same types of practices, historically the latter was the term first used to imply the economic exploitation of poor by rich. The term "cartel" has now acquired a negative connotation associated again with the domination of the "have-nots" by the "haves." The connotations implied as well as the explicitness of the terminology of course affects all its uses. This may explain why the League of Nations in referring to cartels used the phrase "industrial agreements," while the United Nations employs "restrictive business practices." The changes in terms for describing exclusive participation in the pricing process may have no substantial impact upon the structure and practice of the institution, but may reflect an attempt to change its objective or to change prior assessments of unlawfulness.

In cartels, private, governmental, or mixed enterprises seek to dominate markets by agreement. Thus, cartels are defined as "voluntary agreements among independent enterprises in a single industry or closely related industries with the purpose of exercising a monopolistic control of the market." Similarly, Edward Mason defines cartels thus:

Cartels, in the narrow—and proper—sense, are agreements between firms with respect to the production and marketing of their products. Typically, cartel agreements aim at the restriction of output or sales by the member firms, at an allocation of market territories between firms, and a fixing of the price of their products.

The expansion of the cartel practices from marketing agree-

57. Hexner, supra note 56, at 3.
58. Pribram, supra note 56, at 6.
60. The New York Times has noted that the word cartel has become a pejorative label. N.Y. Times, Sept. 14, 1943, at 16 quoted in Hexner, supra note 56, at 7.
61. Hexner, supra note 59, at 8.
63. E. Mason, Economic Concentration and Monopoly Problem 73 (1957).
ments to patents and process exchange agreements between firms in different countries has often been noted.\textsuperscript{64} Hexner, emphasizing market manipulations, defines a cartel as a "voluntary, potentially impermanent, business relationship among a number of independent, private entrepreneurs, which through coordinated marketing significantly affects the market of a commodity or service."\textsuperscript{65} Fritz Machlup refers to cartels as "[b]usiness arrangements which have the purpose or effect of reducing or regulating competition."\textsuperscript{66} The League of Nations, emphasizing the objectives, offered this definition:

Cartels are associations of independent undertakings in the same or similar branches of industry established by a view to improving conditions of production and sale.\textsuperscript{67}

Despite all the negative connotations of "cartel" and "monopoly," both economic writers and, upon occasion, authors of inclusive prescriptions have offered a more objective appraisal of their purposes. Thus, Karl Pribram has said that the effects of cartels "favorable or prejudicial--upon the production and distribution of goods, upon the general economic structure, and upon the distribution of income are variously assessed."\textsuperscript{68} Again, the World Economic Conference of 1927 (Geneva), referring to cartels, stated:

The phenomenon of such agreements, arising from economic necessities, does not constitute a matter upon which any conclusions of principles need be reached, but a development which has to be recognized and which from its practical point of view must be considered as good or bad according to the spirit which rules the constitution and the operation of the agreements, and in particular according to the measures in which those directing them are actuated by a sense of general interest.\textsuperscript{69}

Another writer, referring to the objectives and ultimate impact of cartels on the common interest, has said:

\textsuperscript{64} Id. at 74.
\textsuperscript{65} Hexner, supra note 56 at 24. See also Stocking and Watkins, supra note 56, at 3; Arnold, "Cartels or Free Enterprises?" Public Affairs Pamphlet no. 103 at 5 (1945).
\textsuperscript{66} Machlup, supra note 56, at 3.
\textsuperscript{67} Haussmann & Ahearn, supra note 59, at 10.
\textsuperscript{68} Pribram, supra note 56, at 1.
\textsuperscript{69} Haussmann & Ahearn, supra note 59, at 422.
Thus the monopolist has power for good or ill; he may turn to productive uses energies formerly absorbed in the competitive struggle; or he may drift, through security and the power of extortion, into wasteful and absolute methods of production. 70

Finally, Kronstein insists that it is only the malevolent, or unique kind of cartel which has the purpose "to discriminate against, or to exclude from the market, a specific enterprise, whereas in other types of cartels the discrimination or exclusion is only a device to accomplish a regulation of the market." 71

The trends in practice concerning cartels, as with most social institutions, establish clearly that final judgment on cartels should be based mainly upon ultimate consequences for value production and distribution and the degree of conformity to or deviation from community goals. In general, however, it may be said that private cartels have not left a good record in this respect. The pricing processes with respect to raw materials, and particularly oil resources, have never been competitive. There has always been a deliberate control of supply, with determination of price level, by international oil companies. 72 Contrary to the assertions of the oil companies, the non-competitive nature of this industry has been generally recognized. Leeman and Mikdashi emphasize that the joint approaches and vertical integration among oil companies diminished competition; 73 hence, neither demand nor supply has been particularly responsive to the "price mechanism." 74

The idea of comprehensive control over oil resources began with the multinational oil companies. All the leading

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70. Id. Mason observes that the primary objective of cartels is to increase prices by restricting participation and competition. Cartels would no longer continue, he observes, if "prices and output under cartelization were not more satisfactory to participating members than they could be with competition." Mason, supra note 69 at 78. See also B. Wallace & L. Edminster, International Control of Raw Materials 17-25 (1930).

71. Kronstein, supra note 56 at 142-143.

72. For the description of early control of supply of oil by oil companies see, E. Penrose, supra note 26 at 150-175.

73. Mikdashi, supra note 24 at 70; Leeman, supra note 26 at 6-44.

74. I. Hartshorn, Oil Companies and Governments 117 (1962).
companies were involved at one time or another in the promotion of this idea. The most active participants, however, were Standard Oil Company of New Jersey, Shell, and Anglo-Persian. But monopoly control over oil resources was not accomplished immediately. In the beginning the companies were too busy expanding the industry and meeting the rapid growth in demand, which more than doubled between 1919 and 1926.75 In several countries the companies had price fixing agreements which were not taken entirely seriously.76 In the late 1920's, the major oil companies realized that price competition was not profitable to any of them and should be avoided in the future. In order to organize the joint pricing policies of the oil companies, secret conferences were sponsored through the summer of 1929. The conclusive meeting at Achnacarry Home brought about an agreement for setting up an international oil cartel.77 With the official title of the Pool Association of September 17, 1928, though usually called the Achnacarry Agreement, this agreement covered the pricing process over the entire world outside the United States and the Soviet Union.78 It required a quota system for each market and a formula for price fixing. To implement the agreement two American export associations were set up to allocate the total American quota among various companies involved. One was the Standard Oil Export Corporation formed in December 1928, which consisted of Jersey Standard and five of its subsidiaries. The second was the Export Petroleum Association, Inc. formed in early 1929, which included Standard Oil Export Corporation and 16 other major American exporters.79 Standard was a link between the American and the European Industries.80 A "Gulf plus" system was agreed on as the basis for pricing. Under this system, the price of oil should be the same in every export center throughout the world as in the American ports along the Gulf of Mexico. The final cost at the delivery point, however, depended upon its distance from the Gulf of Mexico and on whether or not the buyer was a member of the cartel.81 This system required the customer oil

76. Id. at 98.
78. For an outline of the agreement see Id. at 200. See also R. Engler, The Politics of Oil 70-72 (1961).
79. See note 77, supra at 202.
80. Id.
81. Tugendhat & Hamilton, supra note 75, at 102.
companies outside the cartel to pay the Gulf price plus the cost of shipping the oil from the United States to the point of delivery. It made no difference if the supply came from a field closer to the destination than that of the Gulf of Mexico. In such situations, extra profits went to the cartel. Obviously, the Gulf pricing system did not take into account the interest of consumers whose oil was shipped from a nearer port; its basic objective was the maximization of the profit of the cartel members. It has been observed that the reason for such a pricing system was that major oil companies had their principal assets invested in the United States. The United States was the major oil producer in the 1930s and 1940s and therefore, it was to its benefit to maintain the largest possible market for American oil. Thus, the higher prices for the Middle East oil not only did not hurt the American oil because it had the same price, but also secured more profits for the cartel because the prices were significantly higher than the cost of transportation.

At the same time as the Pool Association in 1929, there was a similar attempt to control production and lessen competition in the United States. This attempt did not succeed because the Attorney General refused to cooperate. From 1930 until the Second World War three other agreements on control of the pricing process similar to Achnacarry Principles were agreed upon, such as the 1930 Memorandum for European Markets, 1932 Heads of Agreements for Distribution and the 1934 Draft Memorandum of Principles. The latter was made in great secrecy and only the most senior officials were allowed to know all the plan's details. This agreement covered all countries outside North America. A central committee was established in London to control the operation by making separate agreements for each particular market and encouraging other companies to join them. This exclusive control over pricing was not entirely successful. Its proponents could not persuade all companies to join in order to get the major portion of control. The majors further had difficulty at times in accommodating the policies of their subsidiaries in different countries. Above all, governments have become increasingly involved in the oil pricing process. The elimination of formal cartel agreements among oil companies came after World War II.

82. Id. at 104.
83. Federal Trade Commission, supra note 77, at 210-211.
84. Id. at 228-268.
85. Tugendhat & Hamilton, supra note 75 at 109-111.
86. Id.
Nonetheless, their control over oil supplies and their informal mutual understanding and consensus about pricing policy to maximize their own profits remained.\(^8\)

The actual structure of the oil industry outside the United States reached its present state in the late 1940's and early 1950's, when the political and economic influence of the United States was unchallenged, thanks in part to the cooperation between the State Department and the oil companies.\(^8\) Through this mutual cooperation, the seven majors owned 65% of the world's estimated crude oil reserves and controlled more than 92% of the estimated crude reserves outside the United States, Mexico and Russia in 1949.\(^8\) In the same year the seven majors accounted for more than one-half of the world's crude production excluding Russia and satellite countries, about 96% of the production in the Eastern Hemisphere and about 45% in the Western Hemisphere.\(^9\) In 1950 the crude oil refining capacity of the world was also largely controlled by the seven majors. They controlled about 57% of the world's crude oil refining capacity, held more than 75% in the Western Hemisphere excluding the United States and held 77% of the rest of the world's crude oil refinery capacity.\(^9\)

Control over the cracking process in oil production is more important economically than control over crude oil refining. Cracking is a process by which heavy hydrocarbons are broken up by heat into lighter products, yielding a greater quantity of more highly-valued products and produces many of the chemicals which are the basic raw materials for synthetic rubber and many plastics. This process, therefore, makes the petroleum industry an important supplier of products for other industries, and control over this process affects a broader segment of the world economy than control over refining.\(^9\) In 1950 the control of the seven major oil companies over the cracking process was stronger than their control over the refining process. The majors owned 47% of the United States' cracking capacity, 53% of the Western Hemisphere's, 84% of the Eastern Hemisphere's and 55% of the total world's.\(^9\)

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87. Odell, supra note 32 at 15.
89. Federal Trade Commission, supra note 77, at 23.
90. Id. at 24.
91. Id. at 25.
92. Id.
93. Id.
the United States, the USSR and its satellites, the seven majors held 85% of all cracking capacity of the rest of the world and 77% of the crude-refining capacity.94

The control of transportation of oil resources was also long concentrated in the seven major oil companies. They owned more than 50% of the world's tanker fleet in 1950,95 and all of the important pipelines outside the United States.96 In a study by the United States Federal Trade Commission, it is stated that in no industry is the control over marketing as concentrated as it is in the oil industry.97 The study notes that it is "a rule, rather than the exception, for petroleum products to move from producer to consumer by company-owned facilities within one corporate hierarchy."98

The effective control of the major oil companies over the process of use of oil resources was promoted through integration by contracts or joint ownership. For example, in the 1960 oil consortium operating in Iran, five of the member companies were shareholders of companies operating in Iraq, four in Saudi Arabia, and two with special contracts involving

94. Id. at 26.
95. Id. at 27.
96. Id. For the importance of petroleum pipelines outside the United States see World Petroleum, Apr. 1950, at 63, cited in Id. at 28.
97. Supra note 77 at 280-348.
98. Id. at 28; the report states that:

[Control of the industry by these seven companies [Standard Oil Co. of California, Socony-Vacuum Oil Co., Inc., Gulf Oil Corp., and the Texas Co.,--and two British-Dutch companies--Anglo-Iranian Oil Co., Ltd., and the Royal Dutch-Shell group] extends from reserves through production, transportation, refining, and marketing. All seven engage in every stage of operations, from exploration to marketing. The typical movement of petroleum from producer until acquired by the final consumer is through inter-company transfer within a corporate family. Out-right sales, arms-length bargaining, and other practices characteristic of independent buyers and sellers are conspicuous by their absence. Control is held through direct corporate holdings, by parents, subsidiaries, and affiliates of the seven, but also through such indirect means as interlocking directorates, joint ownership of affiliates' intercompany crude purchase contracts, and marketing agreements.
three of the others in Kuwait.\textsuperscript{99} Joint operation in production is only one kind of integration. Integration in the refining, marketing and transportation processes is equally important.\textsuperscript{100}

The effective exclusive control of the oil companies is known to have led to abuse of their power over pricing process, as well as to the promotion of unjustifiable political and other special interests of the companies and their home governments.\textsuperscript{101} The companies' reduction of oil prices in 1959 and 1960, for example, was interpreted as their sanction against Venezuela's imposition of additional taxes on concessionary profits and as a strategy to influence the outcomes of the claims and controversies between Iraq and the Iraqi Petroleum Company.\textsuperscript{102} The 1951 boycott by the oil companies of Iranian oil because of the nationalization of the Anglo-Iranian Oil Company, is another example of such abuse of their exclusive control. The effective power of the major oil companies over pricing not only excluded the authority and control of the producers for participation in this process, but also excluded any opportunity for increasing numbers of oil consumers to have any say in the process.

