

TRADE AND DEVELOPMENT: A CONCEPTUAL FRAMEWORK

By
REGINALD HERBOLD GREEN

I

To Sell Cheap And To Buy Dear

President Julius Nyerere's comment on the world economic order to a phalanx of its leaders in London was:

the present international economic system gives us only two rights—the right to sell cheap and the right to buy dear.

The world of the transnational corporations (TNCs) is the heart of international commerce and finance today. It is a world in which it is critical to be large, wealthy, close to the ear of powerful states and able to acquire, use and monopolise information. It is no way Adam Smith's world of the "invisible hand" of competition which made the individualism of each serve the good of all. It is the world of the descendants of Clive of India and the British East India Company—bodies Smith condemned ruthlessly. It is a world of a few large firms who often can and do meet to agree on at least limited lines of joint action and general principles of dealing with outsiders—a practice not unknown to Smith who warned that businessmen seldom meet even for convivial or social purposes without conspiring against the common good.

This is a world of unequal exchange in several senses. Raw materials are usually sold by competitors to oligopsonists—attempts by producer states to unite are resisted. Processing and manufacturing—usually the source of at least four times as much value added as raw material production—are concentrated in the centre. Transfer pricing (international sales which are intra-TNC because the TNC group controls both companies) allow moving earnings, tax payments, investible surpluses about at the stroke of a pen—moves usually tending to put them into the centre and out of the periphery and thus draining surplus as surely as if with more decorum, "respect" for legal principles and (usually) less overt violence than the administration of Governor Warren Hastings (who was also "not guilty" under the laws and standards then pertaining in the centre)

TNCs will not go away. About 75% of the First and Third World's trade and 50% of their manufacturing is handled by them. They do operate with considerable technical, production and information application efficiency. Simple destruction is not desirable, viable alternatives—including not nationalisation of domestic firms—are only sometimes relevant. What is needed is a level of consciousness, of observation, of political mobilisation (by workers, peasants and associated intellectuals—professionals, managers, decision takers), of enforced national legal codes to make the TNCs safe (or safer) for the world. Calls to mutual goodwill and comradeship are ill considered. A TNC must centre its concerns on medium term global profit and the movement of surplus to the best investment opportunities, whereas a state (capitalist or socialist) is concerned with national production, distribution and investment. Further given the size difference an African proverb is appropriate "when the elephant lies down with the chicken, it is the chicken who is crushed."

The Self Reliance of the Rich

A new slogan in the platforms of rich countries is "self reliance". What is this "self reliance of the rich"? Its most striking example is the European Economic Community's Common Agricultural Policy and especially its sugar subsector. Little Europe (EEC) grows beet sugar at a cost well above tropical cane sugar. It "generously" accepts about 1.2 million tonnes of periphery economy cane at prices linked to its own domestic ones. But it turns around and dumps a larger amount of excess beet on the world markets, rendering the International Sugar Agreement (which it refuses to join) nearly powerless and lowering cane export proceeds by far more than the gain they receive on its imports. "Self Reliance" in that context looks remarkably like exclusion and aggression.

Of course EECs is not activated by malice and a conscious quest for hypocrisy. Beet growers are a part of the powerful European agricultural lobbies. The easy solution—unless and until the Third World organises and delays its potential power better—is to placate these lobbies (a mixed peasant/capitalist farmer sub-class) by hampering Third World access to European markets and dumping abroad. The structures of inequality remain because there are those (including workers and peasants) who benefit by them and because the successful creation of inequality has reduced and divided the power of those (whether in the centre or on the periphery) who seek to change them.

These and other aspects of the Old International Economic Order have often been described as malfunctioning. One must

ask "malfunctioning for whom"? For the workers and peasants of Asia—yes. For those who erected and ran the system—at least in the short run—no. 1945-70 has been described by friends and moderate critics as the "golden age of capitalist industrial economies". 1977-8? is another matter—the new International Economic Disorder falls (albeit not equally) on the just and unjust, the centre and the periphery. However, the leaders of OECD states and their analysts see the way ahead as being back to a slightly refurbished old order, not forward to—say—the Charter of the Economic Rights and Duties of States.

What can lawyers and the law do? Not, one should admit at once, alter basic power balances or substitute for the absence of power. Law can lead, but it can do so only when it also embodies and acts from value premises and power potentials.

In respect to Transnational Codes of Conduct—a subject on which the proponents of codes from absence of legal expertise are in danger of offering proposals better designed to make the world safe for TNCs than *visa versa*—a possible set of practical ways forward include:

- a. to require disclosure of data on relevant (frequently extraterritorial) operations to national governments and control agencies;
- b. to relate taxes to real surplus earned in a country if necessary using proxy bases (like the Jamaica tax on bauxite producers related to the world market price of aluminium not the intra-company "sale" price of bauxite) as appropriate;
- c. to consider how we can reverse the pattern where the state is an actor regulating the weak (by enforcing restrictions on eligibility for rice, not a right to eat) and a bystander holding the scales for the rich (eg. re policy decisions of BAT) so that—at least—the law recognises the reality that *vis-a-vis* large enterprises (especially TNCs but also domestic including public sector ones) the state is an actor with definite interests and goals which are either made enforceable at law or let go by default;
- d. devise national codes enforceable under national law and procedure (and preferably in national courts or, as a second best, by arbitral proceedings which are not so structured as to put the state at a disadvantage);
- e. consider how these codes might be harmonised (by upgrading not diluting) among periphery states and whether (if at all) an international Charter setting minimum (not

maximum) standards for national action could assist in securing international cognisance of national code based decisions and in getting TNC home state cooperation in enforcing disclosure of global activity information both in general and when specifically sought by peripheral state regulating bodies.

Some Lacunae In Drafting and Interpretation

In respect to getting access for Third World exports to First World markets debacles have arisen because the Third World side has been ill (or sometimes not at all) supplied with expert drafting advice. The Lome Convention is a horror story in this respect. For example, contrary to ACP belief at the time, the convention gave no guarantee of any concessions on agricultural products (other than sugar) subject to, or potentially subject to, the Common Agricultural Policy—a range conceivably running from unmilled paddy through chocolate candy to shoes! Worse, as written (and subsequently altered only *ex gratia* and on a year to year basis), it imposed taxes on Botswana's existing beef exports to the UK that could have reduced Botswana cattle growers' net income by over 90% and presumptively wiped out a quarter of Botswana's exports.

More generally the General Agreement on Trade and Tariffs (GATT) provisions in Article XIX in respect to special restrictions on imports are quite unsatisfactory. They do not really set a time limit, nor require phasing out, nor require adjustment by the importer to remove the cause of the special limitation. Nor in many cases do they require that compensatory concessions be given if that aggrieved party is a Third World state because many provisions—eg. the so called Generalised Scheme of Preferences (GSP)—are deemed to be *ex gratia* not negotiated and thereby revocable at will. Further, the so-called "voluntary quota" agreements First World states have imposed on their Third World trade "partners" are on the face of it in clear breach of GATT but to date no formal references have been made. Part of the problem is one of power but part is knowing what the legal position is and how it might be redrafted to protect periphery interests.

III

Unprocessed Exports

Dom Helder Camara, Archbishop of Recife has written:

In the second half of the 19th century the sign of the liberation of a port was "no slaves landed here". In the second half of the 20th century the sign of the liberation of a port should be "no unprocessed primary products shipped here".

There is little disagreement that in general the raising of levels of productive forces requires diversification and structural integration. Primary production alone is rarely either adequate or "natural"—processing, manufacturing, marketing are its logical counterparts. For small economies that necessarily means exports of manufactured goods and especially of those based on their earlier raw material exports i.e. packeted, branded tea not bulk, steel not iron ore, sisal twine not fibre, shoes not hides and skins, garments not raw cotton. That, however, is not how the world economy—especially under the new International Economic Disorder and the pressures of the centre economies' "New Protectionism"—is proceeding.

GATT's Tokyo Round—its 1970s exercise in major reduction in tariff and non-tariff barriers to trade—is likely to prove a disaster for the Third World. Why?

