

INTERNATIONAL LAW ASSOCIATION

LONDON CONFERENCE (2000)

COMMITTEE ON LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT

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FOURTH REPORT

INTRODUCTION

Few issues in current debates on sustainable development give rise to more controversy than the assessment of the positive and negative aspects of globalization. Some view this process as the “dollarization” and the onward march of

global capitalism, whereas others consider globalization as ultimately the most effective way to achieve sustainable development, through eradication of poverty, protection of the environment and promotion of respect for human rights. Recent data reveal that the world economy is still steadily expanding, currently at a growth rate of approximately 3,5%.¹ Many developing countries are part and parcel of this growth. Nonetheless, the number of people living in absolute poverty is still increasing² and a multitude of environmental reports provide gloomy pictures on the state of the environment. Are we witnessing a globalization without a human face? Is there an ecological and social race to the bottom, as some have suggested?

The period under review (1998-2000) has not been without dramatic events in the fields of concern to the ILA Committee on Sustainable Development. In parts of Africa, Europe and Asia new conflicts erupted or old ones continued, thus seriously impeding the path to sustainable development in peace and re-emphasizing the interdependent nature of peace and security, of economic and social progress, of respect for human rights and of environmental conservation. At the multilateral level we witnessed the failure within the OECD to arrive at a Multilateral Agreement on Investment (MAI), partly as a result of severe neglect of the interests of developing countries and of environmental concerns. The WTO ministerial conference in Seattle was adjourned without initiating the envisaged new round of multilateral trade negotiations, the so-called Millennium Round. Rather the summit became known as "the battle of Seattle" in view of unanticipated strong protests by an alliance of non-governmental organizations and trade unions which merely shared a common agenda of trying to halt progress in the World Trade Organization. Such protests were also directed against the Bretton Woods institutions. An appealing, worldwide Jubilee campaign successfully resulted in some debt reduction for the developing world through the (by the Group of Seven) amended IMF/World Bank HIPC initiative (Highly Indebted Poor Countries initiative) and arrangements by the Club of Paris, albeit not surprisingly less than stipulated by the campaign. Consequently, the usually scarcely noticed Spring meeting of IMF/World Bank attracted worldwide attention as a result of protests in the streets of Washington against "global injustice". Various UN review conferences convened to follow up (5+) the large UN conferences of the early 1990s revealed how progress was impeded by continuing differences between industrialized countries and developing countries as well as between government delegations and non-governmental organizations.

These events cannot be viewed as isolated events, but rather as a cry for more justice and equity in international relations and for more influence of people on public international decision-making. Is international law moving in such a

¹ See *World Economic and Social Survey*, Department of Economic and Social Affairs, United Nations, New York, 2000.

² According to UNDP's *Human Development Report 2000*, p. 2, 1.2 billion people are income poor, living on less than 1 \$ a day. More than a billion people in developing countries lack access to safe water and more than 2.4 billion people lack adequate sanitation.

direction? Would that serve the cause of sustainable development? Obviously, this Report will not be able to provide answers to these questions. Rather it intends in Part I to briefly review and evaluate some major developments during the period under review and to draw some conclusions from it. Part II contains a report on the successful seminar on “*Mercosul, Sustainable Development and Human Rights*”, held in São Paulo, Brazil, July 1999 which was jointly organized by the Brazilian branch of the ILA, the Universities of São Paulo and San Francisco and the Brazilian Institute for International Law and International Relations. The 1998 ILA Conference in Taipei endorsed the Committee’s aim of preparing an ILA Declaration on Principles of International Law on Sustainable Development, building on responses received to the Committee’s questionnaire on existing and new principles of international law in the field of sustainable development. With a view to preparing such a Declaration, Part III of this Report tentatively indicates main building blocks for the envisaged Declaration. Part IV deals with the Committee’s Working Programme. Annex I includes the questionnaire, while Annex II and III contain the replies by Working Groups of the ILA branches of Japan and the Netherlands, respectively.

I. SOME SIGNIFICANT DEVELOPMENTS DURING THE PERIOD UNDER REVIEW

1.1 The Failure of the MAI

In the 1998 report of the ILA Committee serious concern was expressed about the appropriateness of the 29-member OECD as forum for negotiating a truly multilateral investment agreement as well on the content of the draft Multilateral Agreement on Investment (MAI) as it stood by April 1998.³ The main reason was that the special needs and interests of developing countries were largely ignored. Here it suffices to mention, among other things, unqualified anti-discrimination clauses, little scope for any performance requirements and severe restraint on the rights of host countries to determine their own development policy and retain certain mechanisms to achieve national priorities in accordance with international law. In addition, States were required to give unconditional consent to dispute settlement by international arbitration, thereby allowing its national judicial process to be bypassed. Extensive rights were granted to foreign investors while imposing hardly any duties on them. Concerns relating to cultural identity, employment, labour standards, human

³ Report of the 68th ILA Conference, Taipei, London 1998, pp. 692-694. For some further critical views see A. Böhrer, ‘The Struggle for a Multilateral Agreement on Investment—an Assessment of the Negotiating Process in the OECD’, *German Yearbook of International Law*, vol. 41 (1998), pp. 267-298; I. McDonald, ‘The Multilateral Agreement on Investment: Heyday or MAI-day for ecologically sustainable development?’, *Melbourne University Law Review*, 22 (1999), no. 3, pp. 617-56; N.J. Schrijver, ‘A Multilateral Agreement on Investment from a North-South perspective’, in M. Brus and E. Nieuwenhuys (eds), *Regulation of Foreign Investment*, The Hague: Kluwer, forthcoming.

