THE CONCEPT OF FAIR PRICE IN THE CONTEXT OF UNCTAD'S INTEGRATED COMMODITY PROGRAMME

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L'auteur résume l'histoire des négociations au sujet du commerce international des matières premières, dont les premiers résultats concrets datent de 1964 et les premiers changements réels de 1973. Malgré la conclusion de plusieurs accords antérieurs, l'action de l'OPEP et la formulation des principes du Programme intégré des matières premières (1976) sont les plus importants jalons sur la voie vers des "prix justes" dans le commerce international. Cependant la notion de "prix juste" n'est pas simple: elle comporte un élément de pouvoir d'achat qui compense la dépréciation monétaire et contribue au développement économique, un élément de stabilité qui isole des variations de conditions sur le marché et un élément de correspondance des valeurs entre la dépense et le bien obtenu par le consommateur. Sa mise en oeuvre requiert l'indexation qui se heurte à de vives oppositions, un mécanisme de financement compensatoire utilisé par le Fonds monétaire international et la Convention de Lomé II (plan STABEX) ou bien un système d'intervention sur le marché afin de maintenir le niveau des prix. Ce système de stock régulateur a été choisi comme outil du Programme intégré, mais il est loin d'être acquis qu'il soit une réponse adéquate aux besoins des exportateurs de matières premières.

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SUMMARY

I. INTRODUCTION

After four years of intensive negotiations and at least 30 years of study by the international community, an integrated programme for commodities is now being launched. This programme and its essential element, the Common Fund, are today seen as major instruments for achieving a more equitable trade in commodities, especially between developing and developed countries.

In order to understand fully how the UNCTAD integrated plan came about, and how the "fair price" concept is linked to it, it is necessary to review briefly the evolution of international concern with regard to commodities. This article will therefore look at the history of international activity on commodities beginning in the early 1940's and culminating with the formulation of the integrated programme in 1976.

The article next will attempt to analyse the concept of "fair price" itself as it relates to commodities in general and to the UNCTAD proposals in particular. It will be shown that the UNCTAD proposals, as now amended, cannot put into effect a "fair price" on their own. The article therefore examines other complementary mechanisms, such as indexation and compensatory financing, that are necessary to ensure that the developing countries earn the income required for their development.

In addition, the notion that international law must evolve in order to become an instrument for "justice" is considered. In this context the agreed elements of the Common Fund are examined, as are proposals for future improvements, and comparisons are made to the original UNCTAD proposals.

The final section of the article will examine where the concept of "fair price" stands today and will draw together some conclusions.

II. SOME HISTORICAL BACKGROUND TO THE COMMODITIES ISSUE

Trade in commodities has been a matter of concern to developing countries and to international organizations for many years. In the latter years of the Second World War, when the negotiations and discussions leading to the establishment of the United Nations were taking place, one of the priorities was a new emphasis on economic cooperation.[1] Even at the time when the Atlantic Charter was being prepared and signed, some of the concepts being discussed included "a buffer-stock mechanism for commodities".[2]

At the San Francisco Conference which set up the United Nations, the participating states repeatedly emphasized that the organization should be an instrument for international economic and social cooperation. This emphasis grew out of the perceived failure of the League of Nations, in the period between the two world wars, to deal effectively with economic issues. Analysts attributed this failure to the lack of any appropriate machinery within the League's system.[3] The Charter of the United Nations has much to say about economic and social development. For example, the preamble states that one of the aims of the organization is "to promote social progress and better standards of life in larger freedom";[4] to harmonize this international activity, the Economic and Social Council (ECOSOC) was set up.[5] The Charter goes on to give the organization an overriding mandate by calling on the United Nations to promote:

> higher standards of living, full employment and conditions of economic and social progress and development.[6]

It was clear to the participants at San Francisco that though the United Nations would have broad responsibilities in this field there would be a need to set up other international institutions to handle particular problems and issues.[7] Thus in the years immediately following the war and the establishment of the U.N., negotiations for the organization of some of these specialized institutions were started. Conferences held at Bretton Woods and Hot Springs culminated in the International Monetary Fund, the International Bank for Reconstruction and Development and the Food and Agriculture Organization.[8] At this time too a fourth organization

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1. Cordovez, *The Making of UNCTAD*, 1 W.J.T.L. 243 (1967) at 245.
2. Id.
3. *Commercial Policies in the Inter-War Period: International Proposals and National Policies;* League of Nations, Geneva 1942.
4. CHARTER OF THE UNITED NATIONS, 1945, Preamble.
5. *Id.*, Article 7.
6. *Id.*, Article 55.
7. *Supra*, note 1, at 247.
8. *Id.*, at 249.

was being proposed — the International Trade Organization — and a conference in Havana was held in 1947 and 1948 to set it up.[9] In 1951, the United States did not attempt to ratify the resultant Havana Charter and many of the other fifty participating countries followed suit. Thus the I.T.O. failed to become established.[10]

In October, 1947, a number of countries who expected the Havana meetings to be a success, negotiated the General Agreement on Tariffs and Trade (GATT) which was aimed at achieving substantial reductions in the general level of tariffs.[11] The main aim of the GATT was clearly to re-establish world trade in the post-war period. The problems of the developing countries *per se* were not foremost in the contemplation of the 23 contracting parties in 1948[12]. It should be noted that the GATT was viewed, in its early years, as a temporary agreement that could later be integrated into the proposed I.T.O. Proposals made in the 1950's for the Organization for Trade Cooperation (OTC)[13] evidenced a further attempt to give GATT a more permanent staff and secretariat.

With the failure of the Havana Conference further initiatives came from various sources. In 1956 the USSR proposed a "World Economic Conference"[14] to the 11th General Assembly. This proposal was faced with strong opposition from the West and was withdrawn and replaced by a Polish-Yugoslav resolution calling for the ECOSOC to consider the calling of a conference.[15] This latter suggestion was defeated in the Economic and Financial Committee of the Assembly,[16] mainly by the western countries, on the grounds that it was a propaganda proposal whose sole objective was to gain the sympathy of the less developed countries.[17] The motives behind the initiative were somewhat differently characterized by others. For example, the Carnegie Endowment[18] stated that the main

9. Friedeberg, THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT OF 1964 (1969) at 4.

10. *Id.*

11. *Id.*

12. *Supra,* note 1, at 251.

13. *Id.,* at 252-53.

14. *Supra,* note 9.

15. *Id.*

16. Document A/3545, para. 15, as quoted in *supra,* note 1, at 255.

17. *Supra,* note 9.