1. GATT's procedures are so complex that a minimum of 20 full time professionals and a global data collection system are needed to play "the GATT game". Further, because bilateral concessions once agreed must be generalised to all states it is suicidal to negotiate with anyone other than the "Big Three"—Japan, EEC, USA;
2. Therefore, what that trio can triangularly agree is almost unchallengeable and what any one of them rejects almost unnegotiable—a situation as alarming to the smaller industrial economies (eg. the Nordic Group) as to the members of the Group of 77 (the Third World caucus in the United Nations Conference on Trade and Development—UNCTAD).
3. The "Big Three" are not interested in lowering barriers to trade on goods in which they face serious competition from outsiders, thus GATT has regularly reduced barriers to trade in the manufactured exports of key concern to the centre more than on those of present or potential concern to the periphery (eg. computers not shirts, complex chemicals not shoes, jet aircraft not twine);
4. In this round they have virtually ignored the general guideline agreed in the governing body (where the members of the 77 are in a majority and thus have a real voice) for removal of trade barriers to tropical products including processed forms; it raises some uncomfortable issues for the Big Three—not least in respect to sugar. While a reconsideration has been forced by the 77, it is a reconsideration by the Big Three not a real negotiation in which the 77 could participate.

The MFA: Menacing Foreclosure of Access

Meanwhile, the 1978 updating of the longterm Multifibre Textile and Garment Arrangements (MFA) has done several times as much damage to the Third World as the Tokyo Round will produce gains:

1. the new quotas are "enforced" unilaterally not negotiated;
2. they represent another step in reducing access and raising uncertainty for Third World textile and garment exporters;
3. for major exporters the base allowed is 1976 (not the much higher 1978) exports and the growth 2% a year so that the entire 1979-83 period will see lower allowed exports (in quantity terms) than 1978;
4. the Third World exporters notably failed to make a common stand and were picked off one by one—their refusal to hang together meant that each was hung separately;
5. made easier the recent US promises to its textile producers to introduce new restrictions beyond those contained in the supposedly mutually binding 1978 MFA;
6. violated all the formal principles (and indeed genuine goals) of GATT of freed and more assured access and to add insult to injury been registered as a GATT protocol.

This is the "New Protectionism" on the march—"let them export cotton" is its apparent answer to the victims. Nor is it isolated—there are other if less stringent and narrower product based parallels. Further there is an ominous upsurge of calls to take general action against the "Newly Industrialising Countries" (eg. India, Hong Kong, Singapore, both Korea, Brazil, Mexico, Taiwan, Yugoslavia, Rumania and for the more enthusiastic axemen such states as the Philippines too; can Sri Lanka be far behind especially if its manufactured export strategy begins to succeed?) on the basis that their moderate success in building competitive manufactured goods export sectors proves both that they offer "unfair" (read effective) competition and that they can today be classed together with Japan (which really does operate a predatory, globally destabilizing export led growth strategy and malignly neglects its impact on the global economy and which really is a first rank industrial economy).

Indeed it is not too much to say that today the peripheral economies—despite poultrices like GSP at the Lome Convention—"enjoy" Least Favoured Nation status, not the "Most

Favoured Nation" treatment GATT is supposed to afford to all its members. In that sense the International Law Commission's study of what problems arose from "most favoured nation" status when formal equality was paralleled by substantive inequality is a trifle premature—the MFA is the symbol and the torchbearer of a growing formal inequality, of the industrial economies pulling up the drawbridge and lowering the portcullis of their protectionist castle against the periphery exports knocking at their doors.

Toward a Workable Trade Organisation Charter

Once the goals on the trade access and negotiation side are clarified the next steps are to see where and how GATT's formal structures militate against them and what structural (constitutional, Article Amendment) changes might facilitate achieving those goals. To a very great extent those are steps for lawyers. Unfortunately they do not appear to be steps many Third World Lawyers have been asked or volunteered to take.

Clearly a number of "constitutional" and "contract" law points area at stake:

- a. how can the formal majority in the governing body be used to inform actual detailed negotiations?
- b. what procedural changes (eg. joint regional or 77 negotiating teams and/or offers?) could open up the negotiating process to periphery participation?
- c. how can the cancerous growth of extra and anti-GATT restrictive "agreements" be halted by bringing all restrictive proposals within GATT (where there is a bias against more barriers to trade) to be negotiated there?
- d. how can the GATT provisions in respect of restrictions be redesigned to cover duration, phasing out, domestic adjustment policies of the imposing industrial economy?
- e. what formal statement of restriction negotiation could be used—like an IMF "Letter of Intent"—to cause GATT monitoring of performance?
- f. how could an arbitral procedure be built into GATT to resolved deadlocked negotiations on restrictions and/or claims of violation (especially when the GATT monitoring noted such violations)?

Of course these are matters of substance as well as form. But much—not all—of the substance is legal and even on other aspects lawyers can be invaluable consultants.

Using the Law

A rather different and more mundane situation pertains in respect to sisal twine. Tanzania has expanded sisal twine capacity to 40% of fibre output (60% by 1980 paralleled by sisal sack capacity of 30% of fibre by the mid 1980s, thus nearing the goal of manufacturing and using domestically nearly 100% of this raw material—the first case in which the response to President Nyerere's pointed use of Dom Helder Camara's words on his 1972 Christmas cards is approaching fulfilment). Domestic use is trivial—this is a case of increasing the value of exports and the employment of Tanzanians not of directly integrating the product into the national supply/use pattern. Exports have been largely to North America, Scandinavia and secondary markets not to the core EEC states despite the fact that half the capacity is in plants which are subsidiaries of, or joint ventures with, EEC sisal twine spinners and wholesaler. In 1977—after Tanzania state owned mills began to sell direct to secondary wholesalers in the EEC core and Tanzania put pressure on the private firms to use their own wholesale links to sell Tanzania twine in Europe—the private firms *de facto* halted effective marketing of the twine forcing sharp fall in output.

In fact there is a cartel of half a dozen to a dozen spinners/wholesalers/importers in four to six EEC states. It has limited twine imports in order to protect its own (less competitive) home mills and has used its dominant position in importing and producing to discourage other wholesalers from going outside the cartel. Tanzania certainly protested and—with its history of nationalising firms who thwarted its goals and then working out how to keep them operating and selling—to some point. By mid 1978 the firms had negotiated to take Tanzania sisal twine for their EEC markets and had returned to full production.

Where then is the legal side? In practice only subliminally in the power of Tanzania to nationalise. What neither the Sisal Authority, the Ministry of Agriculture nor the Attorney General's Chambers seem to have realised was that this cartel is almost certainly unlawful under the provisions of the Treaty of Rome. EEC requires registration of cartels (including *de facto* ones claiming to be something else) and has the obligation to ban those not clearly in the public interest. Price raising and market domination are not acceptable reasons. Thus Tanzania had every reason—had it known—to take the case to the EEC. On the demonstrated actions of the companies and their letters to it, *prima facie* evidence of an unlawful cartel was readily available. Had EEC officials refused to investigate with a view to taking action (including legal action, a fairly common resort in

competition and cartel cases), the refusal could have been raised politically at ACP and governmental level. Indeed the cartel's German and Dutch members were (are) on the face of it quite possibly in breach of their own national anti-monopoly and anti-restraint of competition codes.

Perhaps this approach would not have worked. At the least it seemed (seems) worth exploring and would put pressure on the parties in further negotiations (at least one is very alarmed whenever the issue is raised even by quite unofficial persons). Unfortunately there is good reason to believe this case is far from unique. Third World governments and enterprises do not often ask their lawyers what First World legal instruments and statutes might be of use to them and how they could be activated.

IV

A System That Sells People

In 1971 the "contract" (single migrants at sub-subsistence wages on something closely resembling "indentured labour" contracts) workers of Namibia struck against their bondage, the destruction of their family life, their sub-family subsistence wages. One of their spokesmen said:

We do not believe
in a system that
sells people.

Unless subject to effective state control, a system of autonomous transnational enterprises (even public sector ones) almost inevitably "sells people" even if not always with the nakedness and violence of Namibia under South African occupation. The main duty of an enterprise manager is to the enterprise and its owners. To carry out that duty he must seek to achieve high levels of surplus generation, of opportunities to invest that surplus and of ability to reproduce the surplus and investment in the future. The welfare of communities, past (e.g. dismissed or moved away from) employees and states (or at least host states—a public sector TNC may have a concern for home state economic welfare) cannot be central to his concerns. True, his three key goals do require that he pay attention to contexts—including state policy, power, laws and enforcement. Avoiding (or quietly evading if investigation and enforcement are weak) laws, not defying them, is the prudent TNC approach to regulations which hinder it; at least a certain degree of compliance with state strategy's clearly set out and backed both by law and by capacity to enforce it is good business practice. That is the basis of one of the three reasons TNC's are seen as less dangerous by industrialized capitalist economy states and

public opinion—they are more effectively regulated and pushed into responding to state goals to achieve their own. The second is that TNC's—in their home countries—are so pervasive and so much a part of normal life that most people and officials simply do not see them as a problem. Third, TNC's on balance transfer surpluses from peripheral to central economies—a process which is beneficial to many sectors of the recipients (and not just larger capitalists) and crippling to the losers.