rights, consumer protection and environmental conservation were hardly addressed. This led to fierce protests from many non-governmental organizations. Fear of losing sovereignty was by no means a concern of developing countries only. In the autumn of 1998 France decided to withdraw from the negotiations and the OECD Ministerial Council had no other choice but to suspend further talks for “a period of assessment and further consultation between the negotiating Parties and with (*sic!*) the interested parts of their societies”. Few believe that the MAI project in its present form can be relaunched. However, the case for a comprehensive multilateral investment convention is strong. Currently, foreign investment regulation is scattered over 1,700 bilateral investment treaties (BITs), a few regional investment treaties and national investment laws. If such a project for multilateral investment regulation is to have any added value, it must pursue an integrated approach. Without belittling for a moment the need to protect foreign investment and foreign investors and to accord them fair and equitable treatment, it is equally essential to move now beyond the property-protection type of investment promotion and protection conventions and to perceive foreign investment as an integrated part of international efforts towards sustainable development in the sense of promoting economic and social development, while protecting the environment and promoting respect for other universal values such as labour standards and human rights. That is not to say that all these issues should be addressed in a substantive and detailed way in a future multilateral investment agreement, but one should at least be aware that the environment in which foreign investors have to operate is also shaped by such concerns. Some inspiration towards such an integrated approach could have been drawn from documents such as the 1992 Rio Declaration of Principles on Environment and Development, the 1993 Vienna Declaration and Action Programme on Human Rights, the 1995 Copenhagen Declaration of the World Summit on Social Development and the 1998 ILO Declaration on the core labour standards.⁴ As in various other fields of international economic law, the special needs and interests of poor and needy developing countries should be recognized and addressed. While it is important to assist them in preparing infrastructure and establishing a climate conducive to foreign investment, it is equally important to recognize and respect their right to determine their own social and economic policies.

1.2 The WTO Ministerial Conference in Seattle

In recent years considerable progress has been made in strengthening international organizations and decision-making on international trade. This is reflected in both the establishment of the World Trade Organization (WTO)

⁴ Text in *ILM*, vol. 37 (1998), p. 1233. Paragraph 2 of this 1998 ILO Declaration provides that all ILO members, even if they have not ratified the Conventions in question, have an obligation to respect the following fundamental principles: freedom of association and the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

with its single-agreement package and considerably increased membership including many non-western countries. The impending accession of China to the WTO will undoubtedly assist the WTO in becoming truly a universal organisation. The abortive Seattle Ministerial Conference of the World Trade Organisation of December 1999 proved to be a serious setback. The summit was to have ushered in a new Round of Multilateral Trade Negotiations, the so-called Millennium Round.⁵ The conclusion by some WTO Members of an agreement on the establishment of an independent Advisory Center on WTO law, with the specific mandate to provide legal aid to developing countries in international settlement of trade disputes, was in fact the only tangible result. The main reason for Seattle's failure was a seemingly irreconcilable clash of negotiating objectives pursued by developed industrialized countries including those of the European Community and by developing countries including Least Developed Countries. In addition, a wide variety of non-governmental organizations including environmental groups, trade unions and development movements, proved to be vehement in defining the WTO as "the enemy" rather than as a vehicle for pursuing civil society interests.⁶

Yet there is scarcely any serious disagreement on the need to further strengthen the international trading system administered by the WTO, its substantive rules governing the conduct of trade relations by its Members, as well as its institutional and procedural rules serving them. Indeed, if the trading system of the 21st century is to succeed in "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services...in accordance with the objective of *sustainable development*", it must be equipped to achieve these goals.⁷ The disagreement, in essence, is the result of diverging interests and of different priorities with respect to negotiating objectives. Once again one appears to be witnessing some measure of polarisation between groups of countries, seeking to emphasize particular socio-economic goals and to de-emphasize others. One is reminded of the ideologically charged rift between the 'North' and 'South' over the foundations of a New International Economic Order (NIEO) in the 1970s.⁸ During the seventies, it was developing countries who demanded more equitable international economic standards for the NIEO, both to redress historical injustice and as a means of protection

⁵ This section is based on F.Weiss (Committee member), "WTO: Reformed and Reforming", key note speech at the Spring meeting of the Netherlands International Law Association, 11 May 2000, forthcoming as an international journal article.

⁶ See various articles in *The Economist*, 11 December 1999, pp. 13-19.

⁷ Preamble to the Agreement Establishing the WTO (emphasis added). One may also refer to Article 2 of the EC Treaty, which provides that while "sustainable and non-inflationary [economic] growth" remains the engine of development as a whole, such growth is to be achieved in a framework of a high level of employment, social protection, and competitiveness and of economic and social cohesion and solidarity among Member States.

⁸ Developing countries still emphasize the need for rules to regulate the market to protect their legitimate concerns.

against overwhelming market forces. However, and perhaps somewhat paradoxically, present day advocates of complementary international standard setting are mainly the developed countries. It is developed countries who seek to establish additional rules for the global economy and trading system so as to protect a variety of societal values related to their vastly superior standards of living.

Beyond Seattle: an expanding agenda?

The WTO has already seen its jurisdiction expand over the last few years. But even more is expected of the world trading system, which increasingly intersects with issues directly affecting peoples' lives. They include investment and competition policies, environmental and development policies, human rights, labour standards, health, animal welfare, distribution of resources, ethical issues and even security.⁹ All these issues are raised with "sovereignty of purpose" by particular interest groups seeking regulatory intervention by Members' governments, unconcerned about possible "limits to the growth" and utility of such activity in the global economy. It amounts to asking whether the trade dossier needs to be enriched by flanking, complementary concerns arising from globalizing economies and if so whether the WTO should be used to that end as some kind of Super-Ministry for global economic governance. This is of course a highly complex and controversial topic.