India was one of the exceptional countries able to participate in price adjustments on its imported oil. The opportunity for India became available through support by the Soviet Union of an Indian position. The oil companies while providing India with Persian Gulf oil, charged it on the Gulf price basis. India, a poor developing country, had no other choice but to accept that unilateral pricing policy until 1960, when the Soviet Union offered it to sell oil at prices which were 20% less than the delivered price of Middle East oil offered by the majors. As a result of this offer from the Soviet Union, and in addition to the establishment of a national oil company, the Indian government demanded lower oil prices

\textsuperscript{99} Hartshorn, supra note 74, at 152.
\textsuperscript{100} Id. at 117, 152. In 1960 in United Kingdom, The Republic of Ireland, the Near East, many African territories, Ceylon, Shell and BP engaged in joint marketing and occasionally in joint refining as Shell-Mex and BP; Standard of California and the Texas Company did so in most countries of the Eastern Hemisphere as Caltex. Until the end of 1960 Jersey and Mobil also worked together in Africa. Id. at 153.
\textsuperscript{102} D. Hirst, Oil and Public Opinion in the Middle East 43 (1968).
from the oil companies. After the threat by the government, the oil companies decreased the price of oil and since then there have been several adjustments in prices. The Indian government, however, is one of the very few exceptions among the developing consuming countries that have been able to participate in the pricing of oil imports.

The major oil companies, the most effective participants in the pricing process, at least until 1971, have always avoided a constructive and rational study about how and on what basis this process operates. While this lack of information is ostensibly about the international market, it exists even within the United States national oil industry itself:

Even inside the American oil industry, which has the most elaborate price reporting and statistical series of any oil business in the world, it is not easy to get rational discussion of the way in which these prices are in fact formed. In the United States, the spectre of antitrust proceedings broods over any such discussion, and its shadow extends wherever in the world American companies operate. Even so, it is notable and unfortunate that up to now, most international oil companies, in particular, have left almost all the serious discussion of price formation in the international oil business to their critics—usually contenting themselves with the claim that oil pricing is the result of "competition," naively defined.

While there may be some competition between the oil companies in the United States market, the competition referred to is not in pricing. This kind of competition, known as "non-price" competition, refers to competition at the refining stage for research and production of more complicated and lucrative products.

103. Odell, supra note 32, at 149.
104. Hartshorn, supra note 74, at 128.
105. Hartshorn states that one of the characteristics of "non-price" competition is the use of advertising to express the goodwill and interest of the oil companies in the well-being of their customers and the claims for new and better products. It is actually competitive in quality: It steadily helps to increase the technical efficiency with which the consumer can use the fuel, though sometimes at a significant cost in the technical efficiency with which the refinery that produces the fuel is run. It gives the consumer higher quality at the same price without offering him
Cartel practices are common, not only in primary products, but also in industrial products. Some of the important operating cartels between the two world wars involved such products. The role and objective of these cartels between the two world wars and after World War II were quite different. The primary objective of the cartels between the wars was the prevention of decline in prices, production and sales. After World War II, however, these cartels served, in the words of one writer, "either as a bridge during a transition period of technological or economic development or as a means to protect large investments against the flow of further dynamic development. . . . Every further disintegration of world markets, as the result of the balance-of-payments or similar political economic reasons, encourages new steps toward industrial products cartels." In March 1969, for example, after a negotiation between the United States government and European and Japanese steel producers, an agreement was concluded for a voluntary export quota for 1969. Another example of this kind of cartel is the cartel of the producers of fertilizer. In 1962, Nitrex, a European export association, was established to deal with American and Japanese competition. This association, however, has not been successful in price stabilization. After studying the role of corporations in the pricing of manufactures and semi-manufactures of developing countries, UNCTAD concluded that their role involved:

(a) The fixing of prices for particular markets of the products exported and imported;

(b) Collusive tendering in respect of import tenders called by developing countries; that

the choice of the same quality at a lower price, which sets up a kind of technocratic criterion, and tells the customer what is best for him.

Id. at 156. This kind of competition in marketing is backed by a considerable amount of non-price competition at a further in the integrated operations of the industry.

106. Kronstein, supra note 56, at 119.

107. Id.

108. See The Economist Jan. 18, 1969, at 68-69, cited at id., 120. This agreement was concluded because of the American threat of mandatory import quota legislation.

109. See C. Edwards, Cartelization in Western Europe (1964), cited in Kronstein (ed.), at 127. For more of this kind of cartel see id. at 119-141.
is, agreements as to who will trade, in what amounts, and what prices;

(c) Allocation of markets for exports and imports to particular members of the arrangements;

(d) Co-operation with regard to the manufacture of products, for example, through the mutual exchange of technology, agreements on the level of production and specialization of activities amongst members; and

(e) Collective action to enforce the arrangements agreed upon.\textsuperscript{110}

The unilateral control of private corporations over the pricing process has always to some degree concerned national governments. Such concern has, however, mainly been with regard to finding appropriate ways to exercise their authority over the activities of such corporations to protect primarily their national interests. The antitrust laws, or regulations of restrictive business practices, are well-known national prescriptions toward this end. The notion of antitrust law is of American origin. The American vision of a self-regulating market system led to the development of antitrust law to prevent the interference with that system.\textsuperscript{111}

One of the first, though unsuccessful, American antitrust suits against the American corporations operating overseas was brought in 1953. The Federal government brought a civil suit against five multinational oil companies, owned largely by United States citizens, because of the participation of these companies in the Iranian consortium.\textsuperscript{112} This case,

\textsuperscript{110} UNCTAD Doc. TD/185/Supp. 2 at 7.


known as the Cartel Case, was never brought to trial. The legal ground for dismissal of the case was based on an opinion of the Attorney General that the participation of the five American oil companies in the Iranian consortium did not violate the American antitrust law. An underlying political reason, however, was to preclude any disruption of the world oil supply. After the Korean boom and the Iranian nationalization demand grew for oil resources by American allies in Western Europe. The closing of the Suez Canal, which threatened the supply of Western Europe, caused the United States to give antitrust immunity to the oil companies in order not to interrupt the supply of Western Europe.

Cartel practices have long fared differently in Europe. Contrary to attitudes in the United States and Canada, the prohibition of restrictive business practices were rare in Europe until after World War II. During the French Revolution, France enacted penal provisions against monopoly business practices to fix prices at non-competitive levels. In 1884, pressure groups to protect business sought a judicial interpretation of the above prescription and supplemented this with an amendment in 1926. In Germany some publicists observed that the constitutional guarantee of freedom of contract invalidates any prescription which prohibits cartel contracts. The opposing view comes from Biedenkopf, who insists that indeed regulating cartels is the constitutional guarantee of "contractual freedom which demands an 'order of free determination of the individual, protected against unlicensed interference from private powers.'"

The British Minister of Reconstruction declared in 1944 that, although cartels' activities are not necessarily against the public interest, the power so to be is

113a. For antitrust law in Canada, see L. Reynolds, The Control of Competition in Canada (1940).
115. Id.
nonetheless present.117a Similarly, in other European countries there were shifts over time for and against cartel practices, but in general there was no serious attempt against restrictive practices such as the one in the United States.118

In most developing countries because of a policy of government ownership, cartel practices, particularly as related to international cartels, have not been subjected to national regulation. This has created a number of problems. A study by UNCTAD IV shows that the absence of controls on cartel activity has, in certain cases, led subsidiaries in developing countries to become parties to national and international cartel arrangements in developed countries. For example, Bridon, the subsidiary of the United Kingdom in Mexico, is a party to the export cartels in the United Kingdom in the field of wire ropes and the associated international cartel arrangements.118a In addition, it appears that transnational corporations in developing countries have established import cartels, which these corporations operate in developed countries. The study asserts: "As such, the cartels represent not a defensive response to the existence of oligopoly and monopoly power but a reinforcement of such power."118b

Taxing is one way of indirect participation by governments in the pricing process. A primary objective of taxation on commodities is ordinarily to increase the income of the states. The taxing power may, nevertheless, be deliberately used for other purposes and its exercise always affects the price of goods and services. The taxation by primary producers of their raw materials can be effectively aimed towards a redistribution of the economic values arising from exploitation of their resources. By the end of the 1960's this kind of taxation had achieved significant increase in the foreign exchange of producing developing countries. In Chile, with respect to copper production, the Braden Company was paying the Chilean government 1% of the gross sales value, as taxes, over the period of 1913-1924.119 This tax during 1930-1939 was less

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118. Edwards, supra note 111, at 3.
118b. TD/185/Supp. 2 at 16.
than 6% but reached 64% by 1953 through government action.120 In the early oil concessions in the Middle East, tax exemption of the concessionaire was almost a common practice. The only exception was the concession between Iraq and IPC of 1925.121 Some of the earlier concessions with Sheikhs of the Persian Gulf were silent on the question of taxation mainly because the imposition of taxes was unknown to those areas.122 Getty's concession in the Neutral Zone (1949) in Article 49 laid down the principle of freedom from taxation for the company and its property.123

From the beginning, the imposition of taxes on oil resources, was achieved either through the unilateral action of the host governments or through negotiations with the concessionaires. Taxation was introduced as a part of the concept of equal sharing advocated by the oil producers. The first legislation taxed the profits of oil companies and was enacted in Saudi Arabia in accordance with a Royal Decree of December 27, 1950.124 This Decree provided an income tax on companies engaged in production of hydrocarbons, the tax amounting from 20% to 50% of their net operating income. Kuwait and Bahrein followed a similar policy.125 A Kuwait Decree of December 1951 established an income tax equal to 50% of the income of corporations operating in the production and marketing of oil. Bahrein's Decree, which was similar to those of Qatar and Iraq, in 1952 imposed a 50% tax on oil profits.126 Iran and Abu Dhabi implemented similar formulas in their concessions through negotiations.127 Venezuela enacted 50/50 tax legislation from 1948-1958. By 1958 Venezuela had increased its taxes to some 70% of the profit realized.128 As between the oil companies and the host governments the tax formula has not always meant the same thing. The formula has depended on particular concessions. The terms of each 50/50 agreement determined what items were to

120. Id.
122. Id.
123. Id. at 44.
124. Royal Decree No. 17/2/28/7634.
126. See, Cattan, supra note 121, at 45; B. Shwadran, The Middle East, Oil and the Great Powers (1959) 260.
127. Shwadran at 398-399.
128. Hartshorn, supra note 74, at 177.
be accepted as allowable costs before computing profits in the host country, and whether certain items of expenditures were expenses against current earnings or capitalized or amortized over a longer period.\textsuperscript{129} In 1953 the system of 50/50 taxing was made clearer. The Arabian tax, for example, was based on profits on sales at posted prices to parent companies and it made the 50/50 profit system somewhat larger than American taxes would have been on the same basis of income and profit.\textsuperscript{130} Hartshorn concluded that 50/50 profit-sharing presented largely a transfer of tax revenue from the treasuries of the United States and England to those of the Middle Eastern countries, and the companies became the channel for this transfer without substantial changes in their own income.\textsuperscript{130a} The French and Dutch tax laws at that time, how-

129. Following the Venezuelan example, Saudi Arabia in 1949 decreed an income tax of 50 percent on Aramco's income after payment of the US tax. Subsequent to negotiations between Saudi Arabia on the one hand and the United States Treasury, Aramco and its shareholders on the other, Saudi Arabia drafted a law which imposed a 50 percent income tax before payment of the American tax.

The Saudi Arabian government received considerable help from the United States government. This legislation was a general tax which was admissible for tax credit against the company's American tax. This system increased Saudi Arabian revenue substantially. The increase in Saudi Arabian revenue, however, did not bring about a decrease in the income of Aramco and its parent companies, because the Saudi tax was offset by reductions in American tax on the same income. In fact, "the income on which the Saudi tax was charged originally differed from that on which the American tax was [charged]. Aramco submitted to Arabian taxation in 1950-51 on profits calculated on transfer prices to its parent company 'offtakers,' who received a substantial cost of sales' discount below the price at which Arabian crude was available to outsiders." This system reduced the "turnover and hence the profit on which Arabian tax was charged. It may have meant that the Arabian tax and royalty, which worked out a higher total rate than American tax plus Arabian royalty had done, but was applied to a lower profit, amounted in absolute terms to about the same payments to governments, leaving the companies roughly as before." Hartshorn, supra note 74, at 179. See also United Nations "Multinational Corporations in World Development," ST/ECO/190 66-70 (1973).

130. Id. at 179.

130a. See Hartshorn, supra note 74, at 177-179.
never, excluded the profits made by their subjects abroad from tax, therefore, the 50/50 arrangement cost those companies more than the Americans.131 In this taxing system, the posted prices remained as the basis for tax formulation. During the 1960's an oil surplus kept the posted prices up while the actual prices were lower through discounts. The result was that the real taxable revenues of the producers rose to 60%, rather than 50%, of realized prices.132

Sometimes multilateral agreements between developing countries and multinational corporations provide for tax exemption or reduction for specific projects. Such agreements are designed to encourage investment according to governmental plans. Similar policies are on occasion followed by developed countries with respect to their private corporations, giving them tax exemptions for investment in some developing countries.133

131. Id. at 180.
132. Id.
133. Sometimes instead of bilateral agreements between governments on tax matters, developing countries have concluded agreements with multinationals concerning specific projects. They are mainly related to the granting of tax relief as an investment-inducing measure, and usually also include non-tax matters and convertibility of earnings at a fixed rate and other benefits. Some developed countries have given encouragement to their corporations in the form of tax matters for investing in developing countries. See, for example, American measures on such encouragement, Senate Committee on Finance, Implications of Multinational Firms for World Trade and Investment for US Trade and Labor 71, 124-125, 882-884 (1973).