Manipulated Transfer Pricing

A key method of moving surplus is manipulated transfer pricing (or accounting or billing or financing). A TNC, by definition, has units in several countries. Transactions—sales and purchases of goods, service contracts, royalties, interest, etc.—between such units constitute international transactions but intrafirm transfers. In any such case the prices are transfer—not market—prices. In itself that is not an abuse. The difficulty is that these transfer prices can be set in a way which moves surplus actually earned in one state to another resulting in a loss of foreign exchange, taxes, investible surplus and—perhaps—higher wages and prices to domestic employees/suppliers. The dominant reason is probably to have the profits appear in a convertible currency useable for investment and dividend payments anywhere in the world. The second reason is to have profits appear in states with low or nil effective profit tax rates—apparently an especially critical element in banking and insurance. The third is to disguise true profits if showing them would “invite” the host state to deny tax concessions, raise taxes, lower import duty protection, nationalize or host state workers and producers to demand higher wages or prices. Each of these purposes is consistent with what are necessarily the dominant goals of TNC managers—surplus, investment possibilities, chance to have future surpluses and investment possibilities.

Results analogous to common ownership or management (Gecomines, The Zairean state copper company, appears to be a massive loser by transfer pricing because of effective management control by a Societe Generale group firm even though it is 100% state owned and a formally independent enterprise) can result from unequal knowledge. The Nairobi Tea Auction prices appear to be 20-30% below UK market prices not over half of which can be accounted for by transport/marketing costs and not over a quarter by sales from East African plantation subsidiaries to marketing companies of the same group. Even greater discrepancies exist in East African hide prices paid by brokers and their immediate resale prices to tanners and shoemakers even though no transfer pricing proper arises

here, merely a *de facto* broker monopoly on knowledges of both the actual sellers and the actual users and their dependability, credit worthiness, etc.

The Openings For Manipulators

Transfer pricing's manipulation is made possible by four main weaknesses:

1. inadequate knowledge—e.g. as to non-manipulated prices, alternative buyers or suppliers—on the part of Third World States;
2. inadequate negotiation of contracts and other arrangements with TNC's (e.g. the sweeping tax concessions offered when what empirical evidence there is shows that tax holidays are rarely a crucial factor in TNC foreign investment);
3. lack of adequate legal frameworks (e.g. requiring the divulging of adequate data, providing for binding independent analysis of prices) to control TNC practices;
4. unequal power because no alternative to the TNC exists for a specific purpose (e.g. the Central Selling Organisation in diamonds which is at one and the same time an effective sellers' cartel and an instrumentality of the Oppenheimer Group's de Beers branch) or because no alternative is known (e.g. in simple industries such as glass a seller may give an illusion that only he can provide a machinery—knowhow—credit package when at least a score of alternatives exist unknown to the Third World party).

Building up knowledge collection and analysis capacity is a first necessary step. Sometimes that is easy. For example over 1973-1978 one could compute the intermediate marketing company margin on petroleum from prices of oil and tanker rates regularly published in the *Petroleum Economist*—at least two small states saved themselves several million dollars doing precisely that before agreeing import prices for oil with major TNC's. Sometimes it is very complex—e.g. to calculate the "proper" transfer price for components e.g. parts of machines, or lorry drive shafts may require an engineer and a cost accountant. It is rarely impossible.

Once the information is acquired, it must be analysed to test the reasonableness of transfer (and other) prices. If the results show divergences decisions must be taken on what changes to seek, from whom, by what means (e.g. Jamaica changed its tax from bauxite prices proper to aluminium because there was no apparent way to determine a "normal" bauxite price. Tanzania nationalized a meat packing firm because the domestic

export price setting issues were really insoluble within a joint venture). Much of the action will involve lawyers: drafting new legal instruments and then applying them; negotiating new contracts; possibly prosecuting offenders and, at the least, preparing prosecutable cases to secure out of court settlements.

Namibia: The Political Economy of Theft

A starker case is that of Namibia. Here one has what can only be described as the political economy of theft. Theft of political sovereignty so the state becomes a coercive instrument against the people. Theft of land—including mineral and fishing rights—so that settlers and foreign companies can have investment and profit opportunities. Theft of more land—so that the people have the choice of working for the settlers, foreign firms or starving. Theft of right to choose employers or residence—so that below family subsistence wages can be paid to "contract" (indentured) workers while their families scratch (or herd) out an income supplement in the "reserves". Any settler or company—whatever its desires—operating in Namibia is a beneficiary of and an accomplice to a system of theft. (One may—given the pervasive flows of surplus from periphery to centre—argue this much more generally, but the connection between wages in the UK and the price of Sri Lanka tea is so different in degree as to be different in kind from the "theft of Namibia"/profit of Rossing Uranium nexus).

Rossing Uranium—at 5,000 tonnes capacity one of the world's largest uranium oxide producers with a full capacity turnover of \$500 million, a direct capital cost of the order of \$450 million and an annual operating surplus of the order of \$250 million plus—is a case in point. South Africa (by the relevant date in illegal occupation of Namibia following the United Nations' revocation of the mandate, a fact known to its partners) negotiated with a series of companies led by RTZ to develop the mine. They negotiated a series of long term supply contracts—at least the one to the UK Nuclear Fuels at a "sweet-heart" price—to major nuclear energy producers. Most of the finance is South Africa, the management—technical expertise and majority of the equity are RTZ's.

By the time the mine came into production in the middle 1970's, the International Court of Justice had affirmed the validity of the Mandate's revocation, declared the South African presence illegal and concluded that any contracts purportedly entered into or concessions purportedly given by South Africa sequent to the Mandate's revocation were *void ab initio*. The UN had created the United Nations Council for Namibia as the successor to South Africa in regard to the legal powers of the Mandate (albeit given the continued RSA occupation it

could not exercise the majority of them) and it had legislated to forbid exports of Namibian natural resources.

Rossing—absolutely and in contrast to the least bad major employer (the Oppenheimer Group's Consolidated Diamond Mines—a comparable isolated, high profit, technically complex mining and treatment enterprise)—provided below standard housing, wages and benefits. It quite overtly accepted the benefits of political economic theft in general, as well as in respect to its own mining "rights". In addition grave doubts exist as to the adequacy of its environmental protection measures against windblown radioactive dust and radiation hazards of miners and—especially—treatment plant workers. The complex is now nearing 80% of capacity, may well recover the whole capital cost by the end of 1979 and is selling without serious problems (possibly by "swapping" its oxide flow to Paris for Niger oxide to meet UK and Japanese contracts in an inversion of the "wash" transactions carried out by oil companies and intermediaries to fuel the Rhodesian rebel regime).

Law, Power and Mobilisation

The relevance of law and lawyers to both of the above cases is not hard to see. Nor—hopefully—are its limitations. Until the excluded, exploited and oppressed (nationally and/or internationally) mobilize their power on the basis of self organisation to demand specific changes and are willing to act against those who reject significant change, the included, exploiters and oppressors will have little mutual interest (avoidance of a worse result is a mutual interest) in negotiating structural change and the best formal pattern of laws and array of legal negotiating talent will disguise the reality of lack of change, not serve as instruments of change.

