THE *NEW* NEW INTERNATIONAL ECONOMIC ORDER

Do doctrines contained in the original New International Economic Order have viability in the 1990s, in the face of the increased attractiveness of the free market approaches as contrasted to state socialism? In response to the international capital shortage and worldwide recession, how are states redefining legal regimes to attract foreign business and open new markets? What are the implications of enhancing protection against foreign risk, replacing domestic law with private international law conventions, and negotiating free trade agreements?

The panel was convened at 2:45 p.m., Thursday, April 1, 1993, by its Chair, Harold Hongju Koh, who introduced the panelists: Daniel M. Price, of Haverford College and Harvard Law School, now with the law firm of Powell, Goldstein, Fraser & Murphy, Washington, DC; Helen Elizabeth Hartnell, Tulane University, currently visiting professor of law at Central European University, Budapest; Joel R. Paul, Washington College of Law, The American University, currently a visiting professor at Leiden University; and C. F. Amerasinghe, Secretariat Director of the World Bank Administrative Tribunal.

REMARKS BY HAROLD HONGJU KOH*

Welcome to the panel on the *New* New International Economic Order. No, that is not a "typo"—that is the title of our panel.

At a time when Bill Clinton has promised to focus like a laser beam on the economy, yet at the same time must have at least one and sometimes two eyes focused on the fallout of George Bush's New World Order, it is worth remembering that before there was a political "new world order," there was a New International *Economic* Order. That concept grew out of a concerted drive by the developing nations of the world to establish new international arrangements devoted to principles of distributive justice and economic development rather than solely to the free market.

During the 1970s, the phrase "New International Economic Order" became a rallying cry for a major political campaign and movement by a majority of the nations of the world to move beyond decolonization to an ambitious reconstruction of international economic law around a new set of institutions, principles and legal instruments that has since become familiar to all of us.

With respect to *institutions*, the developing nations sought to develop alternative fora in which they could have a greater voice. They sought not simply to revitalize such fora as the UN General Assembly and Economic and Social Council, but also to develop new arenas, such as the Organization of Petroleum Exporting Countries, the UN Conference on Trade and Development (UNCTAD), the Group of 77 (developing nations), and such arbitral fora as the International Centre for Settlement of Investment Disputes (ICSID) and the Iran-U.S. Claims Tribunal, to work against traditional free-market notions of sanctity of contract and property, free trade, *pacta sunt servanda*, and—most notably—against the "industrialized nations' rule of prompt and adequate and effective compensation." In so doing, developing nations posited a new set of *principles* based on more explicitly distributive and equitable considerations. They spoke of "economic self determination," "sovereignty over natural resources," hostility toward "*dependencia*" (over-de-

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pendence on multinational enterprises), freedom to modify contracts to deal with changing circumstances, and "appropriate compensation under all the circumstances." These redistributive principles soon found themselves embedded in efforts to create new legal *instruments,* such as the UN Codes of Conduct for Transnational Corporations, the UN Convention on the Law of the Sea, and in 1974, first a declaration, then a program of action, and finally an ambitiously worded Charter of Economic Rights and Duties of States. Their efforts generated heated academic debate that still rages in the pages of this Society's publications, not to mention section 712 (the compensation section) of the American Law Institute's *Restatement (Third) of Foreign Relations Law.*

By the late 1970s, these countertrends appeared to promise a full-scale melding of private and public law, as well as an increasing internationalization of domestic law. But the 1980s brought a series of events that complicated the picture: worldwide recession, capital shortages, the debt crisis, Reagan, Bush, the Uruguay Round, the collapse of the Eastern bloc, the renewal of multilateralism, the push for European economic integration, the renewal of the unification movement in private international law, and the restoration of capitalist democracy in Latin America. Thus, it is worth asking at this moment in time—after Reagan, after Gorbachev, after Bush—what has become of the challenges to traditional principles, institutions and legal instruments that were thrust forward by the New International Economic Order? What is the current state of play in areas of trade and investment, private international law, regional integration and arbitration? More broadly, to what extent is a private international economic order based upon free-market principles resurging after a period of challenge to the old international economic order? To address these questions, we have a vibrant and knowledgeable panel of practitioners and academics from both the private and the public sectors.

Remarks by Daniel M. Price*

I would like to discuss some developments that are particularly noteworthy from the perspective of a former trade and investment agreement negotiator. Harold has laid out the questions posed by the *old* new international economic order, and I will address the current trends with respect to those very questions.

First, let me say that from my perspective there has been a remarkable shift in the basic attitude of host governments to foreign investors. One sees this in various specific ways—for example, in their willingness to enter into bilateral investment treaty negotiations and, once in those negotiations, in what they are prepared to agree to. Formerly, there were issues that put the United States and much of the developing world on two different sides of an ideological divide. That divide centered around the issues of what degree of control a host government should have over a foreign investor; how disputes should be settled; how the property of the foreign investor was to be treated; and in general, how the foreign investor was to be integrated or not integrated into the local economy.

I will begin with the last point. The fundamental principle in both trade in goods and foreign investment is that one draws no distinction (1) on the basis of nationality of ownership of capital stock, with respect to the activities of a corporation in one's country, or (2) in the trade field, on the basis of the origin of the traded goods. The widespread acceptance of this principle in both bilateral and multilat-

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