Agreements between developing states and multinationals, however, are not allowed to contravene the tax laws of worldwide taxing home countries. For the practice of Common Market members on tax, see "Tax harmonization measures planned for first stage of the proposed economic and monetary union" in 2 European Taxation, 1971. Another factor encouraging a more uniform taxation of multinational corporations arises out of dissatisfaction over the variety of methods used to integrate the corporate and individual income tax. See C. Shoup, Public Finance (1969). Many countries are afraid that the methods of integration of other countries may become more attractive to direct investment. See "A Comparative Analysis of the Classical, Dual Rate, and Imputation Taxation Systems and an Examination of the Corporate Tax System in Belgium, France, Germany, Italy, the Netherlands and the United Kingdom," in 12 European
The most direct exclusive control of states over pricing has commonly been achieved through the establishment and control of national companies. Such a practice, increasing in developing countries in the modern market structure, is not a new concept. During the Hitler and Mussolini days in Germany and Italy, government cartels were employed in an effective strategy of control over both internal and external affairs. Today all forms of national companies are regarded as means for maintaining direct exclusive controls by governments. The more immediate impact of such controls, however, may be more national than transnational. If, on the other hand, the share of a particular state in the transnational production and distribution of a commodity is high, the unilateral action of the state may have immediate worldwide impact. For example, in the case of grain, the United States alone as the major producer has effective control over production of this vital resource and it is likely that in the future world dependency on the U.S. grain export will increase. This dominance in production will give the United States a measure of power "it had never had before--possibly an economic and political dominance greater than that of the immediate post-World War II years."

The impact of exclusive governmental and private control upon external value processes and the common interests of larger communities have led, beyond the slow growth of national prescriptions in regulations, to the development of some modest inclusive prescriptions about exclusive national competence. The European Economic Community (EEC), a partially inclusive organization with the objective of protection of shared

Taxation, May-June 1972 Nos. 5 & 6, at 1/112-174. See also (United Kingdom) "Tax Reform," 12 European Taxation Mar. 1972, No. 3.

interest of its members, has considered the possibility of negative impact of the practices of its members in pricing on the overall inclusive interest of the community. Article 37(1) of the EEC Agreement, referring to such concern, reads:

1. Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transnational period has ended, no discrimination regarding the conditions under which goods are produced and marketed exists between nationals and Member States.136

This concern for control of monopoly practice brought some changes in the European Coal and Steel Community (ECSC) in 1951. The purpose of ECSC was to establish international control over the coal and steel industries of member countries in order to create an international market, through political unification of the member-states.137 The agreement of the community was to prohibit restrictive practices which were incompatible with the purpose of the community, by both public and private sectors. It should be noted that the EEC prescriptions include public as well as private participants. Article 85(1) of the EEC Treaty expands the prohibition of monopoly and condemns practices which directly or indirectly fix purchase or selling prices, limit or control production and technical development, store market or sources of supply, apply conditions which put the other party at a competitive disadvantage and conditioning the agreement to other situations which have no relation to the agreement in hand.141 Article 86 of the EEC Treaty, expanding

137. Edwards, supra note 111, at 7.
140. See Gruding Case, 1969 CMLR 418, cited in Id.
141. Id. There are, however, some exceptions to Article 85(1). Article 85(3) states the exceptions as:
The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
-- any agreement or category of agreements between undertakings;
-- any decision or category of decisions by associations of undertakings;
-- any concerted practice or category of con-
the concept of the prohibition of abuse of monopoly power, reads:

Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.
(b) Limiting production, markets or technical development to the prejudice of consumers.
(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.
(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.142

certed practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Quoted in id. at 88.

The emphasis and pressure put by EEC has made the members change their internal prescriptions to meet EEC requirements regardless of their sympathy with some monopoly practices.

2. Partially Inclusive Competence Over Pricing

A relatively recent feature of the international pricing process is the emergence of partially inclusive inter-governmental organizations which assert, within the larger permissible framework of international law, a strong effective power and a number of particular competences about pricing. These particular competences include the intelligence, prescription and, to a lesser degree, the application functions. The thrust of these organizations is in direct opposition to the capitalist laissez-faire notion of a self-regulating market and aims toward a conscious change in market forces. The principal participants in these partially inclusive organizations are the exporting developing countries. These new organizations have been aptly described as the "trade unions" of "the poor nations." Their objective is to negotiate a new deal with the rich countries through the instrument of collective bargaining: that is, "to obtain greater equality of opportunity and to secure the right to sit as equals around the bargaining tables of the world."143

These new associations do not fit the requirements of an inter-governmental specialized agency under the Article 57 of the United Nations Charter. Article 57(1) of the Charter defines specialized agencies as inter-governmental organizations with the objectives of "having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields."143a The objectives of the producers' associations are obviously more limited. They may perhaps be best described as associations of interest groups, which in some measure align bloc against bloc. They have such wide membership that they cannot be considered as exclusive organizations; yet they are not wide enough in membership and purpose to be referred to as inclusive, for direct and explicit relation to the most inclusive world organization, the United Nations. For these reasons we recognize these associations as a new phenomenon in international trade and refer to them as partially inclusive inter-


143a. UN Charter, Art. 51(1).
The idea for creating these partially inclusive organizations derives from the desire of the developing countries for greater development and their recognition of the non-conformity of the market structure with that desire. The disappointment they faced in their treatment by industrial countries has been almost universal:

For the producers of minerals, there is moreover (as for oil) the keen sense that their minerals are non-renewable, an asset that should produce the greatest possible return and if possible have its useful life stretched out. Hence, it is only natural that producers should seek to change a situation in which, by and large, the sellers of non-fuel minerals are competing, diffuse, and unorganized in the face of relatively few and well-organized buyers on behalf of the consuming countries. 144

The combined effect of these factors--concern for development, a realistic perception of limited resources and ability, and most importantly, the lack of sympathy for their goals in the market structures and in the developed countries--have fueled their effort to establish a new form of collective bargaining. It has been their hope that "[a] group position is more likely to win than an individual position because of the greater power and resources behind it, because of its greater moral legitimacy (one's cause seems more 'right' when others support it), and because it is more likely to be a moderate and general position (hence more amenable to accommodation)." 145

The Trilateral Commission aptly summarizes the objectives of these organizations:

to stabilize market prices;
to prevent market prices from falling below production costs;
to offset the market power of private firms;
to respond to other market imperfections, such as barriers to exports in processed forms;
to exchange information and to coordinate technical and other developments. 146

146. Trilateral Commission, Seeking a New Accommodation in World Commodity Market 13-14 (1976). The Commission concludes that creating the shortage in the market through
The authority of the producers to establish these new associations derives from their combined sovereignty over their resources. This interpretation has been confirmed in the resolution of the New Economic Order. Article 5 of the NEO states that: "All States have the right to associate in organizations of primary commodity producers in order to develop their national economies to achieve stable financing for their development, and in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly all States have the duty to respect that right by refraining from applying economic and political measures that would limit it." Similarly, the UNCTAD meeting of 1964 (Geneva) adopted a recommendation which confirms the status of producers' organizations:

Recognizing the particular urgent character of the trade needs of developing countries whose exports are mainly composed of non-renewable natural products,

Considering the need for those countries to reach speedily a certain stage of economic development for which investment capital can be raised, by increasing the per unit income from their exports,

Recommends that international organizations set up by the developing countries which are the principal exporters of non-renewable natural products be recognized and encouraged to enable them to defend their interest.147

This recommendation was adopted by a roll-call vote of 83 to 1, with 25 abstentions. The opposing vote was from the United States.

systematic decrease of production does not necessarily come from a formal association. It could result from the actions of a dominant firm or government (in the case of phosphates) or an informal grouping (in the case of manganese). Besides, to increase the price does not necessarily come from production control, but from increases in taxation such as Jamaican increase in the bauxite tax or other internal measures such as the control of export by encouraging domestic processing in the case of iron ore in Australia and export control in the case of Canada. Id. at 14.

Producers' associations are not cartels in the same sense as are the great private associations. They are intergovernmental organizations which have the objective of protecting the total well-being of their nation-state members as opposed to cartels formed by private corporations which have the primary objective merely of profit maximization. The scope of operation of a private export cartel is not limited to price fixing, but also includes the allocation and control of production and market sharing. Furthermore, the private export cartel monitors the activities of its members and penalizes them in cases of violation. 148 With respect to OPEC, for example, these functions are not performed and its members do not accept comparable obligations:

Their agreement on oil export prices is strictly voluntary, and does not carry with it sanctions or rewards. Moreover, the agreements leave to the discretion of each member government the setting and changing of prices within a range considered reasonable by OPEC members. A close scrutiny of OPEC's resolutions shows that the organization does not have supranational powers, and its resolutions are merely guideposts for action. Member countries do not delegate to any central body their decision-making powers. Indeed, they jealously guard their sovereignty, and consider their freedom of action to be paramount. 149

One fundamental difference between OPEC and the private cartels is thus that the members of OPEC in promoting its policies do not give up their freedom of action. This fact was recognized at the beginning of the establishment of this organization. As emphasized by the Venezuelan representative, "[i]t must be borne in mind that the governments are sovereign and can in no way be compelled to fulfill to the letter their obligations toward OPEC which, in any case, are more in the nature of moral obligations." 150 In practice, further, the OPEC resolutions on pricing have not always been followed at

149. Mikdashi, supra note 74, at 77-78.
the stipulated times. It will be observed that comparable freedoms are embodied in the charters of other producers' associations.

Because of their importance to the world economy, there are increasing demands that these organizations be required to meet international standards of responsibility, of at least minimum order, in the exercise of effective control over production and pricing. Some of these responsibilities have already been recognized and accepted, for example, by OPEC. In the Solemn Declaration of the Algiers Conference, the OPEC members clearly announced the policies of ensuring a continuous and sufficient uninterrupted supply to consumers. The Declaration also states that coordination among producers should be managed in conformity with creating a balance between oil production and the needs of the world market. Thus, maintenance of the supply of oil has officially been acknowledged by Arab oil producers as their international responsibility.

From the beginning, OPEC has tried to establish relations with various international organizations in order to confirm its competences and responsibilities and enhance its acceptability and recognition. Its documents of establishment were registered in November of 1962 with the Secretariat of the United Nations in accordance with Article 102 of the Charter. OPEC has also established working relations with the Economic and Social Council. The General Assembly has authorized the Economic and Social Council to establish relations with intergovernmental organizations which do not fall within the definition of the Article 57 of the Charter. Based on this provision, OPEC has participated in Regional Economic Commissions.
for Latin America, Asia, and the Far East. OPEC also participated in the second symposium on the development of petroleum resources organized by the Economic Commission for Asia and the Far East in Tehran, in September 1962. In 1964, OPEC sent an application to the United Nations for acquiring consultative status with the Economic and Social Council. The Council adopted a resolution recognizing such status for OPEC on July 1, 1965. The secretary General of the United Nations was requested to take measures for "(a) ensuring the reciprocal exchange of information and documents, (b) having OPEC represented at meetings of the Organs of the United Nations at which questions of mutual interest are scheduled to be discussed, and (c) ensuring consultation and technical cooperation between OPEC and the United Nations in regard to matters of mutual interest." Finally, OPEC members have tried to express their concern for world inflation and rising oil prices in recent years through different aid programs to developing countries. Though these aid programs have not been entirely successful, they are nonetheless an expression of a sense of responsibility in times of international crisis.

The emergence of the producers' associations has been in general the result both of the unfavorable conditions in international trade for the fulfillment of demanded development projects and of the lack of an appropriate more inclusive decision process to promote the accelerating demands for world reform to achieve a more equitable distribution of values. The important task for the larger community now is to relate these partially inclusive organizations as new factors in the pricing process, with all their competences and responsibilities, to broader conceptions of the common interest. An analysis of some of the more detailed conditions under which the producers' associations have emerged may explain the more important contemporary expectations about the role and function of these associations and aid in relating their activities to the common interest. Our analysis begins with the emergence of OPEC, as the first and the most effective partially inclusive organization. Then we move to other examples of such organizations.

The monopolistic activities of major multinational oil companies both in the process of oil exploitation and in the political processes of the Middle East are well known and thoroughly documented by economists and political scientists.

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157. Id. at 140.
158. Id.
159. For OPEC aids, see Williams, "The Aid Programs of the OPEC Countries," 54 Foreign Affairs 308-324 (1976).
The objectives of the major oil companies have included the maximization not only of wealth, but also of power.\textsuperscript{160} The importance of power in the formulation of pricing cannot of course be ignored. With almost absolute monopoly control, the oil companies set the price of oil at $2.17 per barrel in 1948.\textsuperscript{161} This price was gradually reduced by the unilateral decisions of the oil companies to $1.80 by 1960, regardless of the impact on the producers' well-being.\textsuperscript{162} The low price of Middle East oil during 1949-1959, in relation to the oil of the Western Hemisphere and the prices of products in the European market, deprived the Middle Eastern producing countries of a rightful share of the profits, estimated by a former Saudi Arabia oil Minister at $4.74 billion.\textsuperscript{163} During the same period the prices of oil from the Gulf of Mexico and Venezuela were nearly 70\% and 40\% respectively higher than the Persian Gulf price of oil of comparable quality.\textsuperscript{164} This consistent unilateral decrease in the price of oil (which led to a decline of the revenues of the producing states, while maintaining high profits for the oil companies) gave rise to the demand by the oil producers for profit sharing. The purpose of the producing states in their demand for profit sharing was in the beginning merely to increase their earnings; they were not concerned about, and did not seek to participate in, price determination.\textsuperscript{165} Once they came to participate in profit sharing, the producing states naturally became concerned about price formulation as affecting their share.\textsuperscript{166} To deal with this concern, oil companies began to publicize or, in petroleum terminology, to "post" prices of Middle East oil. The

\textsuperscript{160} See, Hirst, supra note 102 at 37-43; Engler, supra note 78 at 197-220; Tanzer, supra note 101; Kronstein, supra note 56 at 92; Rifai, supra note 88 at 2, and a paper delivered to the Third Arab Petroleum Congress (from Oct. 16-21, 1961) by Dr. Muhammad Lebib Shuquair, "The Relative Bargaining Power of the Arab States and the Oil Companies and Its Effect in Determining the Financial Provisions of the Oil Concession Agreements."