More specifically in the transfer pricing case a series of questions involving legal substance and form arise, *inter alia*:

1. requiring companies to submit data on both local and global operations in a form allowing independent verification (or falsification);
2. setting up data collection channels in such a way that their results can be made binding (e.g. denial of import license or foreign exchange allocation, *prima facie* case shifting the burden of proof in a court proceeding);
3. removing obstacles to mutual use of information collected by government departments (often today statutorily restricted in respect not merely of Tax Authorities but also of Statistical Offices):

4. negotiating action by home governments to enforce data disclosure by their TNC's (starting with cases like Sweden where evidence of willingness to legislate to contract overseas actions of "their" TNC's exists);
5. creating institutional structures for contract filing and analysis and legal guidelines for approving or rejecting them (as in the technology contract screening in Mexico, several Andean Pact countries and—perhaps less coherently—in India);
6. ensuring that the basic legislation relevant to these controls takes account of the fact that the state is a party (not a disinterested arbiter) and places the burden of producing evidence on the firm either from the start or from the point at which a *prima facie* case of manipulated pricing is made out and further ensuring that the penalties for such offences are commensurate with the damage they can do to the economy and people (e.g. unlimited fine, forfeiture of assets in the transaction, and/or 14 years imprisonment ceiling under some Tanzania Acts).

Rossing—The Laws Repeal or Repeal to Lawyers?

In the Namibia case the silence of lawyers—with honourable exceptions—either on the political economy of theft (which may not raise justiciable issues but might be expected to appeal any lawyer who believes that "natural law", "common law" and equity have anything to do with his profession) or the Rossing contracts has been deafening.

If law is at the base of liberal democratic (or bourgeois) order and authority and the International Court of Justice is its highest organ in respect to international law, this silence is curious. Here is a legal opinion handed down (by a wide majority basically composed of liberal democratic lawyers) totally disregarded by a series of companies, to a high degree ignored by many states, flagrantly rejected by at least two (South Africa and the UK). Lawyers are usually quicker to rally to the defense of the law.

What Next?

If Namibia achieves independence because the mobilization of Namibian force (the SWAPO army, held at bay to date but at a cost of \$500 million a year to the Republic) and of foreign pressure (either for justice or for a "peaceful" transition limiting the involvement of other states) then the questions of Rossing (as of the aftermath of the political economy of theft in general, e.g. land "rights") become of prime concern to Namibia's government and its lawyers:

1. is there—as it appears—a clear legal basis for the forfeiture of Rossing (and other post 1966 mines) without compensation to South Africa? to RTZ? to “third party” bank lenders? How can it be best set out?
2. if not, since the “concession” was clearly *void ab initio* what—if any—are the legal constraints on rents, taxes royalties from the date of initial operation?
3. since—especially after the Council for Namibia order—any purchaser was on notice that Rossing oxide was stolen property what legal recourse has Namibia against such buyers? How likely is it to succeed in actions and in which jurisdictions?
4. in particular what legal action is possible to recover on sales made at below world prices on long term contracts interlocked with the Rossing mining “contracts” in such a way as—under the ICJ ruling—to make the purchaser *de facto* (and *de jure*?) a “receiver”?
5. given the ICJ ruling, the Rossing contracts would appear to be not merely void but to involve first conspiracies to commit and then committing of felonies (e.g. grand larceny). If this is correct, then a further issue arises—participants in felonies are normally responsible for side consequences of their actions (e.g. injuries and death resulting from method of construction and/or inadequate safeguards in respect of radiation). Do the contracts constitute conspiracies to commit and then carrying out committing of felonies? Are the consequential results also legally offences? If so, how can they be prosecuted, by whom, against whom (e.g. the signatories? the prime movers of the contracts? major managers and officials?)? What is the relevance of RTZ's defense that as the UK did not accept the ICJ ruling nothing it (RTZ) did was in violation of British law?
6. assuming forfeiture of Rossing on the grounds of initial illegality, what legal obstacles to marketing of oxide may RTZ raise? or South Africa? or term contract purchasers? (Can these be overcome (as they were in the somewhat congruent Chilean copper cases)? How?

These are not trivial questions—the potential output value is \$400 per Namibian and the potential surplus over \$250. That aside, Rossing has become a symbol of injustice and of foreign collaboration with South Africa to Namibians. No Namibian government can afford politically to be seen to fail to act. The better its legal advice, the more effective its actions are likely to be.

Objectivity or Defense of Exploitation?

The standard defense of existing legal norms is that they are objective. It would be surprising if that were literally true—laws and legal systems attempt to embody and to enforce certain values and to require or to prevent (or sanction) certain acts. Laws are not "objective" about murder—they embody a condemnation and provide severe sanctions. No more can one assume economic laws are objective—"caveat emptor" (let the buyer beware) is hardly objective when the seller is large and strong and the buyer not, laws forbidding "bond" labour are not "objective" among different types of labour relations or sub-modes of production. The central problem of international economic law (public or private) has been posed by Idriss Jezairy of Algeria:

How many times more will the law hide behind the necessity to respect established regimes or a purported objectivity compatible with colonialism, diverse forms of racial discrimination, with neo-colonialism and the exploitation of man by man? . . . international law like national law is never neutral to political options.

These characteristics are not unique to First World—Third World transactions. However, within at least many industrial economies, legislation to protect the customer, the trade union, the small firm, the worker and the state has some impact and in transactions among large enterprises each usually is able to afford the time and talent to know and make use of the legal framework. Neither characteristic usually pertains to Third World parties to contracts with industrial economy based enterprises. Two fields in which the resultant difficulties are particularly severe are knowledge purchase or hire contracts and major engineering or plant and equipment contracts.

Knowledge is Profit

Arguably knowledge capital has superceded finance and industrial capital as the dominant form. The knowledge of how to make, to sell, to buy, to organise, to procure finance comprises the key asset of many TNC's. Their ability to sustain and expand surpluses and to find ways to reinvest them depends on their ability to produce, acquire, analyze, reorganise and apply hard (e.g. machinery) and soft (e.g. marketing data) technology. Not all knowledge is directly translatable into power and profit—only that which—whether by patenting or, probably more important, control over use in ways preventing or delaying its acquisition by others—can be made the property of a firm and either used or sold (or rented) by it rather than becoming part of the general store of know-

ledge. Further, not all profitable knowledge has any base beyond psychological preferences themselves built up by advertising e.g. any competent food chemist with a moderate laboratory can effectively duplicate the Coca Cola formula within a year and water taste differences are far greater than the divergences among many cola drink formulas, but acquired (or rather expensively promoted) tastes mean that the "right" to produce Coca Cola is a very valuable one in most market and even some socialist states.

Knowledge can be bought in a variety of forms. Patents, copyrights, trademarks can be leased (licensed) for royalties or for a lump sum. So can particular bits of knowhow or a flow of knowledge developments. Particular services—e.g. marketing or finance raising—can be procured by contract. Knowledge embodied in human beings can be hired—individually, from consultants, as part of knowledge sale contracts. Knowledge embodied in plant, equipment or programmes (e.g. the Kalamazoo accounting system, computer programmes) can be purchased.

What is Acquired?

What type—or level—of knowledge has been acquired varies—partly with what has been purchased but even more with the national training, research, development, adaptation framework into which it is fitted. At one extreme, foreign experts work foreign machines so the knowledge permanently transferred is nil—all there is the temporary use of foreign knowledge e.g. at least in its initial stages the Sri Lanka light bulb factory. At the other a single sample machine or the right to use a process for a lump sum payment leads directly to local personnel training, adaptation, machine manufacture, subsequent innovation i.e. the knowledge is rapidly incorporated into the national enterprises' own knowledge capital—the usual situation in Japan which is by far the world's largest importer of knowledge capital not embodied in plant and equipment.

Knowledge is often sold or leased with limits on its use, adaptation or incorporation into local "stocks" of knowledge. The quantity, quality or type of product may be limited or its export controlled or forbidden. Adaptations may be forbidden or may become the property of the lessor (seller) not the innovator. Retransfer of the knowledge and/or building the plant and equipment embodying it may be limited or forbidden.

Particular Purchasing Problems

Evidently these characteristics of the knowledge business raise problems for Third World (and other) buyers and

1. it is difficult to know what one needs, whether what is offered is suitable, what any particular piece of knowledge will be worth to a degree quite different from that pertaining to standard goods or services;
2. estimating the cost of the knowledge to the seller (and especially the cost of creation or profits on use given up by selling to any particular Third World buyer) is virtually impossible so that the profit margin on many transactions is a matter of conjecture;
3. the absence of knowledge very often means that alternative sources of knowledge (e.g. a market research service or an office staffed by hired experts instead of a commodity broker) are not known so that the true costs of the alternative cannot be calculated by the buyer;
4. absence of knowledge makes it very hard to assess claims for apparently similar, assertedly unique or purportedly more appropriate pieces of knowledge—is the simpler, cheaper tractor really useable? is there only one float glass process? are the dozens of competing bottle making apparatus broadly comparable?
5. in the case of embodied knowledge what is the true cost of the machinery excluding the proprietorial knowledge and what is the knowledge charge is not an easy question to answer without sophisticated machine design and cost accounting knowledge;
6. what part of the knowledge need be purchased, and how much in the way of items (knowledge or goods and services) which could be produced or acquired by the enterprise (or state) itself are being included, is often a key question as is the related one—are the other pieces of the package overpriced?
7. for a state, the issue arises to what extent are technology and knowledge imports preventing the development of local capacity (whether in user firms or specialist enterprises) and thereby raising a case for "infant knowledge industry" or "foreign exchange saving" protection measures?