18. Stern, *Policies for Trade and Development,* in INTERNATIONAL CONCILIATION NO. 548 (May 1964) at 3.

purpose of the Soviet proposal was "to draw attention to Western (chiefly United States) policies of strategic trade controls and denial of most favoured nation treatment to Soviet bloc countries". The western states, who then controlled the General Assembly, proposed another resolution, which ironically is echoed in the sentiments of some Group B delegates at UNCTAD sessions many years later. This resolution recognized that[19]:

> existing international bodies and agreements concerned with international trade provide a framework for the effective consideration of trade problems, payments arrangements and related problems of mutual interest,

and emphasized:

> the desirability of avoiding the waste of resources and the weakening of existing organizations in the field of international trade through the duplication of their functions and activities.[20]

Commodity problems were always a focus of some concern during this period but this concern usually related to supply and price difficulties from the point of view of the industrialized countries. By the late 1950's, with the influx of newly independent states into the United Nations and other international organizations, attention turned to the problems of the developing countries. The United Nations attempted to fill in the gaps left by the failure of the ITO and GATT's OTC and the resulting absence of any major commercial policy institution within the United Nations network. Action in this field was thus carried out by the General Assembly through its Economic and Financial Committee, and through ECOSOC[21]. The commodity issues were considered by the Commission on International Commodity Trade (CICT) which ECOSOC set up in 1954 and which was reconstituted in 1958.[22] Another group was set up to carry out the guidelines of the Havana Charter, Chapter VI.[23] This group, the Interim Co-ordinating Committee for International Commodity Arrangements (ICCICA) was instrumental in setting up a large number of commodity related committees within the other U.N. organs such as the FAO. The ICCICA was also active in ensuring consideration of commodity

19. G.A. Res. 1027 (XI) 1956.

20. As referred to in *supra*, note 1 at 255-56.

21. *Supra*, note 9 at 253.

22. *Id.*, at 254.

23. *Id.*

issues within the framework of the IMF and the IBRD. In addition, prior to UNCTAD, this "interim committee" served as the main focal point for the UN's involvement in commodity agreements and it was on its advice that several negotiating conferences were called by the United Nation's Secretary General.[24]

In 1959 the UN appointed a group of experts[25] to study:

> The feasibility of establishing machinery within the framework of the United Nations, designed to assist in offsetting the effects of large fluctuations in commodity prices, on balances of payments, with special reference to compensatory financing.

The experts reported in 1961 and called for the creation of a "Development Insurance Fund" to provide for compensatory financing to protect the less developed countries from "set-backs in their development caused by instability in world commodity markets".[26]

GATT, in the meantime, had also begun to turn its attention to the trade problems of the developing countries. In 1957 GATT had 37 members of which 16 could be classed as developing.[27] At the 12th meeting of the contracting parties in November 1957, GATT decided to appoint a group of experts to examine international trends in trade with special emphasis on:

> The failure of the trade of less developed countries to develop as rapidly as that of industrialized countries, excessive short-term fluctuations in prices of primary products and widespread resort to agricultural protection.[28]

This report, commonly referred to as the Haberler Report, underlined the increasing urgency of developing country problems. Within the GATT and elsewhere the Report sparked a great deal of interest and moved the contracting parties to formulate a "Trade Expansion Programme". To implement the new programme, GATT set up three committees, one of which, Committee III, was to take up "as its sole task the consideration of the problems of the less developed countries".[29]

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24. *Id.*

25. G.A. Res. 1423 (XIV) 1959.

26. INTERNATIONAL COMPENSATION FOR FLUCTUATIONS IN COMMODITY TRADE, United Nations (1961) at 70.

27. *Supra*, note 9, at 7.

28. TRENDS IN INTERNATIONAL TRADE, GATT (1958).

29. *Supra*, note 9, at 8.

By late 1961, with the developing countries now playing an increasingly large role at the United Nations,[30] the movement towards an overall examination of the trade problems of the less developed countries was gathering momentum. President Tito, addressing a non-aligned nations conference in Belgrade, called again for a world conference on trade, within the framework of the United Nations.[31] In December, GATT adopted a declaration[32] calling for expansion in the export earnings of the less developed countries; action to reduce to a minimum barriers against the access of export products from the developing countries to the markets of the contracting parties; and increased opportunities for less developed countries to sell their industrial goods in world markets. In addition, the Declaration noted that aid was not a substitute for trade.

Late in December, the United Nations General Assembly adopted a resolution[33] calling on the Secretary-General to examine "the advisability of holding an international conference on international trade problems relating especially to primary commodity markets". By 1962 ECOSOC had become seized of the issue and adopted resolutions calling for the convening of a United Nations conference on trade and development[34]. A companion resolution[35] appointed a group of experts to prepare a report outlining the problems to be examined at the proposed conference. In December 1962, the General Assembly endorsed the ECOSOC moves[36] and set forth the broad outlines of the future agenda of UNCTAD. The General Assembly resolution called for the following items to be considered[37]:

(a) the need for increasing the trade of developing countries in primary commodities as well as in semi-manufactured and manufactured goods,

30. During the period 1955-59, 23 states were admitted to the United Nations, of these there were 12 African and Asian developing countries. In 1960, 17 developing countries were admitted.

31. THE CONFERENCE OF HEADS OF STATE OR GOVERNMENT OF NON-ALIGNED COUNTRIES, BELGRADE (1-6 September, 1961) at 163.

32. BASIC INSTRUMENTS AND SELECTED DOCUMENTS, GATT (1962) at 28.

33. G.A. Res 1707 (XVI) 1961.

34. ECOSOC Res. 917 (XXXIV) 1962.

35. ECOSOC Res. 919 (XXXIV) 1962.

36. G.A. Res. 1785 (XVII) 1962.

37. *Supra*, note 9, at 14 and 15.

(b) measures for ensuring stable, equitable and remunerative prices... .

GATT too had received new members from amongst the developing countries[38]. Twenty-one developing countries proposed to GATT an eight-point Programme of Action which was adopted, with some reservations, by a May 1963 Ministerial meeting[39]. In spite of this, the developing countries perceived GATT as an organization which, by its very structure, did not lend itself to the kind of negotiations which they had come to see as being necessary. The pre-occupation of the GATT with non-discriminatory approaches to trade and its emphasis on face to face, item by item negotiations did not suit the concept of North-South negotiations becoming widely accepted by the developing countries.[40]

Preparations for the first UNCTAD were now well under way and an eminent Argentinian economist, Raûl Prebisch, had been named Secretary-General for the UN Conference. Prebisch wrote one of the most controversial and challenging of the many preparatory papers for UNCTAD[41]. The Prebisch Report proposed an analysis of the world economy based on the periphery-centre theory.[42] This theory divides the world into countries of the centre and countries of the periphery. Central countries are the highly developed industrial states that are characterized by high technology. In this grouping are found the countries of Europe, the United States and Japan.[43] Peripheral countries are those which provide the centre with foodstuffs and raw materials and, in return, receive manufactured goods[44]. The Prebisch analysis maintained that the existing international division of labour "did not produce universal prosperity, as most economists maintain, but persistent trends towards a fundamental inequality between rich and poor

38. In 1963 there were 60 contracting parties, 23 were classified as developed and 37 as developing.

39. *Supra*, note 32, 12th Supplement (1964) at 36-41 and 89-95.

40. See, Letelier and Moffit, THE NEW INTERNATIONAL ECONOMIC ORDER (1977), *but compare supra*, note 9 at 170-73.

41. Prebisch, TOWARDS A NEW TRADE POLICY FOR DEVELOPMENT UNCTAD (1964).

42. *Supra*, note 9, at 35.