\textsuperscript{162} Id.

\textsuperscript{163} Rouhani, supra note 156, at 191.

\textsuperscript{164} Id. at 190.

\textsuperscript{165} Cattan, supra note 121, at 51.

\textsuperscript{166} Hartshorn, supra note 74, at 149; Hirst, supra note 102, at 42.
posting, however, carried no indication that oil companies would respect the claim of the producers for participation in the pricing process at any level. The function of posting was only to establish those prices as a basis for the calculation of the royalties and income taxes to be payable to the producers.

Concern for participation in pricing began with the growing consciousness among the Middle Eastern countries about the value of their resources. The price issue was first brought up formally at the Second Arab Petroleum Congress held in 1959 with an elaborate paper presented by the Saudi oil Minister Sheik Abdullah Tariki, concerning the formulation of the price of crude oil. This paper was the beginning of formal and collective concern. It was, however, the decline in oil prices which made the producing countries take a further step and establish OPEC in 1960. The primary objective of OPEC at the time of its establishment was the prevention of decrease in oil prices. The initial efforts of OPEC were successful in stabilizing the price of oil at the August 1960 level. Nevertheless, dissatisfaction with the distribution of profits arising from their oil resources led the OPEC members to expand the organization's scope of action to improve their income. The basic strategy chosen by OPEC to this end has been through formulating common policies concerning the stabilization of prices. The first effort in this respect was Resolution 32, adopted at the Fourth Conference in June 1962. This Resolution protested against the price reduction effected by the oil companies in August 1960 and the fact that the oil companies had so far taken no steps to restore prices to the pre-August 1960 level. The Resolution emphasized the importance of oil revenues to the producers. It stated that a fall in the price of crude oil impairs the purchasing power of member countries with respect to manufactured products, which products are essential to their development.

167. Hartshorn at 149.
169. Rouhani, supra note 156, at 178.
170. The original participants of OPEC were Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. For a brief summary of its establishment, see Hirst, supra note 102, at 100-119; Rouhani, supra note 156; Fesharaki, Development of the Iranian Oil Industry: International and Domestic Aspects 4-62 (1976).
171. For text of Resolution, see Rouhani at 195-196.
Contrasting the rise in prices of manufactures with the fall in the price of oil, the Resolution justified the participation of the producers in the pricing process on the grounds that

the oil industry having the character of a public utility, member countries cannot be indifferent to such a vital element of the industry as the determination of the price of oil. [Therefore, the Resolution recommended] That member countries should forthwith enter into negotiations with the oil companies concerned and (or) any other authority or body deemed appropriate, with a view to ensuring that oil produced in member countries shall be paid for on the basis of posted prices not lower than those which applied prior to August, 1960.

That the member countries shall jointly formulate a rational price structure to guide their long-term price policy, on which subject the Board of Governors is hereby directed to prepare a comprehensive study at the earliest possible date. An important element of the price structure to be devised will be the linking of crude oil prices to an index of prices of goods that the member countries need to import.172

This Resolution was followed by an Explanatory Memorandum issued by the OPEC Secretariat further stressing the importance of oil revenue to the producing countries and noting a lack of benefits to consumers, in that:

7. The fall in crude oil prices has brought no benefit to the consumer because, as decreases in ex-tax price of products have been introduced into the market, fresh taxes have been imposed by the consuming country governments. Furthermore, the cost of manufactured goods, instead of diminishing in proportion to the reduction of the price of crude oil, has on the contrary increased.173

The Memorandum made a comparison between distribution of economic values arising from oil resources through different taxing systems and claimed that the governments of the European

172. Id.
173. For text, see id. at 196-200.
consumers made two or three times more from taxation on oil products than did the producers.173a OPEC in a number of

173a. For example, 'when a motorist buys one liter of premium gasoline for 1.04 francs, he gives no more than 6 centimes to the country which supplies the crude oil, while he pays 79 centimes to the taxing authority of his own country. The remainder, about 19 centimes, covers transportation, refining, marketing, and sellers' profit. . . . Thus, in both cases [the other case is that of the United Kingdom], the payment which the producing country receives is less than 6 percent of the average price to be consumed. These examples could easily be multiplied. It would be enough for the final consumer to look at the above figures to realize what a very grave error it would be for him to think that an unduly large part of the price he pays for the oil he consumes goes to the owner of the raw material.' In the Memorandum the OPEC referred to the different measures taken by individual states to control the economy for their national development and oil producers could be given similar rights:

10. During the last few decades, many countries have resorted to different measures of regulation of the internal economy (nationalization, production quotas, etc.) to ensure a steady rate of economic growth free from violent fluctuations. In the oil industry, there have been prominent examples of such measures (especially in the United States) affecting the free play of the supply and demand and therefore the price. But such safeguards have been relatively absent from the international scene. Competition in the sale of petroleum on the international markets has increased since 1957, due partly to the availability of a large amount of surplus producing capacity. But the oil-exporting countries are dependent on the international trade of petroleum, and their economies are especially vulnerable to fluctuations in price. It is therefore natural that these countries should take steps to safeguard their interest. This does not mean that they are opposed to competition as such. It only means that they cannot sit by with arms folded watching unrestrained competition destroying their chances for the future through successive decreases in the price of crude oil and in the face of mounting prices for their requirements of imported manufactured goods.

Id.
Other resolutions have been concerned about the price issue and has encouraged the more detailed studies of the price structure of the oil industry.\footnote{174.} Another policy adopted by OPEC was in a prorationing scheme. Prorationing refers to control of production. The idea first began in the United States, allegedly for purposes of conservation. There have, however, always been serious doubts about the validity of the conservation argument; the concept has sometimes appeared to be a covert strategy for price control. The prorationing concept was introduced to OPEC by Dr. Perez Alfonso of Venezuela. Dr. Alfonso's basic objective was to protect, or at least equalize, the interest of Venezuela in relation to Persian Gulf producers. The cost of producing a barrel of oil in Venezuela was 51 cents in 1968, but in the Middle East, about 15 cents.\footnote{175.} In addition to this contrast in production costs, Venezuela's revenue was substantially lower than that of the Middle East. The effect of the OPEC establishment in its first year on Venezuela's revenue was only a 3 percent increase over 1959, as contrasted with 14 percent for the Middle East producers. This obviously put Venezuela in a disadvantageous position. The idea of prorationing as a means of price control, in conjunction with conservation, was generally accepted by OPEC members, but the criteria by which quotas should be allocated among the member-states remained a difficult issue. Among the criteria presented were the volume of resources, the rate of current production, the size of investment and population, and degree of economic growth desired. Because of disagreements among members about these criteria, in the Eighth OPEC Conference in Geneva in 1965, a Permanent Economic Commission was established and assigned the task of studying the issue. In the Ninth Conference in Tripoli, the Commission formulated a quota system based on world demand (Resolution IX.61). This quota system was changeable on a yearly basis.

The quota system was designed only as a guideline and was not compulsory. The system was opposed by a number of

\footnote{174. Resolutions Nos. 33, and 34, IV Conference of 1962; No. 4 of V Conference; 49 and 50 of VII Conference; 55 and 56 of VIII Conference; 61 of IX Conference; 64 of X Conference; 72 of XI Conference; 76 of XII Conference; 80 and 81 of XIII Conference; 84 of XIV Conference; and 94 and 95 of XVII Conference; 103 of XVIII Conference; 105 of XIX Conference.}

\footnote{175. C. Tugendhat, Oil: The Biggest Business 189 (1968). On prorationing see also Rouhani, supra note 156, at 211-215.}
OPEC members, including Iran, Libya and Saudi Arabia. The prorationing system, in practice, was never accepted by OPEC. Iran, Libya and Saudi Arabia always operated above their quota. Finally, the resolutions of the Eleventh OPEC Conference held in Vienna in April 1966 omitted any direct mention of the prorationing scheme.

Another strategy for participation in pricing adopted by OPEC after 1971 included both multilateral negotiations with the oil companies and unilateral government actions. The belief that the price of crude oil, despite all OPEC efforts, was kept at an artificially low level over the entire post-war period up to 1971 and that the expansion of economic growth in the Western Hemisphere was due to cheap oil, stimulated the producers to take more effective action toward control of the price of their oil. The producers justified their demand for more effective participation in pricing on the basis that the trade situation was increasingly moving against their own economic well-being. The tax policy of the importing countries, when compared with the income taxes of the producers, was also regarded as unfair and inconsistent with the treatment recommended by UNCTAD. For example, the share of the producers of oil sold in Western Europe in 1967 was 7.9 percent, while the taxes of the consumer governments averaged 47.5 percent. The producers argued for a more equitable taxing system; in fact, the target of the OPEC demand was the consumer governments rather than the oil companies. They claimed that if the price of oil was too high for the consumers, their governments should reduce their excessive taxes. Another concern related to the decline of the purchasing power of the U.S. dollar. The dollar fell by 27 percent during 1960-1970, while the increase in the cost of living rose 24.9 percent in the

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177. (Total: 100)

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178. Fesharaki, at 113-114.
United States and 39.7 percent in the United Kingdom.\textsuperscript{179} The issue was the higher price of manufactured goods as compared with primary products.\textsuperscript{180} Therefore, OPEC recommended its members to take appropriate action to protect their interest. In Resolution XXII.131, OPEC asked that: "Each member country exporting oil from Gulf terminals shall introduce . . . legal and/or legislative measures for the implementation of the objectives embodied in Res. XXI.120." The appropriate measures included total embargo on shipments of crude oil and petroleum products of companies violating the resolution.

The above factors were the basis for success of the Tehran Agreement, by which the companies accepted OPEC Resolutions 120 and 122. They agreed to increase the posted prices to compensate for inflation on June 1, 1971 and January 1, 1973 through 1975. In return the companies were guaranteed security of supply for the remainder of the five years, during which there was to be no demand for revision of the terms of posted prices until 1975. In general, however, the Tehran Agreement had little effect on price changes. The posted prices were increased by 35 cents per barrel, which meant that the governments received 19 cents per barrel more than they did before.\textsuperscript{181}

Although the Tehran Agreement was designed to keep the Persian Gulf producers quiet for 5 years, Libya and Algeria insisted that the Tehran settlement was not even close to their minimum demand. Through negotiations with the oil companies they concluded an agreement on April 2, 1971 (the Tripoli Agreement) in which the interests of the producers were much better protected than they were in the Tehran Agreement. Under the Tripoli Agreement, Libya increased its posted prices to about 90 cents per barrel, which was a seven-cent increase as compared with a five-cent increase in the Persian Gulf. Besides a 55 percent income tax provision there was an additional surcharge of nine cents per barrel and compulsory reinvestment of the companies' net profit in Libya for further exploration for up to five years in the future.\textsuperscript{182}

The Tehran and Tripoli Agreements are examples of changes in pricing by multilateral agreements. Nevertheless, they were among the first manifestations of cooperation with regard to

\textsuperscript{179} Shah of Iran, Press Conference, Tehran, Jan. 24, 1971, cited in id. at 114.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 116 and Rouhani, supra note 156, at 18.
\textsuperscript{182} For the text of the Tripoli and Tehran Agreements see MEES and Petroleum Intelligence Weekly, Dec. 1971 issue. For Tripoli agreement see also Rouhani, at 22-23.
pricing; a clear shift in power from the companies to the producers was becoming obvious. The OPEC Geneva Agreement of 1972 recommending an 8.49 percent increase in posted prices because of dollar devaluation, was the beginning of unilateral action of OPEC members. In October 1973 six Persian Gulf producers unilaterally added 70 percent to the price of oil, and recommended the same policy to other OPEC members. This unilateral decision was later explained by one observer as follows: "after weeks of unsuccessful negotiations with the companies, the oil-exporting governments declared their intention to establish oil prices among themselves, free from the obstruction tactics of the companies in bilateral bargaining." The OPEC decided to raise the posted prices from $3.00 to $5.12 without negotiating with the oil companies. The Arab-Israeli war was a favorable factor for making such unilateral actions acceptable. Since that time a unilateral competence has been consistently asserted.

The basic exercise of the competence of OPEC in the pricing process, as has been indicated, is through the intelligence, promotion, and (to some modest degree) prescribing functions. The application of recommendations has been largely left to members, through their individual or joint action. The recommendations of OPEC are not compulsory but advisory, and there is no sanctioning process in case a member refuses to accept a particular recommendation. The necessity of coordination in pricing policy among members for protection of their common interests has, however, been recognized by the members themselves.

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185. Industrialized countries were faced with embargo by Arab oil producers against "unfriendly" countries. The threat and concern of the embargo, which cut production 30 percent created a shortage overshadowing the unilateral price increase. The embargo and the shortage of oil had panicked Western consumers so much that in an auction in Iran in December of 1973, $17.34 per barrel was offered for small quantities of Iranian oil and $20 for Nigerian oil. The embargo, however, was offered for small quantities of Iranian oil and $20 for Nigerian oil. The embargo, however, was followed by another unilateral price increase in December 1973 to $11.65 per barrel. Fesharaki, supra note 170, at 118.
186. See Marbo, "Can OPEC Hold The Line?" 18 MEES 1, 2 No. 19, 1975.
been effectively followed by other producer associations.