One could continue, but the points that knowledge is a key import, one traded in a complex and imperfect market and raising major problems of contract negotiation (or even knowing what to negotiate for!) are made. In these fields legal instruments are usually none too helpful a guide—the law has lagged in dealing with this branch of commerce especially in respect of forms more modern than patents—trademarks—copyrights or issues more complex than taxation.

Performance and Penalties

Most major civil engineering or complete plant or management contracts do not have workable two way performance guarantees with effective means of enforcing them. From the Third World point of view these standard defects in contracts are a one way street to losses from non-performance costs not recoverable from the defaulting party—after all these are all categories in which the Third World as a whole imports from the First and Second. (Within the Third World the situation is more complex e.g. Sri Lanka doubtless loses to India on this set of standard contract weaknesses.)

In construction, penalties for failing to complete on time are usually absent or so limited as to be derisory relative to costs of delay to the buyer. Fixed price contracts are rare and the degree of justification needed for cost overrun claims varies widely (from derisory to lenient)—the sole exception being certain Middle Eastern states who probably pay by extortionate initial contract prices. Failure to meet guaranteed specifications usually incurs some penalty but rarely the waiting time cost to the buyer. Payments are usually made on a schedule which leaves only a minimal final payment which can be withheld against claims and standard performance bond cover appears to be around 10% of the contract sum. Against designers, consultants, engineers the ability to claim—e.g. if a design is in practice unuseable and redesign during construction doubles costs—is usually even lower and the practical chances of collection near negligible.

The same general problems bedevil plant and equipment contracts and management agreements. In the former test run guarantees are common—actual performance is normal operation over several years less so—substantial post completion performance bonds rare—liability for loss of profits from failure to perform virtually unheard of. These are not small issues—in a single case involving an Algerian gas liquification plant, completed (after redesign) years late, the cross claims for late delivery, redesign, loss of profits on the one hand and added costs on the other approach \$2,000 million. In the case of management contracts, actual performance guarantees are virtually unknown and clauses providing for penalties for non-performance are even rarer—indeed so bad are most such contracts in this respect that the only remedy for an incompetent management contractor is to fire him and seek in litigation or arbitration to limit his claims for "breach" or "premature termination".

A Warning Example

For example, let us take a draft contract for a moderate sized lot to the supplier—very large to the importing state, huge in

terms of previous ventures of the local entrepreneurs) plant using standard, fairly widely available technology to be built in a small poor (say 15 million population \$3,000 million Gross Domestic Product) peripheral economy. The cost of the plant is given in one line with no technical specifications, no performance guarantee, no deadline for completion. The knowledge transfer cost is another single line item without specification or guarantee.

Payment to the supplier is to be by an external financing body on the basis of self certified claims by the supplier not, it appears, challengeable by the purchaser. As there are no performance guarantees, the issue of performance bonds does not arise. Payment to the external financing body is to be guaranteed by two major domestic commercial banks and is independent of whether the plant is on time, able to produce desired quantities of saleable quantity or even—on a quite plausible reading—delivered and made to function at all.

This is a particularly bad example of an unbalanced contract. However, it is not unique. Hundreds of such contracts are "on offer" today. A decade ago they were the norm for TNC/Third World enterprise (public or private) transactions; even today they remain the standard in a not negligible number of Third World economies.

A Qualification

Doubtless there are problems on the other side. With present rates of inflation, fixed price contracts (or even limited cost overrun ones) can be a speedy route to bankruptcy. Guaranteeing performance during operation by others is not without risk (e.g. a qualified engineer—in this case Western European—may turn off the alarm on a pressure gauge because its ringing irritates him with a resultant pipe burst putting a 100,000 tonne fertilizer plant out of action). When a contractor depends on designs or plans from client or consultant, who is to blame if he cannot execute them is rarely an open and shut issue. Large, long term performance bonds are costly—especially because they are rare so insurance companies find it hard to assess risk or build up an adequate range of contracts to achieve a balanced claim record.

However, what cannot be denied is that in this field the law is by no means balanced and objective as embodied either in statute or in contracts. *Caveat emptor* remains very much alive.

Principles, Practices and Methods

Both of the foregoing areas are ones in which the warnings that principles are not self implementing and that slogans are

co-optable are peculiarly opposite. To argue that all knowledge should be made available free is either advocacy of a socialist world government with all knowledge development a central government charge (advocacy which goes rather beyond knowledge creation or, for that matter, this paper) or hopelessly unrealistic. Advocacy of fairly determined prices based on adequate disclosure is a practicable principle, and one which can be embodied in national legislation, but it is not a principle which operates itself. The slogans for a Code to cover transfer of technology have already led to the World Intellectual Property Organisation (the first UN agency primarily for the defense of TNC interests) and even in the presumptively more favourable forum of UNCTAD to the astounding secretariat proposal that for technology transfer code purposes the law of contract should be left open to negotiation—a reversal of what many Third World states (notably Latin America via the "Calvo Clause" and India) have fought tooth and nail, contract by contract, forum by forum to achieve for up to five decades!

Solutions require nuts and bolts to hold a framework and its articulation together—many of them legal nuts and bolts. The debacle in respect to the code could have been avoided by utilizing Third World lawyers with both experience in, and knowledge of the history of, the "choice of law" issue. More generally—or rather more particularly—the codification of guidelines for determining whether a price is fair or performance clauses are adequate and balanced requires a combination of legal drafting, contract law, engineering and design, cost accounting and economic analysis talent. Even then negotiating individual contracts to make effective use of the guidelines will require the same array of expert advice.

Wipe out WIPO

One field of knowledge transactions and especially its apex institution—the World Intellectual Property Organization—appears worthy of particular legal attention. WIPO is the UN family successor to a previous private international body (BIRPI—Bureau for Protection of Intellectual Property Rights). Its avowed purpose is to protect the incomes of those holding patents, trademarks, copyrights. Basically the holders are TNC's—the individual holders of really valuable rights are already rare and becoming rarer and the exceptions rapidly became TNC's in their own right e.g. Polaroid, Xerox. Only trivially do these pieces of paper encourage knowledge creation (IBM does not base its knowledge creation on patentability, nor do university researchers, trademark registrability does encourage advertising and image creation but arguably along the lines of "disinformation" not information; copyright may be more useful in encouraging publishers but can hardly be

supposed to effect most authors including the present one who write for quite different reasons).

What trademarks, copyrights, patents do is to create statutory monopolies over pieces of knowledge, thereby assisting their owners in extracting monopoly profits from their sale and preventing others from reinventing or copying them. On the face of it hardly a plausible purpose for a UN agency (unless one also argues for winding up both UNESCO, the UN Transnational Centre and the Technology Transfer division of UNCTAD!). The cure for once is simple—not reform WIPO but wipe it out and transfer its legitimate concerns to UNESCO (copyrights) and UNCTAD (patents). The omission of trademarks is not accidental—the author sees no legitimate case for them as property rights, they are not subject to abuse but constitute an abuse.

Possible National Legislation Guidelines

Perhaps more important are questions of national legislation. Some working guidelines might include:

1. registering foreign patents fairly freely but on condition that they must be licensed or worked within three years of registration or become subject to compulsory licensing to domestic firms at state set fees;
2. using inventors fees and research support grants (or tax offsets) to back domestic research including copying selected foreign technology and providing a mechanism to encourage licensing (purchase) of local innovations whether through the patent system or otherwise;
3. registering copyrights fairly freely subject to the right to demand local publication if the estimated market is in excess of 1,000 copies (with the penalty forfeiture of copyright) and subject to the right to reproduce in whole or in part for educational use without payment of royalties;
4. ban registration of foreign trademarks (or "get ups" or their extended family such as distinctive packagings) since these give no benefit to the consumer—quite the contrary;
5. however, take powers under fair trading legislation to prevent fraudulent labelling especially as to nature, performance, ingredients or quality but including deceptive naming where this is deemed by the authority to be likely to injure the consumer;
6. consider the informational and identification value of domestic trademark registration vis a vis the cost in terms of creating the basis for artificial "product differentiation based on "disinformation".