WTO decision-making

The formally democratic character of the WTO (in contrast to the IMF, for example) is, at first, surprising. Formally each Member has an equal vote and the WTO Ministerial Conferences have witnessed extensive debate. Turning from theory to practice, *oligarchy* comes closer than democracy to describing decision-making at the WTO. The traditional "*Green Room*" process gets together a relatively small number of self-selected developed and developing countries to decide on divisive issues. During the Tokyo Round, these talks would typically involve less than 8 delegations, today a "full" Green Room might well have 25-30 participants. Currently, "Green Room" participation typically include the Quad (US, EC, Canada, Japan), Australia, New Zealand, Switzerland, Norway, possibly one or two transition economy countries, and a number of large developing countries, including Argentina, Brazil, Chile, Colombia, Egypt, India, Mexico, Pakistan, South Africa and at least one ASEAN country. Most smaller developing countries stay out. 18 of the WTO Members from Africa have no representation in Geneva. Obviously, too many newly active players in WTO negotiations are excluded, including many of those who have undertaken trade liberalization pursuant to the GATT Uruguay Round and now have a greater claim on participation in WTO's decision-making process. Therefore, the *hegemonic* or *parochial* "*Green Room*" process

⁹ For an analysis see F. Weiss, "The WTO and the progressive development of international trade law", in *NYIL*, vol. 39 (1998), pp. 71-117.

needs to be modernized. How is this to be done? Simply put, the WTO needs to establish a small, informal steering committee, 20 or so in number, that can be delegated responsibility for developing consensus on trade issues among the members.

1.3 A New ACP-EC Partnership Agreement for the period 2000-20

On 23 June 2000, a new ACP-EC Partnership Agreement was signed in Cotonou, Benin.¹⁰ The Cotonou Agreement is the successor to the four Lomé Conventions spanning a period of 25 years development co-operation between the European Community and a large number of developing countries in Africa, the Caribbean and the Pacific. For many years, the Lomé Convention served as the showpiece of international development co-operation in view of its contractual nature, equality of partners approach, comprehensive scope and the availability of relatively extensive financial resources. Recently, the Lomé approach was seriously criticized as a result of among other factors “donor fatigue” and the Convention’s incompatibility with Article XXIV GATT. The new Agreement has been concluded for a period of twenty years, commencing on 1 March 2000. In a number of respects, the new Agreement represents a significant break with the past. According to EC Development Commissioner Poul Nielson, it even “constitutes the beginning of a new era of a relationship based on a profound reform of the spirit, the objectives and the practice of (...) cooperation.”¹¹

Objectives

The objectives of the Cotonou Agreement have been formulated more specifically and in more detail than previous Lomé Conventions. The most important novelty is the explicit central objective of the ACP-EC Partnership “of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy”. This is in line with Article 177 of the EC Treaty, as it was inserted through the Treaty of Maastricht Treaty on European Union. In addition, the economic, cultural and social development of the ACP states shall be pursued “with a view to contributing to peace and security and to promoting a stable and democratic political environment.”¹² These objectives “shall inform all development strategies and shall be tackled through an integrated approach taking

¹⁰ For its complete text, see Commission of the European Communities, ‘Proposal for a Council Decision concerning the conclusion of the Partnership Agreement between the African, Caribbean and Pacific States on the one part, and the European Community and its Member States, on the other part’, COM (2000) 324 final, 2000/0124 (AVC), Volume I, pp. 10-81, available through <http://europa.eu.int/comm/development/Cotonou>.

¹¹ Speech by Mr. Poul Nielson, European Commissioner for Development Cooperation and Humanitarian Aid, at the Cotonou signing ceremony, 23 June 2000, Commission press release, SPEECH/00/241

¹² *Ibid.*, Article 1.

account at the same time of the political, economic, social, cultural and environmental aspects of development.” From the subsequent long and diverse list of subjects and principles to be taken into account in implementing the Agreement, it follows that the Cotonou Agreement has a broad range. It includes such matters as sustained economic growth, developing the private sector, increasing employment, improving access to productive resources, supporting respect for the rights of the individual and for meeting basic needs, promoting social development” and the conditions for an “equitable distribution of the fruits of growth”, and the situation of women. Gender issues, environmental protection and sustainable utilization and management of natural resources, and institutional development and capacity building are cross-cutting issues/themes for all development and co-operation strategies elaborated within the ACP-EC Partnership Agreement.¹³

Principles

The spirit of the new Agreement is expressed in the following “fundamental principles”, which formed the basis of ACP-EC cooperation. Firstly, equality of partners and ownership of development strategies feature as such a fundamental principle: the ACP states “shall determine the development strategies for their economies and societies in all sovereignty”. In so doing they are required to show due regard for the essential elements of “respect for human rights, democratic principles and the rule of law”.¹⁴ A major change is embedded in the second fundamental principle spelled out in the Cotonou Agreement, that of participation. This includes opening up the partnership to non-central government actors, such as civil society organizations. In practice, this means that, where appropriate, non-state actors shall be informed of and involved in consultation on cooperation policies and strategies; be provided with financial resources in order to support local development processes; be involved in the implementation of projects and programmes in areas that concern them or where they have a comparative advantage; receive capacity building support.¹⁵ The third fundamental element listed is that of “dialogue and the fulfilment of mutual obligations”. The emphasis on the notion of mutual obligations seems to indicate a more strict approach than in the past. The fourth fundamental element is differentiation and regionalization. The former entails that cooperation arrangements shall vary according to an ACP country’s level of development, its needs, its economic performance and its long-term development strategy. This contrasts with the previous notion of largely uniform treatment of all ACP countries, as is particularly apparent from the new trade regime, which reflects

¹³ Ibid., Articles 31-33.

¹⁴ Cotonou Agreement, loc. cit., n. 10, Articles 2 and 9(2). On the human rights related provisions and concrete supportive and punitive human rights policies within the Lomé framework during the period 1975-1999, see K. Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Conventions*, Kluwer Law International, The Hague/London/Boston, 2000.