The Intergovernmental Council of Copper Exporting Countries (CIPEC) was established in 1967 by the major copper producers, Chile, Peru, Zaire and Zambia, who controlled 35 percent of the world mine production. Article 2 of the CIPEC Charter states that the objectives of the organization are:

(a) to coordinate measures designed to foster, through the expansion of the industry, dynamic and continuous growth of real earnings from copper exports, and to ensure a real forecast of such earnings;

(b) to promote the harmonization of the decisions and policies of the member countries on problems relating to the production and marketing of copper;

(c) to obtain better and more complete information and appropriate advice on the production and marketing of copper for member countries;

(d) in general, to increase resources for the economic and social development of producer countries bearing in mind the interest of consumers.187

CIPEC has not been highly successful in the areas of price maintenance or increase. The strategy of cutbacks in production of November 1974 by 10 percent proved to be inadequate in 1975, basically because of the small percentage of cutback and the low demand for copper.188 CIPEC has, nevertheless, been successful as an intelligence center for securing, processing, and distributing information designed to improve and encourage the awareness of the common problems of its members. Regardless of the sociopolitical differences among its members, CIPEC has kept its solidarity. For example, in 1973, in supporting Chile with its nationalization of Kennecott in 1971, CIPEC members decided not to replace copper on the world market where Chilean copper was seized through legal actions brought by Kennecott.189 CIPEC has also agreed to establish "a permanent mechanism of protection and solidarity in the event of economic or commercial aggression against any of the Organization's member countries."190

187. Quoted in Mikdashi, supra note 24, at 83.
188. Id. at 86.
189. Id. at 88.
Before CIPEC, copper prices were controlled by non-U.S. multinational copper firms and voluntary production restriction and sale-purchase operations on the London Metal Exchange (LME). These operations were generally supported by the producers. By late 1963 the demand began to decline and the market situation changed to a "buyers' market." The attempts of copper firms and producers to stabilize the price by cutting the production and other methods were not effective, and this situation endured until 1966. The non-sensitivity of the consumers to the problem facing the developing copper producers aggravated the situation. In 1966 the individual producers began to raise their own prices unilaterally, but after a few months, because of lack of success, they decided to follow the price policy of LME. The establishment of CIPEC was the last resort of developing producers for the protection of their common interests.

The organization of iron-ore exporting countries, first initiated by Venezuela in 1958, and formed by countries of Brazil, Chile, India, Liberia, Peru, and Venezuela. After a continued decline in the price of iron-ore, the result of an oligopoly of iron-ore buyers, the members believed that their unilateral action was not enough to protect their interest and that they would have to join together in order to increase their effective control. Nevertheless, the members' primary concern was to establish a center for the exchange of information. The establishment of this organization was the first producer association that was carefully considered by exporting and importing countries as well as UNCTAD. The UNCTAD meeting of 1966 regarding the problems of iron-ore exporters concluded that "the participation of a larger number of countries, including the main consuming countries, would make it possible to throw much more light on many of the problems involved and partly on the fact that any international remedial actions which might be considered desirable could be far more effectively implemented by the joint action of a bigger group of exporting and importing countries than by a lim-

192. Mikdashi, supra note 24, at 89.
To promote its policy, UNCTAD gathered a group of 25 developed and developing major exporting and importing countries in Geneva January 19-23 of 1970 to discuss the issue. The conclusion of the meeting was disappointing. It became clear that the problems of primary commodities were not just a problem between producers and importers but only a part of a more general global problem between the developing and the developed countries. At this meeting the ideas of the developed-exporting countries were close to those of the developed-importing countries, while the developing countries again remained as a separate group. The developing-importing countries demanded the linking of the price of iron to its final product, steel, but this was rejected by the developed countries. The developing-producing countries also demanded that the developed-producing countries cut back production in their favor, which also was rejected. The disappointment as to cooperation between producers and consumers resulted in a final decision by the exporting countries to establish the Association of Iron Ore Exporting Countries (AIOEC) in April 1975. This Association does not have any price fixing power.

The monopoly control by private corporations in the international trade of bauxite has been the main impetus for the establishment of producers' organizations. Assocalex, incorporated in Zurich in 1964, is the major cartel of the industry, constituting a combination of Western European and

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196. Id.
197. At the Third UNCTAD Meeting in 1972 the Indian minister for foreign trade stated that "[w]e made a strong plea for arresting erosion in export prices and the need for developed countries to stop further expansion of output so that the competitive position of the developing nations does not get further weakened." Quoted in Mikdashi, supra note 24, at 101.
197a. The framers of the Association are Algeria, Australia, Brazil, Chile, India, Mauritania, Renu, Sierra Leone, Sweden, Tunisia, and Venezuela.
American producing enterprises.\textsuperscript{198} These corporations, despite United States antitrust laws, negotiated collectively with the producers. One State Department official acknowledged that U.S. companies entered collectively into negotiation with the Jamaican government in 1973-74 for tax problems and, moreover, the United States supported such action and "expressed to the Jamaican Government in clear terms as we could what we thought would be the consequences of certain actions proposed by them."\textsuperscript{199}

After a few years of consideration, the producing countries decided to establish a permanent organization in 1974, called the International Bauxite Association (IBA) "to promote the orderly and rational development of bauxite."\textsuperscript{200} Price protection is only one purpose of the IBA; other purposes include the promotion of maximum national ownership, research, exchange of information, provision of common services and technology.\textsuperscript{201} IBA has also been considered a way of checking on transnational corporations.\textsuperscript{202} The IBA controls 63\% of world bauxite.\textsuperscript{203}

The Union of Banana Exporting Countries is another producer association. It was established in March 1974 in Panama by Latin American countries, in consequence of the decline of price of bananas since the 1950's. A report by UNCTAD showed


\textsuperscript{199} "Outlook for Prices and Supplies of Industrial Raw Materials," Hearings before the Subcom. on Economic Growth of the Joint Economic Committee, 93rd Cong. 2nd Sess. July 1974, at 185, cited in Mikdashi, supra note 24, at 110.

\textsuperscript{200} Mikdashi, supra note 24, at 112.

\textsuperscript{201} See "Bauxite Moderate," \textit{Metal Bulletin} Apr. 26, 1974, at 24, cited in id. at 112.

\textsuperscript{202} Mikdashi, supra note 24, at 113.

\textsuperscript{203} The result of producer support for Jamaica has been a raise in taxes for bauxite, and aluminum processing increased its income from $25 million to $200 million in 1974. Mikdashi, supra note 24, at 113. In addition, Jamaica entered into partnership with foreign companies for bauxite exploitation and in order to eliminate possible external jurisdiction over its agreements withdrew from the World Bank International Center for The Settlement of Investment Disputes. See "Bauxite Levy Protest to World Bank," \textit{Financial Times} June 26, 1974 at 29, cited in Mikdashi, supra note 24, at 114.
that the constant decline of banana prices was in fact due to transferral of resources from these countries to the developed countries, since the developed countries are the main consumers of this commodity.\textsuperscript{204} The control over production of bananas is largely in the hands of three American corporations, who also play a significant role in the politics in these host countries.\textsuperscript{205} The first action of the Union in price protection was to recommend higher taxes up to 2.5 cents per pound, which resulted in a boycott from the corporation in Honduras and Panama. In general this Union is weak and unstable. Because of the nature of the commodity and the strategy of the corporations in playing one country against the other, the future of the Union carries little promise of effectiveness.

There have been other attempts to establish associations of producers of commodities. One example is the Uranium Institute, set up in April 1975.\textsuperscript{206} In contrast with other producers' associations, which are governmental, this association consists of private corporations supported by their governments. In fact, governmental policies are promoted and implemented by these private corporations. Another important characteristic of this association is that the home countries of its members are developed countries.

The concern for cooperation among the exporters of uranium began with Australia and Canada for the purpose of price control. Later the private producers in Australia, Canada, France, South Africa and the United Kingdom negotiated with respect to prices at a meeting in Johannesburg in May 1972. The mutual interest of the producers ultimately led to the formulation of the Uranium Institute, with the participa-

\begin{itemize}
\item \textsuperscript{204} UNCTAD, "Pricing Policy in Relation to Marketing and Distribution of Bananas" TD/B/C. 1/CONF 10/L.5 at 5, May 7 (1974). For studies on marketing and distribution of bananas see TD/B/C. 1/163, on Cocoa see TD/B/C/1/164; on manganese ore see TD/B/C. 169, Tungsten TD/B/C. 1/Tungsten/14; on rubber, TD/B/C.4/60/Rev.1 on Jute, TD/B/C.4/85. See UNCTAD, "Proportion between Export Prices and Consumer Prices of Selected Commodities Exported by Developing Countries," TD/184/Supp. 3. Jan. 14, 1967.
\item \textsuperscript{205} The production of bananas is controlled by three American corporations, United Brands (35%), Standard Fruit (25%), and Del Monte (19%). These companies were also involved in political activities and pressure in Latin American countries. See "Multinationals: A Banana Brouhaha"; "Other Nations to Meet on other Resources," N.Y. Times, Apr. 7, 1974, at 5 cited in Mikdashi, supra note 24, at 115.
\item \textsuperscript{206} Bus. Week Aug. 18, 1975, at 32.
\end{itemize}
The United States government and its producers did not participate in this meeting but supported the cooperation among the producers and price control. The principal concern of this Institute, however, is the control of nuclear energy for multiple purposes. This concern is shared by such other nuclear exporters as the United Kingdom, Canada, France, West Germany, Soviet Union and Japan. While there have been some indications that the United States favors monopoly over the reprocessing market, there are also some fears that such monopoly over the whole uranium industry might create special problems in the nuclear age. One writer has feared that such monopoly might create another OPEC.

The effects of these partially inclusive intergovernmental organizations upon the desired global policy of optimalization of common interests are no less important than the conditions of their emergence. The most controversial effects derive from OPEC. There have been claims that the higher prices of oil have caused or contributed substantially to world inflation, and that the basic effect of OPEC pricing has been merely the transfer of wealth to oil producers at the expense of others. Furthermore, some 30 developing countries suffered more than the developed-consuming countries, because the developing-consuming countries must use energy for their essential growth projects and cannot therefore cut back their imports, while the developed countries consume enough energy for comfort to be able to cut back without significant damage to their economy. The Economist reported in 1973 that "the rise in the underdeveloped countries' oil bill will just about wipe out the whole official aid effort of the United States, equal to 25 percent of the foreign currency that the rich world now hands to the poor . . . . The poor nations will have more reason to resent the Arabs' tactics when the recession loosening over the West causes commodity prices to slump. It is only in the unprecedented boom of the past year that commodity prices have come back to what they were in the 1950's . . . ."208 Less than two weeks after this report the price of many commodities began to tumble, for example, copper by 20% and zinc by 33%.209

The industrialized countries argue that the high prices of raw materials, and especially of oil, must lead to economic

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209. Howe at 63.
depression, with worldwide adverse effects even upon the producers themselves.\textsuperscript{210} It is also said that because of high oil prices deficits of the developed countries, as a group, have increased in 1974 from $17 billion to $61 billion, with the UK, Japan and Italy being the most affected.\textsuperscript{211} To the contrary, it has been argued that it is too narrow an approach to blame oil prices, or higher prices of other commodities, as the principal cause for world inflation.\textsuperscript{212} So narrow an approach tends to neglect the fundamental deterioration in world economic structures, including both IMF and GATT.\textsuperscript{213} The higher prices of oil may have contributed to world inflation, but it is naive to argue that they were the sole cause. If inflation had otherwise remained at the level of pre-1971, international trade would have had no problem. The OPEC members can be criticized mostly for not adopting adequate strategies to protect the interests of, or at least to minimize the adverse effect of oil prices upon, the developing countries. The higher oil prices cost the developing countries most of the $11 billion which they received for development purposes in 1974. The report of the Bank of International Settlements estimated that the developing countries' overall deficit, after the rise of oil prices, increased three times more than before the oil crisis to $30 billion. Such inadequate protection provided by OPEC for the developing-

\textsuperscript{210} See President Ford's address to the UN General Assembly, Sept. 18, 1974, in A/PV 2234, and Secretary of State Kissinger's address to the UN General Assembly, Sixth Special Session, UN Doc. A/PV 2214. The fact that inflation would hurt producing nations has been recognized by the producers themselves. See Levy, "World Oil Cooperation or International Chaos," 52 Foreign Affairs 690 (1974).


consuming countries has been noted by the developing countries themselves.214

3. Inclusive Competence Over Pricing

By the exercise of inclusive competence we refer to the making and applying of authoritative policies by a number of states. This assertion of competence with which we are here concerned, differs from those we have been examining above, not so much in the number of participants, as in the characteristics of the participants and their shared purposes. These agreements enable producers and consumers to search for a common policy in pricing. The diversity in representation of interests creates a situation with higher potential for the sharing of effective power in the promotion of common interest. In other words, the outcomes of such exercises of inclusive competence are more likely also to be inclusive.

a. Commodity Agreements

Chronic surpluses, excessive price fluctuation and wasteful methods of exploitation of primary materials, which in times of crisis sometimes reached unmanageable stages, made resort to inter-governmental agreements to regulate the exchange of commodities inevitable. The economic chaos after World War I and increases in agricultural production in countries not involved in the war left the world with a persistent surplus of some crops for which there was no adequate market.215 This situation gave governments no choice other than to increase their competence to participate in the pricing of commodities to protect their common interests more effectively.