Toward Technology Codes

To state technology codes are really cost reduction and use broadening codes—limiting charges and removing restrictions on adaptation, production and export. These objectives are valid but limited—they do not deal with broader "choice of technology" issues and by lowering costs raising benefits of foreign technology they may actually inhibit the development of domestic knowledge creation, adaptation and application capacity. To fulfil these objectives requires other strategies, policies, institutions, programmes and laws. As they are—at least logically—compatible with the goals and working of existing technology codes and are so complex as to require far more space than is available, they will not be discussed further here.

The first step for lawyers (or political economists) in this field should be to look at the better extant national legislation procedures, results and reasons for action e.g. Mexico, Andean Pact, perhaps India (albeit that is relatively more scattered, bureaucratized and internally inconsistent but again also more firmly built into the national legal and state agency system). The next should be to examine what the actual forms of technology knowledge purchase are e.g. in Tanzania it is about 90-95% machinery—plant—equipment, 2-5% contracts much broader than simple knowledge transfer, only 1-2% fees—licences—royalties of the type primarily dealt with by Andean Pact or Mexican approaches.

Only then can one usefully set out to identify specific national problems, goals, procedures. Following that, one can turn back to the existing codes to see what can be utilized, what needs to be adapted, what gaps require original national drafting.

VI

A Trade Union of The Poor

It is—as Chairman Mao pointed out—useless to talk of ends without also identifying means. If, for example, one's end is to cross a river, one must canvass ways and means of constructing a bridge or a ferry (or presumably a tunnel). The issue of mobilization of power has arisen several times in this paper. In that respect a quotation from President J. K. Nyerere's Georgetown, Guyana address is relevant:

We need a trade union of the poor.

Pushing analogies too far is unproductive but the trade union/Third World one has more points of likeness relative to some of the problems in achieving joint Third World action than is usually realized:

1. the interests of trade union members vis a vis each other are rarely identical—a joint position for external negotiation must be based on a compromise or synthesis of targets among members;
2. there are usually quite wide diversities in status and bargaining power among sub-groups (especially within industrial, as opposed to craft, unions) with the best placed (e.g. artisans) under some temptation to split off and "do a deal" on their own—a situation not irrelevant to the "differentiation" issue within the Third World and especially the attempts by the First World to use it to do special deals with certain Third World states e.g. Brazil, India, Mexico, Saudi Arabia and—until early 1979—Iran;
3. external unity is not inconsistent with quite open internal dialogue so long as the dialogue does lead to agreed (even if perhaps limited) areas of joint action and does not open the way for outside "divide and rule" initiatives—a point, perhaps, against that brand of "Third Worldism" which argues against serious internal debate and glosses over differences;
4. trade union activities include both external struggle and internal solidarity (e.g. education, welfare, co-operative shop) aspects—a possible parallel to "Trade Union of the Poor" and "Co-operation Against Poverty" aspects of collective self reliance.

Interaction—Toward Integration and Symetry

The most dramatic form of collective action by peripheral economies is that which involves struggle with industrial economies—the great symbolic successes are OPEC on the operational level and the Charter of the Economic Rights and Duties of states on the international platform level, albeit the limping CIPEC (copper) and UNCTAD quasi-negotiations are perhaps more typical. However, it is arguable that the most critical areas of collective self reliance in the medium term lie in building up interaction among peripheral economies. Evidently the fields overlap—a joint enterprise of several states (as proposed in the context of the Latin American Economic System—SELA) for capital equipment purchasing may promote preferential intertrade and serve as a means to get better prices from industrial economy suppliers. More generally, the existence of an alternative set (or alternative sets) of international economic relations among peripheral economies is likely to increase their bargaining power vis a vis industrial economies.

The present patterns of global economic relations are distinctly distintegrated and non-symetrical. North-North and

North-South links are much stronger than South-South. This is not limited to trade; it is just as true of transport, communications, information and knowledge, technical cooperation, finance, raw material flows. This pattern greatly reduces peripheral economy power individually—by limiting alternatives—and collectively—by ensuring fragmentation. It results in massive intermediation i.e. triangular South-North-South transactions often with the intermediary dominant. For example, the peripheral economies as a group over 1974-78 had a surplus on current account i.e. the deficits which Third World countries perceived themselves as meeting by borrowing from the First World—and perceived correctly so far as actual transactions were concerned—were actually being financed by the surpluses of other peripheral economies relet by denter financial institutions. A trade example concerns African hides and skins used by the shoe industries of the European periphery—almost all are sold to brokers/merchants based in Northern Europe who resell to the Southern European shoe factories, quite often without ever taking physical delivery but equally often at a more than 30% difference in price.

The record of direct South-South economic relations building is a mixed one. Neither the classic free trade area nor the fully institutionalized economic community has a very great record of success. Neither passive or facilitating measures (e.g. clearing unions, tariff preferences) nor coordinated planning (e.g. joint location schemes or regional factories) have had the results their proponents anticipated. However, it is equally true that the number of functional (if not always functioning well) multi country institutions and enterprise of political as well as intellectual interest and—perhaps most notably—of transactions of various types is growing not waning. The process may be one of three steps forward, two steps back on a rather eclectic trial and error model, but South-South action is increasing.

Possible Guideposts?

Some guideposts for further exploration may be useful:

1. while clearing or payments arrangements and tariff (or import licence) preferences facilitate trade, they do not cause it;
2. without commercial infrastructure (not just physical transport and communication but also commercial institutions, commercial data flows and commercial credit availability) trade will not prosper;
3. international trade is not an end in itself but a means to realize production potential or fill production gaps, there-

fore really rapid growth of trade is likely to require some mutual identification of, medium term arrangements as to, production as well as trade;

4. such arrangements may include selective regional planning (e.g. the Kagera Basin Scheme among Burundi, Rwanda, Tanzania and—hopefully—post Amin Uganda), sectoral planning (e.g. hydroelectric and fossil fuel power facilities for Namibia—Angola—Botswana), selected industry specialization (e.g. the ASEAN and Andean Pact regional industry programmes), multinational enterprises (e.g. the Venezuela-Colombia petrochemical-fertilizer-plastics group, the Eastern African National Shipping Line) or may be on a less institutional trade agreement and term contract basis, but at least in the short run will usually fall far short of overall planning coordination;
5. because the most crucial gap to building up links in other areas and to having nationally based development is the absence or intermediation through the North of specialized (as well as general) knowledge, the recent emphasis on TCDC—Technical Cooperation Among Developing Countries—(and in the mass communication field on regional and Third World press coordination and information exchange bodies) is both sound and promising;
6. national, regional and global coordination and integration by the South can use Northern inputs, but must be South controlled; therefore the use of TNC's (or their technical cooperation analogues, notably UNDP) should be limited both in the sense of a minority role in a Third World run South-South framework and in that of using them only where, to the extent that, and so long as no South input is available;
7. no cooperation/integration/collective self reliance venture can prosper unless it serves interests of all its members, serves them better than unilateral action would and is perceived in this light by relevant decision takers;
8. therefore, achieving a consensus on first steps, showing positive results from them and producing a division of gains and costs acceptable to decision takers (roughly no net losers, some special treatment for the weakest, rough equity in any sense meaningful to participants) is much more critical than precise initial programme content or institutional form.