43. Prebisch, *Interpretation of the Process of Development*, in REVISTA BRASILIERA DE ECONOMIA, March 1951, at 117.

44. Prebisch, THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS, United Nations (1951) at 1.

nations".[45] This relationship between the centre and the periphery is demonstrated by the trade in primary commodities. Many developing countries are dependent on a few primary products which they export to the centre. These primary products are the sole, or the major, source of income with which the developing countries are expected to finance their development and purchase manufactured imports from the centre countries. The deteriorating terms of trade for these primary exports is one of the major reasons why developing countries have depended so heavily upon foreign borrowing to finance economic growth.[46] One example of this deterioration was cited by a Sri Lankan diplomat, Neville Kanakaratne.[47] He pointed out that, in 1960, the revenues from 25 tons of natural rubber exports permitted Sri Lanka to purchase approximately six tractors on the international market; by 1975, the revenues from the same amount of rubber exports purchased only two tractors. Such shortfalls in export earnings would have to be offset by capital flows in the form of loans, investments or foreign aid.

The Prebisch Report and its underlying thesis have formed the basis for the analysis that UNCTAD and the Group of 77 have applied to the trade question in general, and to the commodity trade in particular. At UNCTAD I which was held in Geneva from March 23 to June 16, 1964, commodities were a major subject of debate. The Final Act of UNCTAD I[48] contained a recommendation called "International Commodity Arrangements and Removal of Obstacles and Expansion of Trade". The developing countries, or the Group of 77 as they were by then known, had called for a much stronger statement on commodity questions but the final wording of the recommendation had to be watered down to meet the concerns of the industrialized states.[49] Led by the United States, these countries were extremely wary of an undue interference with the operation of the free market in relation to commodities. However, in subparagraph 5 of the extract below the concept of an Integrated Commodity Programme appears in its embryo stage.

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45. *Supra*, note 40, at 15.

46. *Id.*, at 16.

47. *Id.*

48. THE REPORT OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, United Nations (1964) at 112.

49. *Id.*, at Annex A. II. 1, but it should be noted that nine countries filed reservations.

B. Types of commodity and arrangement:

4. International commodity arrangements should be usually on a commodity-by-commodity basis and, as far as each commodity is concerned, should take due account of the interests of exporting and importing countries, of the characteristics of the product concerned and of the trade in and the market arrangements for, that product.

5. Commodity arrangements may, however, also cover groups of commodities under certain circumstances. Where the negotiation of arrangements for a group of commodities is considered desirable but does not appear practicable, the possibility of negotiating simultaneously a number of separate arrangements for different commodities can be considered. In any case, there will be considerable advantage in providing, within the institutional machinery that may be set up, a common forum for consultation and confrontation where the related aspects of all these arrangements may be periodically considered.[50]

UNCTAD II in 1968 again raised the commodity issue. It aimed at setting up price stabilization mechanisms such as buffer stocks. However, the required financial contributions for these buffer stocks were not forthcoming from developed countries who were not prepared to participate in any broad commodities stabilization programmes. They preferred instead to deal on a commodity-by-commodity basis.[51] Thus, UNCTAD II agreed in a resolution[52] that the Trade and Development Board, as well as the Secretary General of UNCTAD should:

(i) monitor the activities of existing commodity groups,

(ii) facilitate their co-ordination in order to promote international cooperation in commodity matters; and

(iii) where appropriate, facilitate the conclusion of international commodity stabilization arrangements.

UNCTAD III, held in Santiago, Chile, in 1972, failed to make any further progress on the commodities issue. As a matter of fact, some authors point to the stalemate on a wide range of issues at UNCTAD III as marking a major turning point in North-South relations. This failure of UNCTAD[53] led the intellectual leaders of the third world

50. *Id.*

51. *Supra,* note 40, at 20.

52. PROCEEDINGS OF THE SECOND UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, United Nations (1968) Res. 18. II.

53. *Supra,* note 40, at 25.

(such as Samir Amin, Director of the African Institute for Economic Development and Planning) to urge the General Assembly to "become an instrument of peripheral countries"[54]. In other words, third world leaders were looking to the General Assembly to play the role that UNCTAD had failed to play and to become a political instrument for achieving their economic and social goals. The Middle East War (in October, 1973) and the emergence of OPEP as a major force in the ensuing oil embargo forced the developed nations to take the developing country positions more seriously.[55]

The years leading up to UNCTAD IV were thus marked by a new sense of urgency. The General Assembly held special sessions in April 1974 and September 1975 and the regular General Assembly of 1974 adopted the Charter of Economic Rights and Duties of States[56]. In 1974 UNCTAD celebrated its 10th anniversary and its new Secretary General, Gamani Corea organized, a meeting on the theme "Tenth Anniversary — First Balance Sheet" to evaluate the progress made by UNCTAD. Corea identified the commodity problem as one of the four major areas for future concentration by the organization.[57]

In 1975, a peculiar, and in the final analysis, ill-fated, attempt to bring the negotiations into a smaller and therefore more controllable forum occurred with the institution of the Conference on International Economic Cooperation in October, 1975. This conference involving 27 countries, 19 Group of 77 and 8 developed, was co-chaired by Allan MacEachen and Manuel Perez Guerrero, the former Secretary-General of UNCTAD. The CIEC worked in four commissions; energy, raw materials, development and financial affairs. The attempts to move the North-South dialogue forward through a new institution ended in June 1977 when, in the words of the final communiqué, the members of the conference:

> Agreed to transmit the results of the conference to the United Nations General Assembly ... and to all other relevant international bodies for their consideration and appropriate action.
>
> They further agreed to recommend that intensive consideration of

54. Amin, *Growth is Not Development*, in DEVELOPMENT FORUM (April 1973).

55. J.K. Gordon, *The New International Economic Order*, in BEHIND THE HEADLINES, No. 5 (1976) at 14.

56. G.A. Res. 3281 (XXIX) 1974.

57. UNCTAD, TENTH ANNIVERSARY JOURNAL (1974) at 19-20.

outstanding problems be continued within the United Nations system and other existing, appropriate, bodies.[58]

The Integrated Commodity Programme (ICP) with a common Fund was first formulated by the UNCTAD Secretariat in preparation for UNCTAD IV. This proposal[59] has been the focal point for much of the North-South debate since 1976. Now that the ICP has finally taken shape, it is necessary to examine the concept of "fair price" in more detail.

III. WHAT IS FAIR PRICE?

The concept of fair price, or as Schachter puts it "a just relationship of prices",[60] needs to be examined in the context of the aims of the Integrated Commodity Programme (ICP)[61]. The original objectives of the ICP were stated in 1976 by the UNCTAD Secretariat, as follows:

> 11. The broad objectives of the proposed programme are: (i) to improve the terms of trade of developing countries, and to ensure an adequate rate of growth in the purchasing power of their aggregate earnings from their exports of primary commodities, while minimizing short-term fluctuations in those earnings; and (ii) to encourage more orderly development of world commodity markets in the interest of both producers and consumers.
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> 12. More specifically, the objectives would be:
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> (a) Establishment and maintenance of commodity prices at levels which, in real terms, are equitable to consumers and remunerative 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 substitutes;
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> (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.[62]

58. *Final Communiqué*, CONFERENCE ON INTERNATIONAL ECONOMIC COOPERATION (1977).

59. UNCTAD Document TD/184 and Supplements.

60. Schachter, SHARING THE WORLD'S RESOURCES (1977) at 88.

61. *Supra*, note 59, *but compare*, the final version negotiated in March 1979 and discussed *infra*.

62. *Id.*, at 5.