Attempts to regulate pricing through inter-governmental

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215. J. Rowe, Markets and Men: Study of Artificial Control Schemes in some primary industries (1958). There were two basic causes for the emergence of unmanageable raw material surpluses in the interwar period. The first was the rapid and continuous flow of technological improvements in commodity production throughout all parts of the world. The second was the rise of economic and particularly of agricultural nationalism. Europe and British dependence on imported food decreased by governmental encouragement for security purposes. This planning caused the problem of surpluses of raw materials for producing countries. Id. at 150-151.
agreements began in the 1920's. Since 1927 the potential of commodity agreements has been widely recognized. The World Economic Conference of 1927 in its Final Report expressed the necessity for inclusive participation in regulating commodities. The United Nations Conference on Trade and Employment which promulgated the Havana Charter for an International Trade Organization in 1948 was another formal recognition of international commodity agreements. Moreover, the Economic and Social Council of the United Nations adopted in its resolution in 1951 Chapter VI of the Havana Charter dealing with such agreements. A principal reason for the encouragement of these agreements was to oppose indirectly the effective power of producers' cartels designed basically to promote their own interests. Commodity agreements would seem a more appropriate means for regulating the pricing process in the common interest, because they represent the interests of both producers and consumers.

International commodity agreements afford strategies for securing multiple purposes, such as stabilizing the market, increasing export earnings, securing the supply of goods, controlling production, and even promoting conservation of resources. One of the principal problems in commodity agreements is the reasonable accommodation of these different purposes. Article 57 of the Havana Charter defines the objectives of commodity agreements as follows:

(a) to prevent or alleviate the serious economic difficulties which may arise when adjustments between production and consumption cannot be effected by normal market forces alone as rapidly as the circumstances require;

(c) to prevent or moderate pronounced fluctuations in the price of a primary commodity with a view to achieving a reasonable degree of stability on a basis of such prices as are fair to consumers and provide a reasonable return to producers, having regard to the desirability of securing long-term equilibrium between the forces of supply and demand;

217. Hager, supra note 48, at 309.
(f) to assure the equitable distribution of primary commodity in short supply.\textsuperscript{220}

This definition of basic objectives reflects the problems besetting the global economic process after World War II--most importantly, the problems of burdensome surpluses and of special difficulties in production and trade in particular commodities. The concern of the member-states was focused mostly on immediate, short-term problems. Their basic objective was to facilitate trade. The dominant role of the United States in the War was also reflected in the Conference in that the concept of free trade was made the testing measure of the adequacy of regulations. All recommendations were required to meet the criterion of "free trade."

The first reactions to international commodity agreements were positive. The report on Measures For International Economic Stability, prepared by a group of experts appointed by the United Nations in 1951-1952, gave significant emphasis to commodity agreements "as one of the instruments for achieving economic stability."\textsuperscript{221} The 1951 Conference of the Food and Agricultural Organization of the United Nations expressed its belief that "commodity control agreements, as defined in Chapter VI of the Havana Charter, could contribute towards stabilizing international markets for agricultural commodities."\textsuperscript{222}

Despite this wide support by governments of international commodity agreements as an appropriate way of protecting the common interest,\textsuperscript{223} the Havana Charter did not accomplish much. In the first four years after the Charter was written, only the International Wheat Agreement was concluded.\textsuperscript{224} A United Nations Study on Commodity Problems reported the reasons for the lack of agreements. Among the major reasons were the general financial problems surrounding the producers and consumers. These financial problems could not have been solved by commodity agreements alone. For ex-

\textsuperscript{220} Havana Charter art. 57.

\textsuperscript{221} Review of International Commodity Problems (Report of UN Interim--Coordinating Committee for International Commodity Agreement) (1952), at 1.

\textsuperscript{222} Id.


\textsuperscript{224} UN Review, supra note 221, at 5-6.
ample, one of the critical financial problems related to currency difficulties. As a result of the shortage of particular currencies, some countries were not able to obtain all their requirements of certain commodities, even though supplies were available in other currency areas. This situation caused variation in prices for the same commodity agreements because shortages in currencies made it difficult for some countries to give long-term commitments to purchase commodities from certain areas. To solve these financial problems, governments engaged in bilateral negotiations for commodity arrangements which were outside the scope of the Havana Charter and were generally regarded as "short-term measures designed to meet special post-war circumstances."

Against this background, the developing countries have faced a continuing external imbalance which has become more acute as their demands for development projects have risen. Their requirements for imported capital and other development needs have tended to rise at a faster rate than their export income. The need for helping developing countries to overcome these problems received considerable recognition by the United Nations Sub-Commission on Economic Development, the regional economic commissions of the United Nations, and the Economic and Social Council. This recognition, however, did not lead to direct and effective action until 1964, with the establishment of UNCTAD.

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225. UN Review (1949) at 4.
226. Id. Many of those bilateral agreements were concluded to obtain urgently needed imports.
228. Concern for the economic development of developing countries, however, began in 1952 when the General Assembly passed Resolution 623 VII, entitled "Financing of Economic Development through the Establishment of Fair and Equitable International Prices for Primary Commodities and Through the Execution of National Programs of Integrated Economic Development." This resolution recommended that:

Whenever governments adopt measures affecting the prices of primary commodities entering international trade, they should duly consider the effect of such measures on the terms of trade of countries in the process of development in order to ensure that the prices of primary commodities are kept in an adequate, just and equitable relation to the prices of capital goods and other manufactured articles so as to permit the more satisfactory formation of domestic savings in the countries in the process
In the UNCTAD Conference of 1964 in Geneva, more than 2,000 representatives of 120 countries challenged the trade policies of the 1950's and early 1960's. In an effort to give a new direction to international economic structures and processes, a new objective of commodity agreements was defined as "stimulating a dynamic and steady growth and ensuring reasonable predictability in the real export earnings of the developing countries so as to provide them with expanding resources for their economic and social development, while taking into account the interests of consumers in importing countries, through remunerative, equitable and stable prices for primary commodities, having due regard to their import purchasing power, assured satisfactory access and increased imports consumption, as well as coordination of production and marketing policies." It was clear that the main issue was no longer "burdensome surpluses" or price fluctuation. The group of seventy-seven poor nations called for more access to the markets of developed countries, preferential treatment, and use of commodity agreements to increase the producers' incomes, as well as stability in prices. In other words, the UNCTAD majority moved from price stabilization to "price augmentation." UNCTAD concluded that

[the case for involving an integrated commodity policy is seen to arise from three control considerations. First, commodity policies must have a major positive role in the broader context of facilitating the economic development of the developing countries. Second, this role must arise from conscious and coordinated action taken over both short and long term, and by developed and developing countries alike. Finally the attainment of specified development objectives for the developing world would be of economic and social benefit to the international community as a whole.]

231. UN, TD/B/C.17/26 Mar. 9, 1967, at 3. In voting on the principles adopted by UNCTAD, the United States was alone
The change in the objectives of the commodity agreements proposed by UNCTAD, was, however, far from being achieved in practice. In fact the comprehensive and multiple goals of commodity agreements were not recognized in practice.232

In a commodity agreement, production, export and stocks are the three main elements which play important roles in control of pricing. These elements are employed in three types of commodity agreements: "quota scheme or export quotas," "buffer-stock," and "multilateral contract agreements." Export quotas restrict the volume of trade. They are designed to maintain prices at or near a desired level by means of fixing market supply, while satisfying demand. The International Sugar Agreement of 1968, the International Coffee Agreement of 1968 and the International Cocoa Agreement of 1972 are examples of this category of commodity agreements.233 The success of export quotas depends on the membership of the major exporting and importing countries in the agreements. Export quotas are generally designed for price support and it is claimed that producers who employ export quotas show a natural tendency to disregard the interest of consumers. Higher prices and low volume are generally preferred to larger volume and low prices.234 Furthermore, an export quota system operates more effectively in a state-supported trading regime than in a private trading regime.

Changes in prices hinge upon not only supply and demand but also on market forces. A buffer-stock regime supports the stabilized pricing system through purchases or sales of stocks in voting against the General Principles, which called for "respect for the principle of sovereign equality of states, self-determination of peoples, and non-interference in the internal affairs of their countries; . . . to help to promote in developing countries a rate of growth consistent with the need to bring about substantial and steady increase in . . . [their] income in order to narrow the gap between the standard of living in developing countries and that in the developed countries." The United States also opposed many other basic recommendations of the UNCTAD meeting, while she was accompanied by some other developed countries in a few of them.


233. For International Sugar Agreement see UN Doc. TD/Sugar, 7/12 (1968); for International Coffee Agreement see "International Coffee Agreement," 7 Int'l Legal Mat. 237 (1968), and for International Cocoa Agreement see UN Doc. TD/Cocoa 3/9 (1972).

234. E. Mason, Controlling World Trade 143 (1946).
when prices go down or above the agreed price. This system challenges unfavorable market forces through its control of stocks. The Fourth International Tin Agreement of 1970 was an example of this kind of commodity agreement. 235

Multilateral agreements for buffer-stocks require the ability to forecast future price trends. In such agreements, producers agree to export a certain portion of the commodity and importers agree to purchase within a stated price range. They agree that in time of shortage the price may not go above a stated price and in time of surplus it may not go below a minimum price. This regime of control is not popular in international trade, and the only example of such an agreement is the Wheat Agreement, beginning in 1949 and continuing through successive agreements.

The participants in international commodity agreements include both producing and consuming countries, other interested governments, and sometimes certain specialized agencies of the United Nations. Generally agreements permit voluntary withdrawal of members provided that a member gives advance notice (Cocoa Agreement Art. 71, Coffee Agreement Art. 66 and Sugar Agreement Art. 67). Some agreements, such as the Wheat and Tin Agreements, require valid reasons for withdrawal. The participants may change their positions from exporter to importer or vice versa (Art. 5 of Tin Agreement) or participate as both importer and exporter, as is the position of the European Economic Community in the Wheat Agreement (Art. 10 of Wheat Trade Convention). Intergovernmental organizations may be permitted to participate in international commodity agreements, sometimes as observers with no voting power or, again, with voting power in special circumstances (Art. 50 of Tin Agreement and Art. 4 of Cocoa Agreement). Participation by private organizations has not yet been generally accepted in international commodity agreements, since such agreements are considered to be governmental activities. Only the Cocoa Agreement (Art. 13) and the Sugar Agreement (Art. 12) contain clauses with respect to participation by private associations.

International commodity agreements may restrict trade exchange of members outside the agreement, and between members and non-members in terms of restrictions on imports from or exports to non-members. Member-states are required to provide the organization with necessary information for effective operation (Cocoa Agreement, Art. 3). Members are also responsible for providing financial assistance to the organization and are bound by decisions of the organization under the terms of the agreement (Cocoa Agreement, Art. 12).

International commodity agreements commonly provide for a Council, an Executive Committee and a Secretariat. The Council is the policy-making body of the organization. Producers and importers have equal voting power in the Council. Usually decisions by the Council are made by a simple majority; in some cases a two-third majority is required. The Executive Committee consists of both producer and importer countries, and its duties and powers are determined by the Council. The function of the Secretariat is to administer the agreement in accordance with policies established by the Council.

The achievements of commodity agreements during the past three decades have generally been disappointing in comparison with expectations and general community goals for development. It has been realized that commodity agreements by themselves are not adequate strategies to protect the common interest of the larger community. It would appear that commodity agreements must be incorporated into a much larger system of economic support of developing countries.236 A different position is taken by some observers, such as Metzger who disapproves of a comprehensive role for commodity agreements and believes that developing countries should "devote their energies, collectively, to securing greater amounts of foreign aid . . . and dismantling of protectionism by developed countries, and individually, to internal societal transformations at home."237


237. Metzger, "Law and Policy Making for Trade Among 'Have' and 'Have-Not' Nations," in J. Carey (ed.), Law and Policy Making for Trade Among 'Have' and 'Have-Not' Nations 39 (1968) and J. Rowe, Primary Commodities in International Trade 215-216 (1965). Stanley Metzger, arguing against the demand of using commodity agreements for redistribution of values, claims that this change in the conception of commodity agreements have consequent effects in several respects. The first effect is the identification of commodity agreements as "aid mechanism" whether supplementary to or in substitution of direct financial assistance, in the forms of loans or grants. Then the question is whether they are an efficient means of aid-giving or "disastrous to the world's economy and to the growth of the world's wealth at the maximum rate." Metzger joins the economists who believe that it is an essential economic principle that the prices should be related to the cost of production, otherwise resources are being wasted somehow, and that a policy of trade which is based on artificially high prices of resources is based on wasting resources. The second effect of changing the concept
Some economists, on the other hand, react more favorably to the use of commodity agreements as a means of increasing the foreign revenue of developing countries for their development programs. Thus, Isaiah Frank in describing the role of pricing says:

"It is proper to regard international price-fixing agreements as a form of aid, since they are a disguised means of taxing consumers in the developed countries in order to provide resources to the low income countries--resources which the governments of those countries can, at least potentially, mobilize for purposes of development. . . . If the advanced countries were to earmark for development assistance a 2 percent tax on imports of all commodities from all sources, it would yield over $2 billion, a sum equal to an aid to less developed countries. Moreover, because the trade of advanced countries has been increasing rapidly, the yield of the tax would rise by about 9 percent annually." Similarly, Michael Hager observes that behind all the criticisms of this role of commodity agreements is the efficiency argument. Under "micro-economic theory, monopoly pricing of commodity agreements in Metzger's view is that the new conception would narrow even more severely the possible number of commodities which might be considered for eventual agreements of the true "stabilizing type.""

238. See, for example, Frank, "New Perspectives on Trade and Development" 45 Foreign Affairs Apr. 1967, at 528-529. Pincus, supra note 229 at 267-284; Hager, supra note 48, at 317-325.