Negotiation, Struggle and Change

The maxim that the South (or sub-groups within it) must stand together in negotiations with the North is now widely accepted not only in principle but to a rather surprising (com-

pared to—say—1945-1960 or even 1960-1970) degree in practice. The solidarity of the 77 in UNCTAD, the ACP in Lomé, the "New Commonwealth" in the Commonwealth is no longer a matter for cynical, relaxed amusement or condescending amazement by the North, but for some rethinking and rather more attempts to co-opt otherwise positive slogans ("More Aid For The Poorest", "Human Rights", "Basic Needs", "Differentiation", "Newly Industrializing Countries", "Special Relationships") to the service of new "divide and rule" efforts to break a solidarity now seen as an emergent reality actually beginning to alter the balance of power in a number of areas of structural negotiation. The February 1979 decision of the 77 to pledge \$1 million each to the Common Fund's equity (no matter how heated the dialogue before this was agreed and no matter what one's doubts on how far forward the Common Fund will take the South) is a major example of this new commitment to joint action. Indeed in going not only beyond joint statements but also beyond joint negotiating stance to joint action to alter the context of negotiations it breaks new ground. (True OPEC had changed the context even more radically but it was a much smaller and—on the point at issue—more homogenous body than the 77.)

However, there are still real dangers. First some of the larger—and at the opposite end of the spectrum some of the weakest—Third World states are tempted to revert to direct negotiations in cases when such action would break a joint position. The only way to reduce the risk of this type of erosion is to achieve at least a few structural breakthroughs and a number of secondary gains. If the NIC's believe they must hang together or have their industrial exports to the North hung separately by protectionist lynch mobs, they will hang together. If they also see that in GATT they need the support of the least industrialized, they will perceive a point to standing firm on trade liberalization in respect to tropical and simply processed products. Collective self interest is a great reinforcer of solidarity.

Second, no global negotiations have yet been carried through to major success by the 77. True this is at one level the result of OECD member intransigence (passively backed by the USSR at the last UNCTAD albeit for reasons divergent from those of "Group B"—OECD) but it is not clear that the 77 as now organized have the information, analysis, personnel, speed and flexibility in response to negotiate very effectively below the level of broad guidelines. Certainly the record in GATT and IMF suggests there are deficiencies here albeit that of ACP/EEC and OPEC also suggests these can be overcome.

Possible Partial Ways Forward

Again a few suggestions for exploration may be of use in stimulating advances in thinking and practice:

1. different issues require different groupings of Third World states e.g. commodity producers associations, textile/garment exporters, users of the services of a particular line conference;
2. as with "cooperation against poverty" South-South groupings, the basic tests for participation are perceived joint interests and ability of the group to develop common stances based on these interests (CIPEC largely fails on the second test, failure on the first has meant to tea or cashew nut producers associations to date);
3. similarly membership in overlapping regional (e.g. an Eastern and a Southern African) or special purpose groups (e.g. dealing with Pacific and with Indian ocean shipping conferences) is not a sign of weakness but of vitality;
4. on the other hand, a plethora of relatively moribund bodies already exists so before creating more a clear common interest, a way to achieve it, a core of interested states and the means to pursue the chosen route should be demonstrated;
5. even in areas—e.g. GATT negotiations—in which a joint 77 stance is needed, an overlapping set of sub-groups (some regional, some product) might well create more specific data and a lesser number of proposals allowing a clearer, better articulated and more effective set of bargaining proposals than starting with all 120 odd 77 member states working from a blank piece of paper;
6. while the 77 (or in some cases the Non-Aligned despite its weak Latin American representation) has become a fairly formidable mobilizer of power and bargaining force on some issues at macro or principle level, it has an uneven record there and a much less promising one at detailed negotiation level; because of person power shortages most peripheral economies cannot participate effectively in all negotiating form suggesting that constituency chosen representatives (balanced by similar limits on total First and Second World participants) might, in some forums, increase Third World impact especially in detailed negotiations or on technical subjects;
7. a weakness of most Third World "trade union" bodies (notably not of OPEC) is the absence of any adequate technical secretariat to collect and analyze information,

with the 2000 proposals and service negotiations—a weakness perhaps most glaringly evident in the case of the 77.

8. to suppose that a global body (e.g. UNCTAD) can play such a role is wishful thinking—any global body is responsible (and responsive) to all (or almost all e.g. South Africa's views can normally be ignored) its members and if it is to be a negotiating forum and "honest broker" (as UNCTAD tries to be) an essential condition is that all parties have confidence in its being relatively impartial among states or groups of states;
9. indeed by securing the image of a "Third World" body in the North, while being heavily First World staffed and influenced, UNCTAD has weakened its potential as a negotiating forum/"honest broker" without providing a technical capacity really under the control of the Third World. Perhaps worse it has made "honest broker" compromise proposals (e.g. the Common Fund, Technology Transfer) which were very far short of any reasonable Third World initial demands, but which in the absence of clear 77 articulated proposals become *de facto* the Third World starting point and thus meant that any compromise was away from the "middle of the road" UNCTAD position and to the Group B side. It is rarely good negotiating tactics for one side to start with what may be an acceptable "final bargain" rather than its own full goals when the other side is certain to start with its own preferred solution (not a compromise), but that is precisely the result UNCTAD's proposals for the Common Fund had in the absence of a clear, detailed, technically articulated 77 position.

Identifying, Grouping, Acting

Third World states have on several occasions failed to act when they had the formal power to do so within existing institutional structures and/or failed to see the broader problems into which certain lines of specialized negotiations were leading. Part of the cause appears to be inadequate use of—or contributions by—lawyers. Only in the Law of the Sea Conference have most Third World states deployed an array of legal talent; but there are legal aspects to all or almost all major international political economic issues not just those labelled "Law of...".

For example the 1977 Amendments to the IMF Articles were woefully unsatisfactory from a Third World point of view. The major capitalist industrial states achieved the main changes they wanted, the Third World's three key targets—a successor to

the Group of 20 with 50% Third World members and specified powers over broad financial policy issues, a guaranteed issue schedule for SDR's (Special Drawing Rights) adequate to move them over 10-15 years to the position of a central reserve asset at least comparable with the dollar, the creation of an SDR-Development Link (the cause for which N. M. Perera had so ably mobilized peripheral economy Finance Ministers on earlier occasions) allocating the bulk of SDR's to low income states—were not included. True, SDR issues were possible (but not guaranteed and with no link) as was the Special Council or Committee (but with no guarantee of activation and with provision for 65% capitalist industrial economy voting strength). All there was for the periphery was a modest bribe—a share of the proceeds of gold sales would go into a soft loan fund. This dismal package was endorsed as the best that could be had by the Group of Twenty Four (in a sense the Central Bankers' sub-committee of the Group of 77 but a self appointed one with no formal linkage or responsibility to it). Very few Third World states (at least one—Tanzania) voted no.

Where is the legal issue? To amend the Articles requires not simply a high per cent of the votes—the North could muster that with only marginal South backing—but also the approval of two thirds of the member states. Three quarters of the member states of the IMF are Third World. The major industrial economies very much wanted the parity and gold changes in the package. Had there been a firm South position there is every reason to believe a better package could have been had, but the Third World side seemed largely unaware that, for once, it held a legal blocking power if two thirds of its members stood together and voted no or abstained.

Similarly in the Transfer of Technology dialogue—as already noted—there is a danger of reaching a "compromise" leaving the law of the contract up to negotiation by the parties in each case. Adequate legal advice should have forewarned those offering this concession of its sweeping implications for other areas of international economic transactions.

Mobilisation, Change, Law

It is, unfortunately, hard to identify a case in which mobilization has been successful on the basis of a legal input. It is true that the only coherent draft articles for the Common Fund are Third World (Marga institute) drafted and that this draft has had some influence on negotiating positions. However, if the Common Fund is salvaged in a worthwhile form two quite different mobilizing acts will have been critical:

1. the December 1977 semi-walkout by the 77, refusing to accept another papered over statement of 'progress' when

the Group B position remained a wrecking or delaying to eternity due—serving clear warning that either the talks had to make genuine progress or end in real confrontation;

2. the February 1979,77 commitment of \$1 million per state to the basic equity to force Group B's hand on the equity capital (and voting power) issues.

True, law is not usually a mobilizing instrument for those seeking to change the status quo. Political action is much more critical for those on the side of major structural change. However, the absence of lawyers from the mobilizing process can be demonstrated to have lost potential gains (the IMF case) and endangered hardwon past gains (the law of contract case). Further it is probable that were lawyers more directly involved they could play a useful supporting role in mobilization of Third World political economic negotiating power over a wider array of cases than those cited.

Structuring for Action

The cite an African proverb:

The shadow of a man drives the fish,
but unless there is a net,
no fish are caught.