The clear aim is to attempt to improve the economic position of developing countries through improving the international commodity market's capacity to produce a stable and increasing inflow of capital. In other words, the commodity market must be seen as a tool for development. Seen in this light it is perhaps easier to understand why the programme has been the subject of such great controversy and difficult negotiations. As with many proposals made by UNCTAD or the Group of 77, it has met with a barrage of negative criticism and obstructive negotiation. Helleiner recently described the fate most Group of 77 proposals meet at international fora, as follows:

> Canadian Government, and other developed countries responses to reforms — of which the UNCTAD integrated commodity programme is a notable example — have been of a foot-dragging sort in which arguments against whatever is being proposed are offered at five or six different levels, depending upon the "stage" of the discussion. The argument's stages run as follows:
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> It is argued that the proposals in question will not work: the third world has not done its homework, or worse, does not understand economics.
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> If it is demonstrated that it *will* work, it is argued that it will have detrimental side effects or long-run effects that the Third World has not thought of and that the proposal is therefore not really in their interest. For example, the successful attainment of higher raw material prices will generate the development of synthetic substitutes. (Parenthetically, it has been unusual to find historical instances in which the oppressed have demanded reforms which were not in their interest.)
>
> If it is shown that the scheme in question *will* increase Third World incomes, the next step is to point out that since developed countries' governments are very wise they will immediately perceive what is happening and will cut back foreign aid (or any other concessions) by an equivalent amount. The gains will therefore not be "additional" to what they already receive.
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> What if it is granted that the proposal just *might* conceivably raise the quantity or the quality of resource flows from rich countries to poor? The next argument in the sequence is then that the distribution of the gains among countries is unattractive — some countries who need help will not get it from the scheme in question, while others who do not so evidently need it will nevertheless receive it.
>
> If the inter-country distribution *is* finally agreed to be not wholly unreasonable, then the argument becomes one of internal distributional equity within each recipient country. How can we be

> sure that the gains from the higher price of coffee will actually get to the poor in the coffee exporting countries? Examples are invariably found in instances where they may well not — Tanzanian smallholder growers are less usually offered as examples in these discussions than are Brazilian estates.
>
> But if *all* these points are met, if each level of objection is beat back, and it is finally demonstrated beyond reasonable doubt that certain changes in international policies are likely to reduce poverty in the Third World, there remains one final, over-arching argument. There remains a supreme "bottom line". For when all the possible arguments have been answered, there comes the moment of truth — when the policy-maker at last declares what it has all been about: "Ah" he says, "but this proposal is not in *our* interest.
>
> All of these arguments have been made about the Common Fund for commodities which, whatever its shortcomings (and there are some), has become the symbol of the North-South dialogue. The seriousness of the developed countries' response to the Third World's demands for a new international economic order is being judged by their performance on the issue of the Common Fund. Developed countries' policy-makers have treated this proposal (and others) in the manner I have described; and I think it fair to say that we can expect similar treatment for other reform proposals of the future.[63]

An example of the criticism of the ICP and the Common Fund can be found in a recent book review in the American Journal of International Law:[64]

> An idea whose time never comes, but which doesn't seem to fade away, is the so called Common Fund, to finance, support, even create a series of commodity agreements in an integrated programme. What would these agreements have in common? Not necessarily any common purpose, or common technique, except to stabilize (if they are high) or raise (if they are low) the prices received by Third World producers of basic raw materials.

It would be easier to write-off such views as being those of an ill-informed few if they were not representative of the attitudes expressed by many economists and government representatives in the developed countries. It would seem that the basic objectives of the

63. Helleiner, *The New International Economic Order, A Canadian Perspective,* in CANADA AND THE UNITED NATIONS IN A CHANGING WORLD (1977) at 75-76.

64. 73 A.J.I.L., at 309-310, Review by Andreas Lowenfeld of C.F. Johnston, Jr., LAWS AND POLICY OF INTERGOVERNMENTAL COMMODITY AGREEMENTS, 2 vols. (1976 & 1977).

ICP are being overlooked in the rush to condemn market intervention, on ideological grounds.

Given the objectives of providing improved terms of trade in commodities for less developed countries, what does the term "fair price" mean? Can "fair price" be interpreted to mean fair to the producer alone? Or does it have to include a measure of fairness to the consumer? How can you balance fairness to the poor producer with fairness to the rich (at least, richer) consumer? Schachter[65] looks at the notion that a fair price is the market price. This notion is based on the idea that the market for raw materials exists in conditions of "nearly perfect competition". However, this perfect situation is marred by discriminatory practices in the markets of the developed world. Schachter notes that the market price idea has thus been destroyed by discrimination in the industrialized countries and by retaliatory defensive measures, such as producers' associations and other pricing arrangements, taken by the developing countries.

Schachter adds that the structures of the world economy are such that there is a built-in deterioration in the terms of trade for producers of raw materials. (He defines terms of trade as follows: "The terms of trade can be summarized as the index of the average price of a country's exports in terms of the average price of its imports").[66] While noting that this view of the world situation has been criticized, he acknowledges that in recent years, at least, the developing countries have clearly been adversely affected by high costs in food, fertilizers and manufactures. Given these trends, market prices, Schachter concludes, cannot be equated with just or fair prices.

The issue, according to Schachter, is to establish an equitable relationship between the prices of goods sold and bought by developing countries. This relationship can only be achieved, he says, in many situations, "by manipulating prices for the benefit of the less developed countries, or by providing for other compensatory arrangements"[67]. Thus just price is defined as "the price necessary to cover the costs of production, including the social costs of minimum welfare and development."[68] The implication is that a

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65. *Supra*, note 60, at 89-95.

66. *Id.*, at 90.

67. *Id.*, at 91.

68. *Id.*

need factor is added to the pricing mechanism. Can it thus be argued that, given two producers of a commodity with different development needs and clearly different standards of living, the poorer producer is entitled to a higher price for his product? Or do you establish an average price taking into account the needs of both producers and provide for other forms of assistance, or compensatory financing, for the poorer country? If the latter course is chosen, is "fair price" therefore merely an average price based on the development needs of all producers? Or just Group of 77 producers? Or producers who are not members of OPEP? Or...?

It is perhaps becoming clear that, even from a producer perspective, there is no single "fair price." To put it another way, price cannot be the sole instrument for distributive justice.

The concept of "fair price" must also take into account the effect price increases may have on consumer country economies. Price increases must therefore be so organized as to allow for gradual adjustment within consumer countries and to ensure that synthetic or other substitutes are not made more attractive.

The reverberations of price increases on the economies of the industrialized countries can have extremely serious results. Schachter, in speaking of the petroleum price increases, states:[69]

> Both the inflationary effect (adding to other forces) of the oil price rises and the adverse consequences they have produced on the balance of payments of importing countries brought about defensive measures that tended to reduce world trade, create massive unemployment, and lower production. Although these are economic effects, they present questions as to the equities in bearing the costs and sacrifices that are involved in meeting the problems.

It should be noted that price increases in commodities may have deleterious effects on developing countries.[70] This phenomenon has been demonstrated most markedly by the petroleum price increases but it could also arise with respect to a number of other primary products.