239. See Frank, id.

240. Hager, supra note 48, at 318. The efficiency argument is based on the assumption that resources not used in production of primary resources will be used in other development processes. Hager argues that "while this use of resources in development process other than production of primary resources may be true in complex industrial societies, it is not necessarily so in poor countries. There the capacity to diversify may depend upon further development." ECOSOC has also recognized this problem:

If a persistent movement indicates the need for some structural adjustment this may have to be approached in a more positive manner, with Governments actively assisting factors to more productive employment. This poses particularly difficult
wastes economic resources, generates excess capacity, and leads to higher average costs than are technologically necessary." Hager rejects this efficiency argument as the sole criterion for appraising international commodity agreements. He emphasizes growth, stability and equitable value distribution as basic goals for such agreements. This attitude has of course been supported by the developing countries. They demand a more comprehensive role for commodity agreements—their policies should be accompanied with preferential treatment of their exports of manufactured and semi-processed goods. They demand that commodity agreements should become part of, and be related to, a new structure of international economic order. They are regarded as indispensable to the new order being demanded.

b. The New Economic Order

The most inclusive policies concerning the pricing process have been formulated and adopted by the General Assembly of the United Nations in the Resolution of May 1, 1974 on a Declaration (3201. S-VI), and a Program of Action (3202. S-VI) on the Establishment of a New International Economic Order. The Charter of Economic Rights and Duties of States, adopted a few months later by the 29th regular session of the General Assembly in conjunction with the two above resolutions, expresses demands of the vast majority of the United Nations members for reconstruction of the global economy. The ultimate approval of the General Assembly of these documents created the first policy statement participated in by the widest number of states as decision-makers. Regardless of some reservations about specific issues of these resolutions by the developed countries, the overall reform proposal has won almost global acceptance.

The New Economic Order (NEO) recommended by the resolutions expands the competence of nation-states in economic activities with regard to increase production and a more equitable distribution of values. The basic emphasis on the ex-

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ECOSOC, UNCTAD Proceeding; 3 Commodity Trade at 83.
The expansion of such competence has been effected through promotion of the concept of "permanent sovereignty over natural resources." NEO calls for competence of states in nationalization or transfer of ownership of their economic institutions to their nationals, regulation and supervision of the activities of transnational corporations, and strengthening of bargaining power through collective action in the form of participation in regional economic groups and producers' associations. The NEO furthermore calls for "just and equitable relationship between the prices of raw materials, primary products, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy." It demands the protection of raw materials from the competition of synthetic substitutes.

Among the large number of demands for changes, NEO demands preferential and non-reciprocal treatment for developing countries wherever feasible, securing favorable conditions for the transfer of financial resources and technology to developing countries, and fundamental changes in the International Monetary System, General Agreement of Tariffs and Trade and United Nations.

The United States as speaker for a limited number of developed market economy countries opposing the NEO, has emphasized that there is no need for structural changes in the international economic order and efforts should be concentrated on adjustment of the present system. The United States Ambassador, Mr. Scali, referred to NEO as a "significant political document" that does not represent unanimity of opinion in the General Assembly. Secretary of State Kissinger in an address to the Ministerial meeting to the Organization for Economic Co-operation and Development in Paris in May 1975 said that the issue of global development is not the only subject of the NEO and its issues go far beyond economic considerations. The American view, however, was not shared to the same degree by its European allies. Prime Minister Uyl of the Netherlands in an address to an international symposium on the Seventh Special Session on May 23, 1975, stated that he could not agree that the growth of the gross world product over the last three decades has been enormous, but at the same time he said, "we have witnessed failures as a result of today's system . . . the uneven distribution of income between States and within countries . . . increasing destruction of our environment . . . and a threatening scarcity of resources, caused by unlimited exploitation." Mr. Uyl, referring to the fundamental problems of present institutions, emphasized that the
present system was not a free market system and that these problems would not be solved by marginal changes. The representative of Finland, Aarno Karhilo, while making it clear that some of the provisions of the resolutions would cause obvious problems for his country, expressed the full support of his government of NEO.

Regardless of early predictions about NEO regarding it as a political maneuver for short-term interest and with short-term effects, NEO became the major goal and center of attention of the vast majority of nation-states. The collective and unilateral actions of states for the implementation of NEO have been increasing the community expectations about the effectiveness of NEO policies as authoritative presumptions. The General Assembly's Seventh Special Session on Development and International Economic Cooperation ended on September 16, 1975, and requested a number of institutions to study and formulate detailed proposals for the implementation of general policies for a new economic structure. UNCTAD has become the main director of these studies. After one year of constant studying and discussions on its Fourth Meeting in Nairobi (1976), UNCTAD proposed an integrated program which is the most comprehensive formula on reconstruction of the process of value distribution more compatible with present expectations and the general community goals for development.

c. The Integrated Program

The inadequacy and incompatibility of the conventional approach to commodity agreements for fulfillment of the needs of the present world economy have stimulated a more widely inclusive approach to this issue. Attempts to regulate commodity markets through international agreements have remained largely unsuccessful. Only five international commodity agreements--relating to wheat, sugar, tin, coffee and cocoa--have been concluded; among these only the agreements for cocoa, tin and coffee have been successfully renegotiated. Much of the difficulty has stemmed from the traditional approach which denies government a role, save in exceptional cases, in the regulation of commodity markets and which insists that the appropriate function of pricing is "the control of fluctuations rather than the reversal or modification of long-term trends as determined by the forces of the market."243 Such attitudes toward commodities affected the negotiation of the International Cocoa Agreement, for example, which took seventeen years to

reach agreement.244

The third session of UNCTAD in 1972 initiated "intensive intergovernmental consultations" concerning 13 commodities on a case-by-case basis, but no proposal at this session could resolve the major differences between producers and consumers. Some of the main problems are "weakness in motivation on the part of the consumers and a lack of capacity on the part of producers to command attention to their needs."245 For the consuming countries, the Report continues, "there was a strong disinclination to establish governmental intervention to 'free' markets--a disinclination born of a system and an ideology which reflects the dominance of private interest."245a The study by UNCTAD IV shows that while both producers and consumers have a common interest in avoiding sharp price fluctuations, their interest is not quite the same, because commodities include a much smaller portion of the trade of consumers than of producers.246 The study criticizes the case-by-case approach to commodity issues, since it tends to focus on the economic interests of the consuming countries as buyers and gives too little attention to the broader issues of international development policies. The purely economic aspects of the agreements are too often allowed to overshadow the preferred outcome of optimization of development goals. Against this background, the traditional commodity approach for developing countries has given no assurance of adequate growth in their foreign exchange for their primary commodities.

The inadequacy of inherited thought for formulating and implementing effective development programs has led to demands for a new approach to commodity issues. An important item in the Program of Action of the New International Economic Order requested studies and reform proposals in commodity issues compatible with the policies of the NEO. After one year of study UNCTAD IV recommended a new approach to commodity problems: a broad approach referred to as the "integrated program" which would "constitute a break with past approaches by introducing an important element of global resource management in the interests of the development process, as well as promoting a more orderly evolution of commodity supply in the interests of the world economy as a whole."247 The integrated program is de-

244. Id. at 20.
245. Id.
245a. Id.
246. Id.
signed to secure not a mere negotiation or consultation in a narrow and isolated case-by-case approach to commodities, but rather an intensive inter-governmental consultation to secure an international consensus on a wide range of products through a decision process which takes into account all essential factors. The integrated program is also supplemented by complementary measures which deal specifically with the problem of preserving and improving the purchasing power of the commodity exports of the countries of the third world. The more specific objectives of the integrated program, besides expansion of research and development and production and consumption of resources, are:

(a) Establishment and maintenance of commodity prices at levels which, in real terms, are equitable to consumers and remunerative to need to producers, taking full account of the rate of world inflation, the need to provide incentives for adequate investment in commodity production, the depletion of non-renewable resources and the need to keep the prices of natural commodities competitive with those of their synthetic substitutes;

(b) Reduction of excessive fluctuations in commodity prices and the volume of trade, taking account of the special importance of this objective in the cases of essential foodstuffs and natural products facing competition from stable-priced substitutes;

(c) Assurance of access to markets, especially those of developed countries, for commodity exporting countries;

(d) Assurance of access to supplies of primary commodities for importing countries, with particular attention to assured supplies of food aid and other essential raw materials;

(e) Expansion of the processing of primary commodities in developing countries;

(f) Improvement of the competitiveness of natural products vis-à-vis synthetics;
Restructuring, or rationalization, as appropriate, of the marketing and distribution system.248

I. The Main Policies of the Integrated Program

The integrated program covers a wide range of commodities, important in the external trade of the developing countries. The decisions as to what commodities are to be covered are intergovernmental. The UNCTAD Secretariat presented a list of seventeen commodities important to developing countries. These commodities account for about three quarters of their agricultural and mineral exports other than petroleum. The developed countries also have a substantial interest in international markets for these commodities. Ten of these commodities—cocoa, coffee, copper, cotton, jute, rubber, sisal, sugar, tea and tin—account for 75 percent of the exports of all seventeen commodities.249 The seventeen commodities are storable products suitable for stock investment schemes, and there are proposals for a common fund for financing stocks. The trend in the real value of exports of the ten commodities referred to as the ten "core" commodities was almost zero or negative over the period of 1953-1972.250 The list of seventeen commodities, however, is not exclusive and governmental decisions may change the list.

The goals of protection against price fluctuations, of assurance of adequate supplies at any time, and of effecting the disposal of production on the basis of a realistic estimate of demand, all require the establishment and operation of international stocks. The idea of using stock has been employed effectively, except in the agreements as to tin and cocoa. Resistance to using stocks derives from an ideology that rejects government interference with the market system, and the lack of finance for international stock-trading. Even if a stock operation is possible, it can be successful only if it is employed in combination with policies concerning the expansion of production and consumption, improvement of marketing and distribution, and softening export regulation.251

The major difficulty that international stock-dealing faces is in securing the necessary financial support. In the past the operation of stocks has depended upon the financial situation of the producers. Past experience also shows that

248. Id. at 4.
249. For the list of these commodities see TD/184, table 1.
250. Id.
251. TD/183, at 27.
funding available to stocking operations has been inadequate. To solve this problem in the operation of an international stock-trading, the integrated program proposes to set up a common fund. The function of the common fund will be to lend money, under appropriate conditions, to commodity organizations operating international stocks. The terms of the agreement would be filled by negotiations with individual commodity organizations, and the organization is obliged to repay the fund. It has been estimated that the establishing of a common fund, for the ten "core" commodities including some allowance for other commodities, with the exception of grains, would require aggregate capital of $3 billion. One third of the $3 billion could be provided as paid-up risk capital and the rest as loans. Similarly, governments would be expected to undertake a $3 billion commitment, out of which $1 billion would be on call and $2 billion as loans. These government commitments would be used for crisis situations; when the original fund cannot meet the demand, the government fund would prevent the distribution of the operation of stocks. It has been suggested that the fund should be paid both by commodity exporters and commodity importers. Some countries with special situations, such as the petroleum exporters, could contribute long-term loans to the common fund. On the other hand, some developing countries, referred to as the least developed countries, might be given special treatment such as exemption of their financial responsibilities to the common fund.252

The situation for non-storable commodities is rather different. The protection of these commodities cannot be limited to stock operation, and other measures such as "supply management by producers," and "multilateral trade commitments" by both producers and consumers may be employed in conjunction with stocks whenever feasible.253 Export quotas could be a useful technique for management of supply. The program includes a uniform ad valorem export tax or minimum export price scheme, and cooperation in investment plans as other useful techniques of supply management. Multilateral commitments also assure the long-term planning of resource use and investment.

The final main theme of the integrated program is the establishment of compensatory financing of export fluctuations. The integrated program does not exclude the possibilities of

252. For a detailed discussion of criteria for determining the contribution of different countries, see TD/B/C.1/196 and Add. 1.
253. TD/184, at 11-12.
decrease in earnings of individual countries, regardless of the efforts for the stabilization of prices. One of those possibilities, for example, is the adverse effect caused by poor crops. Therefore, to have a system of compensatory financing in the context of an integrated program is necessary for the promotion of development goals. The necessity of this program is particularly important with respect to inefficient IMF facilities, at least up to the end of 1975. Only the recent liberalization of IMF facilities in 1976, by providing a $1 billion fund and introducing more flexible procedures, has afforded some possibilities in such assistance to developing countries. In general the structure of IMF does not seem to be adequate for such purposes. The integrated program, however, relates the establishment of compensatory financing to the willingness of the governments to provide compensatory loans, and to their preferences for amending the IMF for establishing a new structural arrangement.