¹⁵ Cotonou Agreement, ibid., Article 4.

clearly this shift towards differentiation.¹⁶

In addition to these previously known essential elements of ACP-EC cooperation, the Cotonou Agreement introduces yet another new legal category of significant principles underlying the Partnership. It is the so-called “fundamental element” of good governance, defined as “the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development.” It is further provided that good governance entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption. Serious cases of corruption, including acts of bribery leading to corruption may give rise to “appropriate measures” such as punitive measures, which may - depending on the seriousness of the situation - amount to partial or full suspension of the Partnership Agreement.¹⁷ This new good governance/corruption provision was included under very strong pressure by the European Community, despite strong objections by the ACP.

Implementation

The means to achieve the ACP-EC Partnership’s objectives are diverse. They extend from a regular “comprehensive, balanced and deep political dialogue leading to commitments on both sides”, to development finance co-operation and economic and trade co-operation. Overall, 15,200 million Euro will be made available by the European Community for implementing the Cotonou Agreement in the next five years, of which 13,500 million Euro will be channelled through the 9th European Development Fund.¹⁸ The new trade arrangements are a drastic change from the past. Previously, all ACP states enjoyed access to a non-reciprocal preferential trade regime. Under Cotonou arrangements, after a transition period, the previous system will be replaced by new (WTO compatible) Regional Economic Partnership Agreements aiming at progressively establishing free trade areas. However, least-developed ACP countries will continue to receive special and differential treatment and will by and large continue to benefit from the Lomé preferential trade regime.¹⁹

1.4 Towards a new architecture of the international monetary system?

New Architecture

The IMF is often criticized because it does not fulfil its proper role as an institution with primary responsibility for the promotion of international monetary stability. The Fund appeared to be heavily involved in promulgating adjustment programs and long-term development strategies in dozens of developing

¹⁶ Ibid., Article 2.

¹⁷ Ibid., Articles 9(3) and 97.

¹⁸ Financial Protocol, Annex I to Cotonou Agreement, loc. cit. n. 10, Volume II, p. 4.

¹⁹ Ibid., Articles 35 and 37.

countries, while neglecting its primary task as supervisor of the international monetary system. The volatility of the international financial markets and currency crises, particularly in Asia and Russia, have prompted calls for a new architecture of the international monetary system. Various groups, including the G-7, G-10, G-22, international organisations and NGOs have made proposals for a new design. Generally, such proposals suggest (re)creating global institutions to cope with current international financial and monetary problems. These institutions should have the capacity to act respectively as a (i) global lender of last resort (a 'global central bank'); (ii) global bankruptcy court (settling debts and providing a fresh start when countries cannot meet their international financial obligation); and (iii) a global financial regulator to exercise jurisdiction over non-sovereign actors in the international capital markets. The latter would seek to remedy the lack of supervision by domestic regulators.

Hitherto, the involvement in debt reduction operations, the HIPC [Highly Indebted Poor Countries] Initiative²⁰ is one of the most successful activities of the IMF. The HIPC may be understood as a contribution to the promotion of sustainable development. However, the process towards debt reduction has proved to be burdensome and slow.

Institutional Change

In the institutional sphere the IMF has made only some cosmetic changes to respond to new challenges. Thus the 'Interim Committee' was replaced by the 'International Monetary and Financial Committee' in order to be able to cope with both monetary *and* financial issues. Moreover, the 'Enhanced Structural Adjustment Facility' (ESAF) has been transformed into the 'Poverty Reduction and Growth Facility' (PRGF) in an attempt to introduce additional conditions on the use of resources. Thus the PRGF will put 'great emphasis' on 'greater transparency, improved monitoring, anticorruption initiatives, accountability, and involvement of all sectors of society'.²¹

Meanwhile, more substantive changes are demanded by the Fund's largest member. Legislation in the United States is underway to force the IMF to lend only so as to address currency crises and to prohibit lending with maturities of more than one year.²² Further, the Fund must only lend against market interest rates. This legislation, if implemented effectively, would virtually prohibit the Fund to serve as a development institution. The obvious purpose of this legisla-

²⁰ The HIPC was established in 1996 through an IMF Executive Board instrument creating a trust for financing debt-rescheduling operations. The joint IMF-World Bank HIPC initiative, which was substantially broadened at the G-7 meeting of finance ministers in Cologne in June 1999, aims at helping developing countries to reduce debt to levels that enable them to meet their foreign obligations without jeopardizing economic development. Resources under the initiative may be made available as grants or as loans.

²¹ *IMF Survey*, October 11, 1999, p. 308-7.

²² IMF Reform Act of 2000, February 29, 2000, 106th Congress, HR 3750. For the rationale of this Act see the Report of the Meltzer Commission at <http://phantom-x.gsia.cmu.edu/ifiac>.

tion is to force the Fund to stick strictly to its original mandate and to avoid overlap and conflict with other financial institutions.²³ The legislation also includes a menacing sanctioning mechanism: if the Fund fails to bring about the changes stipulated by the Act, the US must draw on its reserve tranche position, thereby effectively reducing the resources available for lending.

Towards Monetary Convergence

Another response to crises is what may be called monetary convergence. There are three forms of such convergence: (i) monetary union, (ii) dollarization and (iii) currency board systems.²⁴ A monetary union is a multilateral arrangement between States, whereas dollarization and currency board systems are introduced unilaterally. A common purpose of these arrangements is the adoption of a currency that is stable, and that will not be weakened by inflation. The price to be paid is that a state can no longer (fully) exercise its monetary sovereignty. Thus, the alternatives proposed are:

(i) a monetary union replaces a number of currencies by one currency and creates a single monetary jurisdiction. The Economic and Monetary Union (EMU) of the European Union is the most salient example of a monetary union, with the Euro as its single currency. As the Euro eradicates exchange risks between the 11 EU members, it creates a truly common market in which goods, services and capital freely flow.

(ii) dollarization is the *de facto* or *de jure* replacement of a local currency by the dollar or other major currency. *De facto* dollarization takes place when economic actors (business, consumers) have lost confidence in the local currency and maintain their financial wealth in assets denominated in foreign currency. This occurs in an increasing number of developing countries. *De jure* dollarization is making the foreign currency the only legal tender, thereby abandoning monetary sovereignty. The most important difference with monetary unions is that here is no participation in the decision making on monetary policy issues as there is no international agreement between the dollarizing state and the US.