There is another point to be made arising out of Schachter's comment. Should there be serious economic dislocation, as a result of price increases, in the industrialized (read rich) countries, which sector of the population will end up carrying the major burden and bearing the heavier costs? It is not likely to be the rich who will lose

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69. *Id.*, at 94-5.

70. *Id.*, at 94.

their jobs, nor will the rich have as much trouble paying for more costly imports. Thus equity must bear in mind the distribution of the burden within consumer countries as well.

It is also useful to examine the relationship that exists between the price paid to the producer of a commodity and the price paid for that same commodity by a consumer. A study prepared in June, 1975, of the pricing system for sugar in 1974, at the height of the sugar price boom, produced the following table:

	Return per lb.		Percentage of total	
1. Plantation labour[1]	.9¢		2.1%	
2. Growers' other costs	6.1¢		14.2%	
3. Growers' net profit[1]	4.6¢		10.7%	
4. Mills' share	5.8¢		13.5%	
5. Government tax, etc.[1]	11.6¢		27.0%	
TOTAL PRODUCING COUNTRY[2]		29¢		67.5%
6. Brokerage, shipping,[3] insurance	2.0¢		4.65%	
7. Hedging/speculation	2.0¢		4.65%	
LONDON DAILY PRICE (adjusted)[4]		33¢		76.7%
8. Unloading at port	1.0¢		2.3%	
TOTAL PRESUMED COST TO REFINER		34¢		79%
9. Refiners' expenses	4.0¢		9.3%	
10. Refiners' presumed profit[5]	1.0¢		2.3%	
WHOLESALE PRICE[6]		39¢		90.7%
11. Retailers expenses & profit	4.0¢		9.3%	
TOTAL COST TO CONSUMER[7]		43¢		100%

* Estimated. For details of method used, see explanatory note that follows

1. Main variables from one producing country to another.
2. Total based on statistics from Brazil and India. Breakdown based on information on Philippines in Far Eastern Economic Review.
3. Based on ISO information on Caribbean-London freight rates.
4. 107 lb. raw sugar = 100 lb. refined.
5. Information provided in Redpath advertisement.
6. Based on refiners' list prices.
7. Based on Food Prices Review Board data on Toronto retailers.

DETAILS OF METHOD USED IN CONSTRUCTING TABLE ON BREAKDOWN OF SUGAR PRICES

Useful information in this field is hard enough to come by, so one takes whatever bits and pieces are available to try to arrive at a coherent picture of the whole situation.

The key figure in drawing up this chart is the 1974 average London Daily Price of 31¢ per lb. for raw sugar, which becomes 33¢ when we calculate that 100 lb. refined = 107 lb. raw sugar. We add to this 1¢ to cover unloading costs and we have the total cost to the refiner of 34¢. The average wholesale price in Canada was 39¢, so the difference of 5¢ per lb. gives us No's. 9 and 10, the two elements in the refiners' margin. The retailers' margin of 4¢ (No. 11) is estimated from information contained in the Food Prices Review Board July report, and gives us the final figure of 43¢ per lb.

In order to arrive at No. 7, which purports to show the speculators share, we had to get an idea of what producing countries received for their raw sugar. Brazilian sources indicate that they received an average price of 26¢ per lb., and Indian sources give a figure of 28¢ for that country's exports. These figures seem fairly typical, therefore taking an average figure of 27¢ and adjusting it by 2¢ to give the refined equivalent, we arrive at 29¢ as the producing country's share. Allowing 2¢ for shipping, insurance and brokerage fees (based on published freight rates and estimate insurance and brokerage), we come up with a 2¢ difference from the adjusted LDP of 33¢ for which no value is added and therefore it is put as the risktaker or speculators share. It seems small enough, but for Canada's total imports would total $30 million, and magnified on a world scale nearly $1 billion.

Let us now take a look at the producing country's share. The percentages here are based on information from various sources, including the *Far Eastern Economic Review* 24.6.74. The major variants here in applying the model to other countries would be labour, profit and taxes. The industry in the Philippines is at the low end of the wage scale, but profits could be higher and taxes lower in some other countries. Naturally the picture would be quite different in Cuba and in countries where the industry is nationalized, e.g., Peru.

On might object that the three countries upon whose data the model relies, Brazil, India and the Philippines, were not suppliers of sugar to Canada last year. However, the world sugar market is so homogeneous and its power centres are so few that Canada's unquestioning participation in that market on its terms makes us a part of what goes on in whatever exporting country.[71]

71. SUGAR: WHO PAYS THE PRICE? GATT-FLY (1975) at 16.

From the table it can be seen that 2.1% of the price paid by the consumer goes to the worker, a further 38.4% goes to growers and to the mills, and 27% goes to the producing country governments. In several producing countries, it should be noted, the plantations and mills are owned and operated by multinational enterprises such as Tate and Lyle.[72]

This point raises the troublesome issue of distribution of wealth in developing countries. If increased prices for commodities serve only to enrich a few multinational corporations, or a small number of large landowners in developing countries, then the equity argument will no longer hold. One reviewer[73] took the position that, in light of the fact that there is so much evidence of gross mismanagement and misuse of aid, trade and investment, there ought to be a withdrawing from the equity notion. However, Goldie, in reviewing Schachter's book,[74] considers that such factors:

> ... do not negate the fact that today we do have, in C.P. Snow's words "a moral community of man"[75]. It is also true that such a moral community requires implementation through principles of international equity.

One writer, in a recent paper devoted to an analysis of official development assistance,[76] postulates that in the present international situation the provision of aid has been transformed from an act of charity to an obligation. Although his study dealt with aid the author claims his arguments apply also to other resource transfer mechanisms. The theses he advanced were:

> (1) a concessional transfer of resources from the developed to the developing countries ought to be treated as an *obligation and not as a charity;*
>
> (2) this proposition is predicated on ethical imperatives as well as on the sheer self-interest of the donor countries;
>
> (3) the establishment of the NIEO postulates a positive evolution of international law; and
>
> (4) the role of international law is not confined to aspiration *de lege ferenda* alone; even in the context of *lex lata*, progress has certainly

72. *Id.* at 7.

73. Moss, *Let's Look Out For Number One!*, in NEW YORK TIMES MAGAZINE, s. 6 (May 1, 1977) at 31.

74. 16 COLUM. J. TRANSNAT'L L. 555 (1978) at 563.

75. *Supra*, note 60, at 142.

76. Haq, *From Charity to Obligation: A Third World Perspective on Concessional Resources Transfers*, in 14 TEX, INT'L L.J. 389 (1978).

taken place along the charity-obligation spectrum.[77]

The author goes on to advocate that international law must evolve in order to meet the challenge of closing the gap between the developed and developing countries.[78] International law was created by the European powers as an expression of the liberty of the Sovereign state; but, he says, the poorer nations have a different set of priorities.

The author quotes Röling who wrote in 1960:[79]

> They expect to receive technical and economic assistance from the world community, since their low standard of living has become intolerable. A community in which the majority of members are indigent has need of a law that expresses the responsibility of the whole for the part. The alteration in the sociological structure of the community of nations should, therefore, be accompanied by an alteration in law. In this way the inter-dependence of the nations, and the related development of a sense of solidarity, leads to an alteration in which fundamental change is necessary if international law is to fulfill its task.