Mobilisation of power is primarily the duty and the possibility of politicians—that is the shadow to drive states and TNCs into serious negotiation. But the counterpart is devising structures, contexts (legal and other) and institutions which constitute a fine meshed net. That is in large part the business of technocrats and intellectuals advising, articulating, acting on political decisions and it is a duty which has not been very well performed to date perhaps especially by intellectuals (whether political economists or lawyers).

Part of this issue relates to institutional structures, their "constitutions" and procedures and their interactions. Here a few skeletal comments can serve:

1. regional, special product, sectoral (e.g. communications, development banking), functional (e.g. clearing unions), and operating (multistate joint ventures) bodies with self selected membership and workable goals—procedures—divisions of costs/benefits are slowly becoming of increasing weight and could in many cases do so more rapidly if their technical (legal, economic, managerial) personpower was more adequate in numbers and more innovative in approach;
2. there is a need for developing interrelationships among such bodies—perhaps logically via specialized groups or

committees (e.g. for Regional Clearing and Payments Unions, Conferences of Central Bankers) under the aegis of the Group of 77 (or the Non-Aligned). To work well these committees would need at least a small permanent secretariat for data collection and analysis, identification of opportunities for collaboration, responding to group requests for articulated programmes;

3. in some negotiating forums, and in some stages of most negotiations, Third World interests would be better served by having groups of 14-30 negotiators (one half Third World) chosen by constituencies of countries. These are not levels at which a majority of votes helps much but they are forums in which specialist knowledge is essential. The latter can be secured on the Third World side only if each state has only a limited number of groups to participate in, and can be enhanced if there is a backup secretariat to provide the Third World representatives with information and specific research on request. (The model is the Group of 20 on Monetary Reform whose 9 elected Third World members were able to represent their "constituencies" effectively, to mobilize adequate technical expertise and to call on a secretariat responsible to them). For detailed negotiations the added point arises that 100-125 participants is not a workable number—20 is rather more optimal for achieving results which are then subject to approval (or otherwise) by a plenary of all participating states and by their governments;
4. the Group of 77 (and other broad membership Third World groups like the Non-Aligned) need to develop greater articulation of a broader range of targets, to translate these into clearer negotiating proposals, to elaborate tactics and fallback positions so that they can respond to counter-proposals and compromise offers and to have an independent technical/analytical/data base both for elaborating and for defending their negotiating positions. Barring virtually continuous sessions of senior 77 officials working from national data and detailed proposals, this appears to require a permanent Third World technical secretariat responsible to the Conference of Ministers.

A Third World Secretariat?

Each of the above propositions has legal implications—constitutions, elections, procedures, intergroup relations, legal data and analysis, servicing negotiations. Each also suggests that a key missing element in South-South cooperation is a permanent Third World Secretariat.

The need for more data and analysis to back up Trade Union of the Poor political mobilization is no longer widely disputed—at least in the South. The impossibility of seeing UNCTAD'S secretariat as more than an interim substitute and perhaps a longer term source of specialized technical assistance has been argued. The Third World Forum—occasionally nominated for this role—is a group of intellectuals whose critical, ideological and prophetic roles are hardly compatible with being an inter-governmental research unit. Bodies like the Centre for Research on NIEO can play a supportive role but are unlikely ever to have the resources (or the breadth of confidence among 77 states) to be a real substitute.

What are the real problems:

1. location of headquarters;
2. initial secretary general;
3. selection of staff;
4. finance;
5. powers and responsibilities.

These have embrangled progress to date—hopefully the exploratory committee appointed by the 77 at its Arusha Conference represents the beginning of a breakthrough. On each issue lawyers could do much to reduce real fears and to smooth procedural problems:

1. select an interim **location** in a Third World country not large enough or ideologically prominent enough to be likely to dominate the institution and with good transport and communication links—e.g. Malta;
2. choose secretary general's for six year non-renewable terms with the first a distinguished economic (e.g. Finance, Planning, Commerce) minister personally known and respected by many 77 ministers, with clear views and an ability to develop them but also of demonstrated ability to work with those of divergent views (the 77 is far from homogenous on many issues). Again he should be a citizen of a respected state but not one so strong as to be able to dominate (e.g. not Brazil, India) nor one perceived as so rigid in its position as to raise worries by a large number of the 77's members;
3. if each state was entitled to name 4 professional staff and the Secretary General in consultation with a Steering Committee elected by the 77 to name 75 more (subject to a ceiling of 15 from any one state) a total of about 500 professionals—or distinctly more than the minimum needed—would be to hand with no danger of dominance by one state or group;

4. the budget requirement of—say—\$25 million (at full staff) could be handled if states expected results. If staff were seconded and the seconding state paid their salary to the Secretariat as part of its contribution, this would cover over half the cost. The balance could be collected on a scale ranging from \$20,000 for the smallest states to \$500,000 for the largest. In fact the initial staff and budget are likely to be much smaller;
5. evidently the 77's Conference of Ministers must have the power to give general guidelines and to request specific services from the Secretariat. The Guidelines may include negative ones—e.g. A Secretariat concentrating its attention on "how to speed the replacement of capitalist by socialist modes of production" would have a very short life expectancy; some rules and self denying ordinances are needed to avoid divisive and self destructive (to the 77 and to the Secretariat respectively) initiatives. On the other hand, the Secretariat needs the freedom to use its professional judgement, to formulate technical proposals, to offer suggestions as to possible lines of action to the 77 and potential committees (e.g. of Central Bankers, Payments Unions, Preferential Trading Areas). No insoluble problems need arise—any major technical secretariat has similar problems and parameters. A widely supported Secretary General, a broadly agreed set of Guidelines, a Steering Committee for Ministerial/Secretariat liaison and a responsible staff should find no major problems (as opposed to secondary tensions) in this field.

In each of the "answers" sketched above, a legal component can be critical. This is especially true of the last. Whether formal Guidelines or formal Conference of Ministers/Steering Committee/Secretariat divisions of duties and powers can solve operational problems may be debatable. However, it is beyond doubt that badly drafted ones can cause problems.

Further it is probable that carefully drafted ones can—probably quite rightly—alleviate some of the real anxieties which have to date balked the institution of a Third World Secretariat to the benefit of the defenders of the Old International Economic Order and to the grave detriment of Trade Union of the Poor action.

VII

In Conclusion: A Valediction Enjoining Morning

A great poem by a British author is titled "A Valediction Forbidding Mourning" but what we need in respect of lawyers' role in trade and development is a valediction enjoining morning. There are too many darknesses—of lawyers who say why

or how what is needed cannot be done instead of devoting their minds to how it can or might be done. There are too many non-lawyers (in government or in universities) who see lawyers as hack translators to "put it into legal". There are too many on both sides who refuse to learn enough about each others disciplines, constraints and potential contributions to be able to hold a mutually intelligible dialogue, let alone to work together as a team united for common goals.

This paper does not purport to be—and I hope is not read as—a political economist "laying down the law" to lawyers. It is an attempt by a political economist who has worked closely and to his (and hopefully to their and their common clients'!) benefit with lawyers to illustrate some aspects of the present trade and development struggle and to show some areas in which law and lawyers have a basic contribution to make and should be far more integrally involved (especially on the Third World side) than they are today. As such it is as much an injunction to political economists as to lawyers and may indeed be as provocative in the interactions it suggests to the one profession as to the other. Its message in that respect is intended to be to cease to throw disciplines at each other like hand grenades and come together to unite the disciplines in a joint barrage on the problems, a joint struggle to achieve patterns of trade which actually are supportive of (not constraints on or inimical to) development.

That will be a long and arduous struggle. It will require identifying, mobilizing and organizing Third World power—not simply in general terms but also on issue by issue, sector by sector and case by case levels. It will require deploying analysis, selection and negotiation to win not merely overarching Charters but specific institutional, structural and contractual changes. To do this will require better political economic and sociological as well as legal analysis—better in the sense of relevance to Third World realities, responsiveness to Third World needs, application to solving real practical problems and within these parameters considerably higher professional competence and inventiveness.

No one should know better than lawyers that sweeping break-throughs are few and that even they are usually built on arduous step by step work which, in and of itself, is not very exciting but is often very exacting. It is a lesson that one hopes they (like the makers of successful revolutions—violent or otherwise—who from a very different perspective have a similar grasp on this aspect of reality) can convey to social scientists—academic and technocratic—and to decision takers who are, perhaps, too prone to visualize the end without adequate attention to the nature of necessary and possible means.