(iii) a currency board system is a system, protected by law, of fixed exchange rates in which the local currency continues to exist; a key feature is that a board maintains a fixed proportion of reserves in a foreign currency, usually the US dollar (or any other major currency); the board guarantees the exchange of notes and coins for the foreign currency and *vice versa* at the fixed exchange rate; as convertibility and the exchange rate guaranteed by law, a stable local currency

²³ For a discussion on the expanding jurisdiction of the Fund and the 'principle of speciality' as developed by the International Court of Justice, see Erik Denters, 'New Challenges to IMF Jurisdiction', XXIX *Netherlands Yearbook of International Law* (1998) 3-44.

²⁴ Zeljko Bogetic, 'Official or "Full" Dollarization, Current Experiences and Issues', 1999. This paper and other literature are available at <http://users.erols.com/currency>, dedicated to dollarization and currency boards. Steve Hanke, ' "Dollarization" - Linchpin of the New Financial Architecture', *Central Banking*, May 1999, 63-66. See also Andrew Berg and Eduardo Borensztein, 'The Dollarization Debate', *Finance and Development*, March 2000, 38-41.

is guaranteed. Such a system is practised by China and Malaysia, among other countries.

1.5 Earth Charter Launched

On 29 June 2000, the Earth Charter was launched at the Peace Palace in The Hague. Initially, during the process leading to the 1992 United Nations Conference on Environment and Development (UNCED), the Earth Charter was envisaged as a binding international instrument. However, at the time a binding treaty proved not to be realistic. After UNCED a NGO approach was chosen to foster the cause of an Earth Charter. The international partners (the Earth Council, World Conservation Union (IUCN), Green Cross International, the Amazonian Parliament, YMCA and many others) and national committees should function as its promoters in this process. The current Earth Charter is designed as a peoples' treaty and is aimed to serve as "an ethical foundation for the emerging world community" and a source of inspiration for policy, education, religion and dialogue: 'We must join together to bring forth a sustainable global society founded on respect for nature, universal human rights, economic justice, and a culture of peace', as the Preamble puts it.²⁵ The former chairman of the IUCN Commission on Environmental Law stressed that the Earth Charter should function as an ethical foundation for the IUCN Draft Covenant on Environment and Development, an initiative of the IUCN to develop an international legally binding instrument on environment and development to be adopted by the UN General Assembly.²⁶

The Earth Charter consists of four parts, entitled: 1. Respect and care for the community of life; 2. Ecological integrity; 3. Social and economic justice; and 4. Democracy, nonviolence and peace. Each part is specified by four principles, a total of 16, which cover nearly every conceivable issue in the field of environment and development. The first four principles, the core of the Charter, include: 1. Respect Earth and life in all its diversity; 2. Care for the community of life with understanding, compassion and love; 3. Build democratic societies that are just, participatory, sustainable and peaceful; and 4. Secure Earth's bounty and beauty for present and future generations.

The other principles range from rather established legal principles such as the precautionary principle in Principle 6, through adopting patterns of production, consumption and reproduction that safeguards Earth's regeneration capacities (Principle 7), to guaranteeing a human right to drinking water, clean air, food security, shelter and safe sanitation (Principle 9.a).

While the principles as formulated in the Rio Declaration and the IUCN Draft Covenant often involve a balance of interests, or at least reflect an awareness of potential frictions, the Earth Charter presents its principles separately and much more straight forward. Other notable differences are that the Rio

²⁵ For information see the Earth Charter web-site: <http://www.earthcharter.org>

²⁶ A revised version of the IUCN Draft Covenant was launched in Spring 2000, IUCN Environmental Law Centre, Bonn.

Declaration and IUCN Draft Covenant address States and that they are cast in the legal language of international instruments. In contrast, the Earth Charter is written in an ambitious and informal, sometimes even poetic, style and is meant to serve as a common standard for a sustainable way of life by which the conduct of all individuals, organizations, businesses, governments, and transnational institutions is to be guided and assessed.

It is still somewhat unclear to what extent States and international organs such as UNEP will support this process. Obviously, the Earth Charter cannot and is not meant to replace public international instruments. However, as a private, if not 'civil society' initiative, the principles of the Earth Charter can certainly provide a useful contribution to discussion and dialogue and serve as another source of inspiration for the progressive development of international law in the field of sustainable development.

1.6 Sustainable development in international judicial decisions

While international environmental law-making as reviewed in previous reports proceeds extensively, it is timely to highlight the contribution made by international courts to the clarification, consolidation and application of the concept of sustainable development and related concepts in recent years.²⁷ Reference should first of all be made to the International Court of Justice. In its Advisory Opinion to the UN General Assembly on *the Legality of the Threat or Use of Nuclear Weapons* the Court made reference to Principle 24 of the Rio Declaration on Environment and Development (on protection of the environment in times of armed conflict) and stated that "the environment is not an abstraction, but represents the living space, the quality of life and the health of human beings, including generations unborn".²⁸ Moreover, the Court concluded: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is part of the corpus of customary international law relating to the environment".²⁹ In its judgement in the case concerning the *Gabcikovo-Nagymaros* project between Hungary and Slovakia the Court re-emphasized and elaborated on this principle.³⁰ Particularly noteworthy is the following paragraph: "...new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such standards given proper

²⁷ See in particular P. Sands (Committee member), "International Courts and the Application of the Concept of Sustainable Development", in *Max Planck UNYB*, vol. 3 (1999), pp. 389-403.

²⁸ *ICJ Reports 1996*, para. 29. Also reproduced in *ILM*, vol. 35 (1996), pp. 809-938.

²⁹ *ICJ Reports 1996*, para. 29.