Eugene Rostow is also quoted to cement the link between international law and the aims of the developing countries. Rostow said that the "ends of economists become policy only through the means provided by the law."[80]

The next section will examine the ICP and the Common Fund in the context of their capability to provide a legal framework for the attainment of the overall objective, as outlined by UNCTAD and the Group of 77. Can the ICP and the Common Fund be an instrument for achieving a just distribution of the world community's wealth?

IV. THE ICP AND COMMON FUND AS INSTRUMENTS OF FAIR PRICE

The Common Fund was finally born on June 27, 1980 following a lengthy session of the full Negotiating Conference, held in Geneva.[81]

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77. *Id.*, at 392.

78. *Id.*, at 394-95.

79. B. Röling, INTERNATIONAL LAW IN AN EXPANDED WORLD (1960) at 25.

80. E. Rostow, PLANNING FOR FREEDOM (1959) at 362, cited in *supra*, note 76, at 395.

81. 19 ILM 896; UN TD/IPC/CONF/L. 15, June 26, 1980.

The present agreement represents over four years of intensive and sometimes acrimonious negotiations. The North-South Institute described the early common fund meetings as follows:

> At the negotiating conference on the Common Fund in November 1977, debate became mired in ideological semantics and a morass of conflicting formulae, organizational models and cost estimates.[82]

One of the most controversial aspects of the early proposals was the plan to institute a system of "indexation" for the prices of commodities. This concept caused negative reactions based on the degree of market intervention required and on the built-in rigidity indexation would cause.[83] The proposal was carefully examined by J.D.A. Cuddy[84] who defined indexation as follows:

> ... international price indexation ... would be a procedure for the automatic adjustment of a nominal target price or price range, so as to ensure that, in conditions of inflation, this always expressed correctly in current money units the real target price or price range specified for the commodity concerned.[85]

The author examined the thinking behind indexation and noted that there was confusion between two distinct objectives: (i) the desire to improve the terms of trade for developing countries; and (ii) the aim of ending, or at least substantially reducing, commodity price instability.[86]

With respect to the terms of trade, a further distinction may be made: whether the objective is to protect developing country purchasing power or whether it is to improve the terms of trade between commodities exported and manufactures imported.[87] Cuddy states that whatever the actual aim, indexation would require direct regulation of market price which, in turn, entails the establishment of appropriate international mechanisms.[88] He adds that the most modest objective would be to stabilize the price of the

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82. CANADA NORTH-SOUTH, v. 3., *Commodity Trade: Test Case for A New Economic Order* (1978) at 1.

83. *Supra*, note 60, at 100-101.

84. Cuddy, *Indexation in International Commodity Markets*, in 12 W.J.T.L. 501 (1978).

85. *Id.*, at 505.

86. *Id.*, at 504.

87. *Id.*, at 505.

88. *Id.*

commodity concerned, in real terms, at or near its long-term market equilibrium trend.[89]

At the end of his analysis Cuddy finds indexation to be an unattractive method for achieving the stated objectives, whether in terms of trade or price stabilization. He wrote:

> I believe the evidence presented in this paper strongly supports the conclusion that, if at the theoretical level many criticisms can be made of the likely effects of indexation (not to mention the difficulties of its implementation), at the empirical level there seems also to be but meagre support for indexation. The interests of development would seem likely to be served better by the employment of intellectual (and other) resources in different directions.[90]

The indexation proposals, faced with such serious opposition, have now been dropped. But the North-South Institute claims that the idea has not been subjected to sufficient in-depth analysis.[91]

The developing countries have now begun to examine the possibility of using less direct methods of protecting their terms of trade. One approach is through compensatory financing programmes linked to export earnings. Two major schemes now exist. The North-South Institute identifies these as follows:

> The IMF facility which was improved and enlarged in 1975, and the European STABEX scheme adopted under the 1975 Lomé Convention between the European Community and (then) 46 African, Caribbean and Pacific countries.[92]

These two schemes were compared and analysed by Cuddy[93] who noted that they were put forward as possible alternatives to the ICP and Common Fund by some "policy-makers". The European Community and the ACP States have now entered into a new Convention — Lomé II —[94] which has improved may of the aspects dealt with in Cuddy's comparison. These improvements will be considered below. The comparison covers eight characteristics but

89. *Id.*

90. *Id.*, at 515.

91. *Supra*, note 82, at 27.

92. *Id.*, at 26. The Lomé Convention included 53 ACP States by 1978.

93. Cuddy, *Compensatory Financing in the North-South Dialogue: The IMF and STABEX Schemes*, in 13 W.J.T.L. 66 (1979).

94. 19 ILM 341 (1980).

for our purposes it is perhaps useful to consider only five[95] of these: country coverage; trade coverage; base for compensation calculation; eligibility conditions; and limitations on use.[96]

(i) **Country coverage**

(a) For the IMF scheme all members are eligible;

(b) STABEX is limited to the original 46 ACP countries who signed the 1975 Lomé Convention (now expanded to 53 nations). The E.C. Nine are the other parties to the agreement.

(ii) **Trade coverage**

(a) IMF covers the "total merchandise export trade" and therefore excludes services;

(b) STABEX is limited to exports by the ACP countries to the E.C.[97] of 19 primary products or groups of primary products.[98]

(iii) **Base for compensation calculations**

(a) Since 1975 the IMF formula used is: "the amount by which the member's export earnings in the short-fall year are less than the average of the member's export earnings for the five-year period centred on the short-fall year. In computing the five-year average, earnings in the two post-short-fall years will be deemed to be equal to earnings in the two pre-short-fall years multiplied by the ratio of the sum earnings in the most recent three years to that in the preceding three years".[99] There is some allowance for flexibility should the calculation create unreasonable results.[100]

(b) The reference level for STABEX is the "moving arithmetic average" for the four years preceding the short-fall year for the ACP country's receipts from exports to the E.C. on the product concerned.

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95. The other three characteristics are: (vi) repayment conditions; (vii) rate of interest charged on outstanding balances; and (viii) other.

96. *Supra*, note 93, at 67.

97. In some cases exports to *all* destinations may be included, quoted in *Id.*, at 70.

98. Ground nuts, cocoa, cotton, coconuts, palm oil and palm Kernels, leather and skins, wood, bananas, tea, sisal, vanilla, cloves, pyrethrum, ylang-ylang, gum-arabic, mohair, wool and iron-ore. The ACP has requested the addition of five other products (sesame, tobacco, sisal products, cashew nuts and kavité almonds). Quoted in *Id.*, at 70.

99. *Compensatory Financing of Export Fluctuations*, IMF Executive Board Decision, 24 Dec. 1975, quoted in *Id., at 67-68.*

100. *Id.*

(iv) Eligibility conditions

(a) IMF members may draw only when they have a balance of payments need and only if the IMF is satisfied that the short-fall is temporary and due to circumstances out of the country's control. The member must also "co-operate" with the IMF to find "appropriate solutions" to any balance of payments problems.

(b) an ACP member must certify to the E.C. that the "products to which the stabilization system applies have originated in their territory" (Article 18). It must be shown that the products were "released for home use in the community (or) brought under the inward processing arrangements there in order to be processed" (article 17(2)). Two other conditions are imposed —

(1) a "dependence threshold" (Article 17 (3)) — which requires that the country's earnings from the export of the product or products to *all* destinations represent at least 7.5% of that country's total earnings from merchandise exports;

(2) a "trigger threshold" (Article 19 (2)) — which permits a financial transfer if the country's earnings from each of the products, considered individually, are at least 7.5% below the reference level. (For the "least" developed, the trigger is 2.5%).