The impact of the integrated program on developing-importing countries has been carefully considered. There are twenty developing net importing countries. Thirteen of them have a relatively high income or fast growth in their export earnings. For the rest, seven developing net importing countries, the import problem is food deficit. The increase in the price of food since 1972 has caused more economic problems because of the shift of more foreign earnings to food supply. The alternative which the integrated program provides for these countries includes: "(i) agreements to assure the availability of basic food imports at reasonable prices, or the provision of food aid, for the countries concerned; (ii) provisions in individual commodity agreements for the supply of commodities on concessional terms to such countries; and (iii) relief for such countries from financial or other burdens arising from the operation of international stocks or of the proposed common fund." The integrated program, however, recognizes that the inadequacy of the remedial measures designed for the protection of the developing importing countries and a need for further study and consideration.

ii. Complementary Policies of the Integrated Program

Besides the main content of the integrated program, there are complementary policies which facilitate the operation of the program as a technique for changing the structure of the global value distribution process so as to accelerate the development

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254. Id. at 16.
255. Id. at 17.
of the third world. One objective of the complementary program is to preserve the purchasing power of the exports of developing countries. This has to be understood to mean preservation of an adequate rate of growth of that purchasing power and not simply its maintenance at an unchangeable level. Serious attention to this problem first came from the General Assembly Resolution 3362 (S-VIII) because of the acceleration of world-wide inflation since 1969. Between 1954-69 the annual rate of world inflation, measured by the United Nations index of prices of manufactures exported by developed market economy countries, was an average of one percent per year.\(^256\) From 1969 to 1973 the rate of inflation rose to seven percent and in 1973 and 1974 to eighteen percent.\(^257\) It has been estimated that this rate declined somewhat in 1975. Such a rate of inflation in the prices of manufactured goods in comparison with the slow growth or decline in the prices of primary commodities exported from developing countries is quite far from the recommendation of the Second Development Decade (1971-74) of a minimum seven percent growth in real income necessary for development. To resolve this problem the complementary program proposes international measures first for the general stabilization of commodity prices and the support of the real prices of particular commodities, known as an indexing system, and secondly for support of the real export incomes of individual developing countries.\(^258\) The indexing system refers to either regulation of actual market prices within individual commodity agreements, known as direct indexing, or financial transfers within individual commodity arrangements or under a comprehensive scheme known as indirect indexing. On the other hand, actions to support the real incomes of exports of individual developing countries are achieved either through financial compensation of shortfalls from target real levels in earnings from the export of particular commodities similar to the STABEX system of EEC, or through financial compensation of shortfalls in export incomes from planned real levels a form of "supplementary financing."

a. The Indexing System

Indexation refers to a process of relating the prices

\(^257\) Id.
\(^258\) Id. at 11. For early UNCTAD studies on indexation see TD/B/503 and Supp. 1 and Supp.1/Add.1. TD/B/C.1/168 and TD/B/563.
of primary commodities to manufacturers' goods. The effort is to ensure that the prices for commodities "in conditions of inflation . . . [express] correctly in current money units the real target price or price range specified for the commodity concerned."259 Direct indexing is effective through direct regulation of market prices and thus "would require the establishment of appropriate mechanisms to adjust the prices at which international transactions in indexed commodities could be carried out."260 Such a mechanism has been suggested to be established by the producers' associations, by international commodity agreements or by bilateral or multilateral long-term contracts.261 The objective of direct indexation in stabilization of real prices would be implemented by a buffer stock operation; to improve the real price, then, the control of supply by the producers is necessary, whether or not a bufferstock is established.262

By contrast, the indirect indexing refers to a financial transfer without intervention to the operation of commodity market. If the price of any commodity was below the arranged level in any year, financial compensation would be paid to any exporting country participating in the arrangement. This process also includes a reverse system, where the price is above the reference level. The financial transfer applies only to the developing countries, while the developed countries are obliged to provide the finances in proportion to their imports of each related commodity. The financial transfer may also be available through a central international fund to which the developed countries would contribute at any rate or proportion they want.263

b. The Earning Support System

As mentioned earlier, another system of preserving the purchasing power in real income of developing countries is to compensate individual developing countries for the decrease in their real value of their exports. This is referred to as an earning support system as a part of the integrated program. The difference between this system and indirect indexing is that while the former provides compensation for decline in earnings, the latter does so for decline in prices. This earn-

259. TD/184/Supp. 2, at 12.
261. TD/184/Supp. 2 at 12.
262. For a more detailed description of the direct indexing system see id. at 13-15.
263. For the operation of this system, see id. at 18-21.
The support system is similar to the STABEX scheme established by the Lome Convention. The STABEX system of the Lome Convention is a process designed to reduce fluctuations in the real earnings of 46 African, Caribbean and Pacific (ACP) countries individually, from their 12 selected primary and 17 semi-processed commodities. The STABEX scheme formulates a reference level of earning for each ACP country each year at a nominal level of each accepted commodity based on the preceding four years. If the earnings of each ACP country from the accepted commodity in any given year falls below 7.5 percent and 2.5 percent for the least developed, land-locked and island countries, the member country is entitled to the amount of compensation which is the total difference between the actual earnings and the reference level. The compensation, of course, is repayable under certain conditions, but it does not include interest. The STABEX system is regional with a smaller number of participants and commodities. The integrated program of UNCTAD has expanded the STABEX system to have global implications. It has included almost all developing countries as participants. The EEC role, however, is performed by all developed importing countries, OPEC members and developed socialist countries. The number of commodities is also expanded to cover the so-called weak commodities such as tea, bananas, wine, jute, cotton, iron ore and manganese ore.

The last recommendation in the complementary part of the integrated program is supplementary financing. The idea of this financing system began with recommendation A.IV.18 of the first UNCTAD meeting in Geneva in 1964. That recommendation invited the World Bank to study the possibility of setting up a process to deal with the problems arising from adverse movement in export earnings of developing countries of a natural or duration which could not be adequately dealt with by short-term balance-of-payment support. The purpose of the recommendation was to provide long-term assistance to developing countries to support their development plans; for this purpose it defined "adverse movement" as "a shortfall from reasonable expectations of the level of export proceeds." The World Bank immediately conducted a study based on the UNCTAD recommendation. The World Bank in its study referred to "reasonable expectations," and suggested that the func-

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265. "[T]here is an important difference between the concept of reasonable expectations suitable for a short-term compensatory finance scheme (such as the IMF compensatory
tion of supplementary financing would be to estimate the future revenues of about five years ahead earned from a commodity by developing countries upon which each country drew its development projects. This estimate should be agreed upon by both a proposed agency and each country. Thus the "reference levels from which shortfalls in actual earnings would be measured under such a scheme would differ from those used in connexion with the IMF's compensatory financing facility inasmuch as the latter, being trend values, reflect the actual course of export earnings, including unexpected adverse movements in term, whereas the former could be the levels planned and expected under reasonable optimistic assumptions."266

The compensation for differences between the actual earning and the predicted one is to support the development plans of developing countries formulated upon a realistic earning expectation.

E. Recommendations

This new perspective about pricing as a technique of value distribution is representative of, and responsive to, new demands and expectations about the structure and function of the world wealth process. This new perspective emphasizes the necessity of a coordinated economic policy, incorporating and interrelating the policies of different wealth practices and institutions for the promotion of common interests. It recognizes that unintegrated economic activities for the achievement of isolated short-term, or even long-term, goals are not appropriate for present and future demands. Certain new phenomena, such as resource scarcity and the deterioration of the environment, in conjunction with increasing demands for use of resources, have proved that the traditional pricing technique is incapable of dealing adequately with contemporary problems.

The fact that the traditional economic system, including the pricing process, must be changed, despite disagreement among some economists and nation-states, is coming to be recognized globally. The resistance of scattered elites and a few states will not stop this change. A constructive evolution at least

266. TD/184/Supp. 2, at 28.
is indispensable to the kind of world order being preferred by many; indeed, some changes would require a considerable reconstruction of existing processes. To resist the necessary changes is to deny reality. The reality is that the pricing process has been largely inadequate to secure value distributions around the world which are now demanded with increasing effectiveness. The first general recommendation we make is, therefore, that all observers seek to encourage all participants in the world process to cooperate in reformulating a new process more compatible with the new demands and expectations. Such cooperation is indispensable to the establishment and maintenance of a process responsive to the common needs of all participants and the vital needs of some. We sketch some possibilities for change.

1. Basic Policies for Constitutive Process

The proposed integrated program, first suggested by UNCTAD, includes a comprehensive set of recommendations for achieving preferred outcomes compatible with community goals. Its detailed recommendations include a system for interrelating the prices of raw materials with those of processed materials; provides a new form of international commodity agreement, supported by international stock operations and inclusively financed; and incorporates strategies designed to stabilize the income of developing countries and to compensate for fluctuation in prices. The integrated program, however, as is acknowledged by its draftsmen, has not served adequately to protect the interests of developing countries who are not exporters of raw materials. To protect the interests of such countries we recommend differential pricing policies as part of a more general preferential treatment scheme. As noted in the general discussion of policies above, differential pricing is not new, but rather part of the General Scheme of Preferences, with a history of some success in practice.

The accommodation of various internal policies of countries to conform with more inclusive policies as to pricing should also be given more attention. Sometimes internal barriers such as tax practices and tariff regulations are permitted to interfere with inclusive policies on pricing. This problem was recognized by UNCTAD in 1964 in a recommendation adopted by a vote of 79 to 15, with 12 abstentions. Recognizing the adverse effects of higher rates of taxation by developed countries on the imports of some commodities on the earnings of developing countries, UNCTAD recommended that "developed countries should effectively reduce or eliminate barriers and discrimination to the trade and consumption of those
products, particularly internal taxation, with a view to increase the real income of the developing countries from the aid exports. Tax issues, however, are only one of many complications which may arise from the conflict between exclusive and inclusive pricing policies. In the case of copper, for example, when the United States government decided to keep the price of raw copper, but not of fabricated copper products, at artificially low levels, it threatened to release large quantities from its strategic stockpile. Through this strategy the United States government, with the support of the major US copper companies, succeeded in a policy of holding down prices and, therefore, deprived certain host countries of the benefit of selling their copper in a sizable market at the price increase of 1964-1966. The major American copper companies did not lose much by this policy because their profits derived from fabricated and semi-fabricated goods. As one observer has noted:


269. Mikdashi, supra note 24, at 91.

270. Semi-manufactured goods were not subject to price
commented, the control of the United States, in affecting the international price of copper, appears greater than that of the producing countries:

Over the long run the United States Government has exercised far greater control over the price of copper [than the governments of producer countries, like Chile], partly through tariffs, partly through direct price and production controls of stimuli, and partly through the operation of a strategic stockpile of copper. . . .

When in the past, prices were driven higher by collusion, the profits went entirely to producers and not to host governments. Now that countries such as Chile could recapture a large share of those profits, producers are unable or unwilling to force prices up or to take full advantage of periods of scarcity. 271

Considering the interdependencies and interrelationships among the world's wealth practices and institutions, exclusive pricing policies require constantly to be checked and balanced against inclusive pricing policies.

2. Improved Functions in the World Constitutive Process

A constitutive process adequately responsive to the demanded changes must be a process open to all who can affect, or are affected by, its decisions; that is, a process representative of both producers and consumers. The degree and forms of participation by these two groups may be dependent upon context. Sometimes, to overcome the inequality in market forces, collective participation may be preferable to individual participation. Similarly, participation in the different functions of the constitutive process, such as intelligence, promotion, prescription, application, and so on, might be made to differ in different contexts.

One major difficulty in the constitutive process has traditionally been the lack of necessary and accurate information at appropriate times. The significance of the intelligence function in making present decisions and clarifying future policies for the use of resources is obvious. The role

control. See P. Bohn, Pricing of Copper in International Trade: A Case Study of Price Stabilization Problem 10 (1968).

of this function in relation to raw materials in general, and agricultural commodities and food stuffs in particular, is becoming more critical. The Agricultural and Food Organization in its 1948 Conference referred to the importance of the availability and exchange of information in the field of food and agriculture. This need has also been recognized by the producers of raw materials; one of the main goals of producers' associations is to provide information about the availability of, demands for and possible continuing roles of, a resource. In commodity agreements also the need for exchange of information has been recognized. An appropriate exchange of information can provide the latest news about more adequate techniques in production, distribution and processing of resources, as well as about future substitutes for such resources, all of which may improve the effective consideration of pricing policies.

The intelligence function in the pricing process has generally been performed through regional or group associations. Commodity agreements and producers' associations are, for example, the most common centers for providing such information. These regional and group centers, while necessary, are not enough. They have a tendency to limit their studies to their immediate exclusive interests on a small geographical scale. Such limited studies do not inquire into the effects of particular policies on a larger scale and upon the more general common interests of the world community. To solve this problem more inclusive organizations should undertake appropriate studies, with recommendations, and make such studies available to the appropriate decision-makers. In the FAO Conference of 1971 (Rome, Nov. 6-25) this problem received attention. The Conference agreed that for several commodities it was necessary for FAO to provide adequate information through the Committee on Commodity Problems (CCP). The Conference agreed that CCP should study and examine the commodity problems and prescribe recommendations while using the FAO capabilities in helping the countries most affected as a result of inadequate policies about those resources. The role of inclusive organizations in providing information about commodities might be increased, as recommended in the UNCTAD proposed integrated program. The scope of studies by these inclusive organizations could, however, be expanded to include the gathering and processing of information about national and regional policies regarding resources which may have regional or global implications.

The role of the prescribing function at both the regional and global levels requires improvement. The regional organizations, including producers' associations, do perform some
service in this respect, but their formulations are more in the form of "non-binding" recommendations than of authoritative decisions. The implementation of such policies is left dependent upon the participant's unilateral discretion. In practice, of course, the regional recommendations are basically accepted by members, because such recommendations tend to protect their shared interests. At the international level the role of inclusive organizations is much weaker in prescribing pricing policies to protect the common interest. Appropriate institutionalization might be sought to increase performances of this function at the global level; inclusive organizations might be made competent to appraise national and regional pricing policies possibly having significant effects on the common interest. Inclusive organizations might also employ their general facilities and skills to assist exclusive or regional organizations in implementing their pricing policies which contribute to the well-being of the most comprehensive community.

Consideration might be given, finally, to the establishment of an organization open to all interested parties for the continued discussion and evaluation of all factors affecting pricing in its broadest aspects and of possible practices in the constitutive process for implementation of basic policies related to the pricing process. The bringing together of all interested parties in a process of continuous negotiation might in itself produce an effective informal performance of some of the relevant decision functions. The competence of this organization might be limited or expanded, depending upon context and acceptability. The fact that the organization was functioning even without explicit effective power, could provide a forum for direct communication between the interested parties. Such a forum might facilitate understanding of the problems involved, particularly with respect to vital resources, and increase the possibility of a more relevant appraisal of decisions.