³⁰ For an analysis see K. Wellens, "The Court's Judgement in the case concerning the Gabcikovo-Nagymaros project (Hungary/Slovakia): some preliminary reflections", in K. Wellens, *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague: Kluwer, 1998, pp. 765-799 and P. Sands, op. cit., pp. 390-395. See also the report in *EPL*, vol. 28 (1998), no. 1, pp. 12-20.

weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile development with protection of the environment is aptly expressed in the concept of sustainable development.”³¹ It is interesting to note that Judge Weeramantry considered in his separate opinion sustainable development not merely to be a concept, but also a principle with normative value, based upon both the right to development and the right to environmental protection. In his view sustainable development is “part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community”, reaffirming that “in the area of international law...there must be both development and environmental protection, and that neither of these rights can be neglected”.

Second, reference can be made to the pronouncements by the WTO Appellate Body, most notably in the *United States-Import Prohibition of Certain Shrimp and Shrimp Products Case* (1998), commonly known as the Shrimp Turtle case between the United States and India, Malaysia, Pakistan and Thailand.³² The dispute centred on the question whether the US import ban on shrimp harvested with the commercial fishing technology which may adversely affect sea turtles could be justified under Article XX (g) of GATT, which permits in deviation of the GATT rules the taking of measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. In its interpretation of this Article the Appellate Body referred to “contemporary concerns over the community of nations about the protection and conservation of the environment” and to the fact that the Preamble of the WTO Agreement explicitly acknowledges the objective of sustainable development, a concept which in its view “has been generally accepted as integrating economic and social development and environmental protection”. Hence, the Appellate Body deemed US legislation “provisionally justified” under Article XX(g). Although the Appellate Body ultimately decided that the US measures constituted an unjustifiable discrimination, the various references to sustainable development and legitimate environmental concerns contrast this decision with earlier decisions of GATT panels, especially the Tuna/Dolphin panels (Mexico/US). Lastly, it is interesting to refer to the provisional measures prescribed in the *Southern Bluefin Tuna Cases* brought before the International Tribunal for the Law of the Sea by Australia and New Zealand against Japan. The two claimants alleged that the unilateral fishing program by Japan is contrary to the 1982 UN Convention on the Law of the Sea, the 1993 Convention for the Conservation of Southern Bluefin Tuna and customary international law. The Tribunal ruled that indeed “measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin

³¹ *ICJ Reports 1997*, para. 140.

³² Reproduced in *ILM*, vol. 38 (1999), p. 118 and analyzed by P. Sands, op. cit., pp. 395-401.

tuna stock”, in this way through the latter phrase suggesting that the prevention of serious harm to the marine environment served as a main reason for the Tribunal prescribing provisional measures.³³

1.7 Assessment

From the above review of significant recent developments it follows that on the one hand sustainable development has become an established objective of the international community and a concept with a certain status in international law, as exemplified in its incorporation in various conventions and in international judicial decisions. On the other, little progress could be achieved in the development of a comprehensive and balanced international law of sustainable development. It proves to be extremely difficult to integrate environmental, developmental and human rights concerns. As in the past with the Lomé Conventions, the new Cotonou Agreement between the EC and the 71 developing countries in Africa, the Caribbean and the Pacific may well serve as a testing ground for new directions international law is taking in this respect. We cannot but note the erosion of some “traditional” principles of the law of international development cooperation: equality is increasingly being replaced by conditionality, partnership by “take it or leave it”, preferential treatment in favour of developing countries by graduation and integration into the GATT regime and by common, but differentiated obligations in international environmental regimes. Similar trends can be inferred from an analysis of the discussions in the context of the WTO on a new Millennium Round and in the context of IMF/World Bank on a new international financial architecture. Nevertheless, from the policies of and discussions within these institutions and the United Nations we can still observe a commitment to assist developing countries in their development process and in coping with the potential negative aspects of globalization. The same goes for the policies of individual industrialized countries, albeit that official development assistance is decreasing considerably. It also became apparent that a perceived neglect of the interests and special needs of developing countries still gives rise to strong protests from many circles, including civil society in the west. It is a considerable challenge for international lawyers to analyze which parts of the traditional law of international development co-operation can and should be consolidated, where and how it is to take new directions through normative developments and practice, and to what extent international law can contribute to the integration of public international policy goals in the fields of human rights, development and environmental protection, i.e. to promote sustainable development.

³³ The text of the decision, with various separate and dissenting opinions to it, can be found at <http://www.un.org/Depts/los/ITLOS>. See also Ellen Hey’s contribution in *International Law FORUM du droit international*, vol. 1 (1999), pp. 191-192. On the role of ITLOS see T. A. Mensah, “The International Tribunal and the Protection and Preservation of the Marine Environment”, in *EPL*, vol. 28 (1998), pp. 216-219.

II. SÃO PAULO CONFERENCE ON MERCOSUL, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

On 26 and 27 July 1999, the first regional conference of the International Law Association (ILA) in Latin America took place at São Paulo³⁴. It focused on Mercosul, human rights and development, and was organized in close co-operation with the ILA Committee on Legal Aspects of Sustainable Development. Mercosul or Mercosur is the Portuguese respectively Spanish acronym for the Mercado Comun do Sul/del Sur. Argentina, Brazil, Paraguay and Uruguay created this Southern Common Market on 26 March 1991. Chile and Bolivia became associate members in 1996 and 1997, respectively.

The Secretary of the Brazilian ILA branch, Susana Camargio Vieira, was the key figure in the preparation and organization of the conference. The conception and ideas for the present conference evolved out of the 1996 Amsterdam Conference on International Economic Law with a Human Face, convened by the University of Amsterdam under the auspices of the ILA Committee on Legal Aspects of Sustainable Development.³⁵ The greater part of the programme dealt with sustainable development, the related themes being the implementation of the main environmental treaties; environmental aspects of the law of the sea and international co-operation; human rights and sustainable development law, including the Inter-American System for the Protection of Human Rights, the Central American experience, the right to development, environmental protection and national sovereignty over natural resources.