(v) Limitations on use

(a) drawings under the IMF cannot exceed 50% of the member's quota in the IMF in any twelve-month period. In total, the drawings must not exceed 75% of the quota.

(b) STABEX offers no guarantee that a transfer will be made. The Community must examine each application in light of the available resources (Article 19 (3)). The Community can also refuse if the short-fall arises out of a trade policy decision of the ACP state which has had adverse effects on its trade with the E.C. As well the Community may refuse an application if there has been a "significant change" in the total export earnings of the ACP state (Article 19 (4) (b)).[101]

Compensatory financing on the basis of these two programmes is clearly inadequate. There are two proposals for improving the system: an improvement in the IMF scheme and/or a widening of the STABEX into a global programme.[102]

The new Convention (Lomé II) has attempted to make adjustments to take account of some of the criticisms levelled against the 1975 version. For example the coverage has been

101. This comparison is drawn totally from the article cited *supra*, note 93, at 66-73.

102. *Supra*, note 82, at 51.

extended to 44 products,[103] and the "trigger" mechanism may be applied with reference to groups of certain products.[104] Iron ore

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103. Article 25(1). These are:

1. Groundnuts, shelled or not
2. Groundnut oil
3. Cocoa beans
4. Cocoa paste
5. Cocoa butter
6. Raw or roasted coffee
7. Extracts, essences or concentrates of coffee
8. Cotton, not carded or combed
9. Cotton, linters
10. Coconuts
11. Copra
12. Coconut oil
13. Palm oil
14. Palm nut and kernel oil
15. Palm nuts and kernels
16. Raw hides and skins
17. Bovine cattle leather
18. Sheep and lamb skin leather
19. Goat and kid skin leather
20. Wood in the rough
21. Wood roughly squared or half-squared, but not further manufactured
22. Wood sawn lengthwise, but not further prepared
23. Fresh bananas
24. Tea
25. Raw sisal
26. Vanilla
27. Cloves — whole fruit, cloves and stems
28. Sheep's or lambs' wool, not carded or combed
29. Fine animal hair of Angora goats — mohair
30. Gum arabic
31. Pyrethrum — flowers, leaves, stems, peel and roots; saps and extracts from pyrethrum
32. Essential oils, not rerpeneless, of cloves, of niaouli and of yland-ylang
33. Sesame seed
34. Cashew nuts and kernels
35. Pepper
36. Shrimps and prawns
37. Squid
38. Cotton seeds
39. Oil-cake
40. Rubber
41. Peas
42. Beans
43. Lentils
44. Irons ore (ores, concentrates, and roasted iron pyrites).

104. Article 25(3).

exports are given special treatment for a period of five years.[105]

Lomé II has also provided for a less stringent "dependence" threshold, 6.5%[106] as opposed to 7.5%, while the "trigger" threshold is 6.5% below the reference level.[107] This reference level is essentially unchanged from that in Lomé I. However, Article 36 permits the reference level to be calculated on the basis of three instead of four years for certain products. In an attempt to encourage diversification and processing the three year base applies to products the exporter is starting to process or is exporting for the first time.[108] While this is not a major innovation there is no doubt that it is a step in the right direction.

With respect to the IMF plan, the North-South Institute proposed six areas for improvement:[109]

> (1) easing the conditions for obtaining compensatory financing, including a reduced emphasis on assessment of strict balance-of-payments needs;
>
> (2) greater availability of resources for developing countries through increased country quotas and increased percentages of quotas allowable for compensatory financing;
>
> (3) broader export coverage including tourism, "invisibles" exports and explicit account of major commodities;
>
> (4) more flexible repayment scheduling;
>
> (5) calculation of short-falls on the basis of real rather than money earnings; and
>
> (6) progressively lower interest charges for poorer countries and conversion of loans to grants for poorest countries if circumstances warrant.

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105. Article 25(2).

106. Article 29 but special provision is made under Article 46 for products from certain states that are least-developed, land-locked or island states. These states are listed in Article 155(3). The "dependence" threshold is reduced to 2%.

107. Article 37. The "Trigger" threshold is 2% according to Article 46, for these Article 155(3) states.

108. Article 36 provides as follows:

> (3) Where, however, an ACP State:
> — starts processing a product traditional exported in the raw state, or
> — begins exporting a product which it did not traditionally produce,
> the system may be put into operation on the basis of a reference level calculated on the three years preceding the year of application.

109. *Id.*

The Institute also examined the possibility of transforming STABEX into a global plan.[110] Cuddy proposed a detailed set of changes that would be required to effect the transformation[111] which includes changes in the eligibility rules regarding both countries and products, dropping of the "dependence" and "trigger" thresholds, and recalculating the "reference price". Using a simulation model the net cost of such a scheme, Cuddy calculated, would have been "$1,000 million (at 1974 prices) over the period 1965 — 1974 for a sample of 72 countries accounting for approximately 70% of the trade of the non-oil exporting poor countries".[112] For the period 1976 — 1980 Cuddy estimated the scheme would have cost $2100 million (at 1974 prices).[113]

Compensatory financing, by its very nature, and certainly by its past performance, is not an instrument for achieving "distributive justice". It appears to be no more than a means for protecting the past patterns in terms of trade and cannot, under any existing proposal,[114] become the tool for undertaking the major transfer of resources called for by the Group of 77. Thus it is to the Common Fund that the developing countries still look as the best means to achieve their overall objective.

Helleiner has stated that the Common Fund is symbolic of the North-South dialogue.[115] But, he warned:

> Despite its symbolic importance, the Common Fund is not even close to being a panacea. Even if the full UNCTAD version of the Fund were put in place and the relevant prices were effectively stabilized (even at higher levels than would otherwise have been possible) its total impact upon the world economy simply cannot be that great... . As has been seen, underlying conflicts will not, in consequence of its creation, disappear. Moreover, other elements of reform may be just as important or even more so in the resolution of North-South problems. This may be true even within the realm of commodity problems. One must still arrive at solutions for commodities which are not easily stockable. One must still achieve improved market access for processed raw materials. One must still

110. *Id.*, at 52.

111. *Supra*, note 93, at 74-75.

112. *Id.*

113. *id.*

114. Unless compensatory financing were based on a "growing" trend of export revenues. This idea has been proposed and rejected on several occasions.

115. *Supra*, note 63, at 76.

> seek to liberalize still further the IMF's compensatory financing facilities,...[116]

The present aim of the Common Fund is to stabilize prices and, according to Cuddy, this is not enough:

> In the first place it is clear that for any given country the stabilization of the prices of its exported primary commodities will not necessarily stabilize its earnings from the export of these commodities. Whether or not its earnings will be stabilized will depend, *ceteris paribus,* upon the price elasticity of demand for its exports.[117]

He goes on to note that with certain primary products, such as agricultural raw materials, and food and beverage crops, that are heavily dependent upon weather and other uncontrollable natural factors, earnings may be seriously destabilized *"even if prices remain more or less stable"*.[118]

Cuddy concludes that since the main objective of the original UNCTAD Common Fund was price stabilization around a rising trend, a necessary adjunct would be the establishment of a compensation fund. He argues that the best approach is to combine the Common Fund, which he calls the Market Intervention Authority (MIA) with a compensation scheme. His closing sentence is particularly appropriate:

> ... the joint MIA — compensation scheme would appear to be not significantly more expensive than a purely compensatory system (and possibly even cheaper) and would come closer to meeting the world community's goals of global economic justice...[119]

The key question yet to be answered is to what extent the Common Fund, now signed, retains the objectives set for it by UNCTAD in 1976. At that time, UNCTAD stated that the Common Fund would "inject a new dynamism into international commodity policy".[120] On the other hand, the "new" Common Fund, according to one author, will do "little more than meet administrative expenses and gain some standing in the international markets".[121]

116. *Id.*, at 77.

117. Cuddy, *The Common Fund and Earnings Stabilization* in 12 W.J.T.L. 107 (1978) at 109.

118. *Id.*

119. *Id.*, at 120.

120. *Supra*, note 59, at 9, para. 23.

121. *The Common Fund: Development Mechanics and Forecasts,* in 11 LAW & POLICY INT'L BUS 1193, (1979) at 1200.

The agreed Programme calls for a first window of $400 million, devoted entirely to financing buffer stocks. This would be funded out of direct governmental contributions of $80 million (from a fund created by contributions of $1 million each from the assumed 150 participating countries) added to $320 million derived from participating countries along the following lines: Group of 77 — 10%; Group B — 68%; Group D — 17%; and China — 5%. The remaining $70 million (of the initial $150 million) would be used for the second window, which has a target of $350 million. The balance of $280 million for this fund would be raised through voluntary contributions. The second window would be used for activities other than buffer stocks, such as research and development and productivity improvement.

At UNCTAD V, several countries pledged contributions to the second window, amounting to approximately $87 million. Since then, several additional pledges have been received and a number of countries have indicated their intention of contributing an unspecified amount.[122]

The final version of the Common Fund appears to differ greatly from the first proposed. The original plan called for the stocking of 10 "core" commodities[123] and for a capital fund of $3 billion. An additional $3 billion was to be committed by governments to be on call when needed. (Of that $6 billion, $4 billion was envisaged as being in the form of loans, bearing interest, with the remaining $2 billion as paid-up risk capital[124]).

But the UNCTAD Secretariat notes that such differences are merely superficial:

> It would be erroneous to compare, as has sometimes been done, the capital structure of the first window of the Fund now contemplated, i.e. $400 million, with the six billion estimate of stocking requirements which the Fund was intended to provide, according to earlier estimates of the secretariat. The latter amount represents the estimated total needs of stocking which would, in terms of the structure now envisaged for the Fund, be financed by cash deposits of ICAs (International Commodity Agreements) and by the Fund's borrowings.[125]

122. UNCTAD, *Monthly Bulletin,* No 153 (August 1979).

123. These were coffee, cocoa, tea, sugar, cotton, rubber, jute, sisal, copper and tin.

124. *Supra,* note 59, at 10.

125. UNCTAD, *Monthly Bulletin,* No. 151 (April-May 1979).

Voting rights in the Fund were dealt with by a "consensus" agreement in March 1979. The distribution was: Group of 77 — 47%; Group B — 42%; Group D — 8%; and China — 3%. Important decisions, including those with significant financial implications, would require majorities of three-quarters of total votes cast. Other decisions, depending on their importance, would require two-thirds or simple majorities.[126]

The voting scheme did not have the full support of the United States and the Soviet Union. The United States might still press for equal voting power between Group B and the Group of 77.[127] In addition, the United States, although it succeeded in keeping the second window within very narrow limits, has nevertheless not yet contributed to it.[128] Canada has agreed to contribute to this second window.[129]

It should also be noted that the aim of the Common Fund is not to stabilize the prices of commodities "around a growing trend" but rather around "a long-term equilibrium price".[130] Thus the only way to increase real earnings is for the developing countries to increase the amount of their exports.

Perhaps what is needed is Cuddy's compensation scheme attached to the ICP and Common Fund. How likely is this to come about? The North-South Institute commented on this while suggesting an alternative approach:

> It is also not yet clear that the IMF and global STABEX approaches are incompatible. Some observers of the Common Fund negotiations suggested that the resources and best features of the two facilities could be ultimately combined under the responsibility of the Common Fund, with the cost of concessional lending borne independently by the fund's Second Window. The establishment of a compensatory financing facility or "third window" within the fund would likely entail a transfer of resources and operations from the IMF and would require a much stronger committment to the fund than has so far been evidenced in the North.[131]

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126. *Id.*

127. G. Lehner, *Common Fund Negotiations Produce Framework Agreement*, in 73 A.J.I.L. 522 (1979) at 523.

128. *Supra*, note 121, at 1203.

129. *Supra*, note 125.

130. *Supra*, note 121, at 1204.

131. *Supra*, note 82 at 52.

The Common Fund is in place and international commodity agreements are soon to be linked with it. Are we any closer to the concept of "fair price"?

V. CONCLUSIONS

"Fair price" can be many things. In the context of the developing countries, it can only mean the price which provides sufficient income to improve the economic and social lot of the citizens of those countries. Thus the objective, in terms of commodity pricing, has always been to do more than to provide stability of price and supply. These latter have been developed country objectives.

Although the Common Fund and ICP represent a significant step towards greater price justice, it has been seen that they cannot alone meet the objective of the developing countries. It has been suggested that the mechanism of indexation might provide the requisite additional income, but that idea appears to be either ahead of its time or completely discredited. Others have pointed to compensatory financing as an instrument for achieving predictable income around a rising trend. Here again the existing IMF and STABEX (even though improved) schemes appear to be too niggardly, too limited in scope and impose too many terms and conditions (many of which are unacceptable) on the recipient countries. Proposals for major changes seem to meet the same "foot dragging" response as Helleiner described.

Cuddy's idea of a link between the Common Fund and a compensation scheme, and the North-South Institute's suggestion for a Third Window encompassing the IMF and STABEX in a global compensatory financing instrument, could well be the basis for further negotiations.

The most troubling point, however, is that it took the world community from 1945 to 1980 to achieve the ICP; will it take as long to reach agreement on meaningful compensatory financing?

We seem to be examining the problem posed by the commodity issue and its relation to distributive justice as if it were a matter for negotiation between adversaries. This approach is exemplified by the United States position on voting in the Common Fund.

The question that needs to be asked is what position are the Group B countries trying to defend? Are they protecting the concept of the free market, discredited as it is? Are they defending their "way of life", unrelated as it may be to global realities? Are they attempting to stave off the final reckoning, inevitable as it appears to be? Are they, in the final analysis, merely afraid of the economic and social consequences, in their societies, of a more equitable international trading system? If the latter is the case, the solution is surely to make a clean start. Explain the issues, prepare the people, and adjust the economies.

If the concept of "fair price" is based on anything, it is based on the notion that the price paid for a commodity must bear a direct relation to the needs of the producer who must meet his obligations to his population and to their development. The Integrated Commodity Programme and Common Fund, if only partially, represent a small and tentative step towards a "fair price".

How long before another step will be taken?