As to the implementation of international environmental agreements speakers stressed again that it is up to States to move with the times. Developments within Mercosul countries towards this end are promising. As for human rights the same holds true, in that some States allege 'changes in *mores* should not be brought about by imposition from an international jurisdictional body but rather by the internal debate within the legislature and the reflection of the popular will'.³⁶ However, it was also said that no State can ignore the impact of its action on the citizens of other States and that the right to development 'can serve very well as the synthesis of core economic and social and civil and political rights.'

The co-sponsors of the conference - the Brazilian ILA Branch, the Brazilian Society for International Law, the University of São Paulo, the University São Francisco and the Brazilian Institute for International Law and International Relations (IDIRI)- had skilfully anticipated the challenge of globalization in the

³⁴ For a full report see Paul J.I.M. de Waart, 'MERCOSUL, Human Rights and Sustainable Development', *International law forum de droit international*, vol 1 (1999), no. 4, pp. 240-2.

³⁵ See Susana C. Vieira, 'Regional integration and protection of the environment: the case of Mercosul', in Friedl Weiss, Erik Denters and Paul de Waart, eds., *International Law with a Human Face*, Kluwer Law International (1998), pp. 327-45.

³⁶ 'Challenges to compliance with the human rights decisions of the Inter-American System', submitted by Christina M. Cerna.

new century as a search for 'the rules and institutions for stronger governance - local, national and regional - to preserve the advantages of global markets and competition, but also to provide enough space for human, community and environmental resources to ensure that globalization works for people - not just for profit'.³⁷

Moreover, the programme urged practitioners and scholars from countries of Mercosul, the North American Free Trade Agreement (NAFTA) and the European Union as well as from Asia (Bangladesh, People's Republic of China/Hong Kong and Japan) to discuss the impact of the present economic crisis on globalization and regionalization.

The general view was that there is no way back for Mercosul. The unmistakable advantages of having a market with a population of almost 220 million largely outweigh the present disadvantages of members availing themselves unilaterally of the safeguard clauses in the trade opening programme in order to prevent the import of certain products such as Brazilian cotton or Argentinean rice seriously damaging their respective domestic markets.

It was stressed time and again that Mercosul offers its investors a securities market and a treaty system to avoid double taxation. Such advantages were highlighted in the programme of the conference under the headings of intra-regional co-operation possibilities and the impact of regional integration processes upon companies. To that end Mercosul was compared with the European Union. It was shown that the former is deliberately less institutionalized than the latter.

The speakers underlined in a variety of ways that Mercosul prefers flexibility in the mutual economic relations between the member states, if only for the fact that its members detest supranationality. There are thus only some parallels with the Western European models. In other words, Mercosul intends to be more a free trade zone and customs union than a real common market. It does not provide, for instance, for a compulsory settlement of disputes between the members themselves, let alone with the institutions.

It was also observed that the institutional structure of Mercosul does not include a permanent court. The Brasilia Protocol of 17 December 1991 on a system for the settlement of disputes provides for arbitration by ad hoc three-judge tribunals, the composition of which requires the co-operation of the States involved. What is more, the 1994 Ouro Preto Protocol on the institutional structure of MERCOSUL shifted the attention to a General Procedure for Complaints to the Mercosul Trade Commission.

Only recently the arbitration procedure has been employed. It is telling that the recent fundamental differences regarding the interpretation and application of the Mercosul safety clauses did not change this situation even in spite of Brazil submitting the dispute to the World Trade Organization.

Various Committee members participated in this conference. They all learnt

³⁷ UNDP, *Human Development Report 1999*, United Nations, New York, p. 2.

a great deal on Mercosul as an example of regional economic co-operation and on the way human rights and environmental conservation concerns are increasingly integrated in economic decision-making at international and national levels. In sum, the 1999 São Paulo conference served as a very useful lesson in how countries and peoples in a particular region are working in practice to give substance to the concept of sustainable development.

III. BUILDING BLOCKS FOR AN ILA DECLARATION ON INTERNATIONAL LAW IN THE FIELD OF SUSTAINABLE DEVELOPMENT

Below an attempt is made to explain the rationale and feasibility of drafting an ILA Declaration of Principles of Public International Law in the Field of Sustainable Development. Moreover, a first outline is presented. The replies to the questionnaire (reproduced in Annex I) by a number of members and other participants in the work of the Committee are gratefully acknowledged and have been a valuable input for preparing this list. A compilation of those individual replies to the questionnaire is available as a separate document, while the replies by Working Groups on Sustainable Development of the Japanese and Dutch branches of the ILA are included in Annexes II and III, respectively, to this Report.

Changes since the 1986 Seoul Declaration

At the ILA Taipei Conference in 1998 the Committee decided to embark on the process of supplementing the ILA's Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order with a new document. While the Seoul Declaration remains a significant and inspiring document, obviously some fundamental changes have taken place in international relations and international law since 1986.³⁸ New challenges have emerged, including:

- the end of the Cold War and of East-West confrontation;
- a lessening of the North-South division between industrialized countries and developing countries;
- the increase of environmental awareness and political attention to environmental conservation policies, reflected in the phrase “sustainable development”;
- considerable differentiation among developing countries;
- the rise of economies in transition as a legally separate category;
- the growing attention to the role of human rights in development processes;
- the emergence of the concept of “good governance”;
- a strong tendency towards market economy, exemplified by liberalization and privatization policies as stimulated by IMF, World Bank and WTO;

³⁸ See also P. VerLoren van Themaat, “Ten Years after the Seoul Declaration”, in E. Denters and N. Schrijver, *Reflections on International Law from the Low Countries in Honour of Paul de Waart*, Nijhoff: The Hague, 1998, pp. 13-26.

- the notion of interdependence and the necessity of positive integration of various public international policy goals, calling for long-term planning.

Obviously, these significant changes have had a profound impact on the evolution of public international law since 1986. Various principles and concepts such as a New International Economic Order are no longer referred to, while others such as the right to nationalize foreign property rights or the right to transfer of technology are hardly invoked. The preponderant emphasis on sovereignty is challenged by strong emphasis on adherence to human rights, good governance and environmental conservation. Some principles, for example that of the principle of the common heritage of humankind, is increasingly being replaced by the concept of common concern of humankind and the principle of positive discrimination in favour of developing countries by those of common, but differentiated responsibilities and graduation and integration. Moreover, key principles such as those of sovereignty and of sovereignty over natural resources have taken new directions in an increasingly interdependent world and are no longer understood to entail just manifold rights but also duties and responsibilities in a wide varieties of fields, for example in those of human rights observance, good governance, foreign-investment regulation, the environment and sustainable development.³⁹

Work of other fora

The ILA Committee is in the fortunate position to be able to learn from and build upon the work of various other international institutions, governmental and non-governmental ones. Without claiming to be exhaustive, reference may be made to the:

- Report by the Brundtland Experts Group on Environmental Law (1987);
- Rio Declaration of Principles on Environment and Development (1992);
- final documents of various other large UN Conferences, including the 18th UNGA Special Session on International Economic Co-operation (1990), the Vienna World Conference on Human Rights (1993), the Cairo Conference on Population and Development (1994), the Beijing Women Conference (1995) and the Copenhagen Social Summit (1995);
- Report of the Consultation on Sustainable Development: the Challenge to International Law, FIELD, 1994;
- Agenda for Development by the UN Secretary-General (1995);
- IUCN Draft Covenant on Environment and Development, launched in 1995 and revised in 2000;
- Report of Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, UN Secretariat, September 1995;

³⁹ N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: CUP, 1997.

- Books resulting from research seminars of our ILA Committee, including *The Right to Development in International Law* (1992), *Sustainable Development and Good Governance* (1995) and *International Economic Law with a Human Face* (1997);
- Position Papers on International Environmental Law Aiming at Sustainable Development, UNEP, 1997 and 2000 (“Montevideo Programmes II and III”);
- Earth Charter (2000).

The particular relevance of the Committee’s work

The main challenge for our Committee is now to build upon these declarations and reports and to seek to identify existing and new legal principles of international law relevant to the pursuance of sustainable development. While the Committee should give due weight to both environmental and developmental concerns, the particular value it could add to the debate is undoubtedly its competence with respect to international law relating to development. The very fact that in recent years developmental concerns have been given relatively less weight in politics as well as academia adds to the relevance of the Committee’s mandate which is to contribute to the achievement of a balanced and comprehensive state of international law in the field of sustainable development, as also called for in Chapter 39 of Agenda 21 of the UN Conference on Environment and Development (1992). For further progress can be noted in the field of international environmental law, through both standard-setting by way of the conclusion of new conventions and through improved entry-into-force and implementation records, whereas very little progress can be reported on international law relating to development. As so aptly stated in the reply by the Japanese branch “our future Declaration may serve as a stimulus and source of inspiration for States and international organizations in their work for codification and progressive development of international law in the field of sustainable development. It may also be useful in raising the public consciousness in this field as well as in promoting movements by NGOs for sustainable development”.

Framework of an ILA Declaration on Sustainable Development

Preamble

It is proposed that the Declaration will consist of a preamble and an operative part. In the preamble reference should first of all be made to the Rio principles, which still reflect the views of the international community in the most authoritative way. Furthermore, reference can be made to ILA’s Seoul Declaration, to the profound changes in international relations since its adoption in 1986 as indicated above and in particular to efforts to integrate the international law of development, international environmental law and human rights law, to global consensus on major aspects of development policies as reflected in the final documents of the various large UN conferences during the 1990s and the UN Secretary-General’s Agenda for Development and Millennium Report, and to the work of various other bodies as referred to above. In addi-

tion, the preamble should emphasise the need to give due weight to both the developmental and environmental concerns in order to arrive at a comprehensive and balanced international law in the field of sustainable development. Hence, it should also be stated that the Declaration includes both a statement of existing law (*lex lata*) and emerging “new” law (*lex ferenda*). The addressees of the envisaged Declaration should not only be States and international organizations, but individuals, civil society, NGOs and companies as well.

Operative part: general section

A first section of the operative part could include a few general paragraphs of key relevance to sustainable development. It seems imperative to provide in a first paragraph a somewhat more precise and realistic definition of the concept of sustainable development, in addition to the one of the Brundtland Commission: “to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁴⁰ In such a paragraph it could also be emphasized that the concept of sustainable development integrates developmental, environmental and human rights concerns.⁴¹ Here one could build on the description of development as contained in the 1986 Declaration on the Right to Development,⁴² while adding the element of the protection of the environment. On the other hand it should refer to the time dimension of the word “sustainable” in the sense of the need for medium- and long term planning in order not to operate structurally beyond the limits of the environmental utilization space and not to undermine the integrity of the environment on which nature and human life as well as economic development depend.

Secondly, it appears relevant to say something on the rule of public international law in international economic relations and on the relevance of a normative framework for the quest for global justice.

Thirdly, the integration principle deserves a prominent place. Here inspiration can be sought from various principles of the Stockholm and Rio Declarations and the World Charter for Nature as well as the preamble to the UN Convention on the Law of the Sea and Article 6 (on “positive integration”) of the EU Treaty of Amsterdam.

⁴⁰ World Commission on Environment and Development (“Brundtland Commission”), *Our Common Future*, 1987, Oxford: OUP, p. 8.

⁴¹ Cf. also P. Sands, “International Law in the Field of Sustainable Development”, *BYIL*, vol. 65 (1994), where he describes sustainable development at p. 379 as: “a broad umbrella accommodating the specialized fields of international law which aim to promote economic development, environmental protection and respect for civil and political rights”. See also M.C.W. Pinto, “The Legal Context: Concepts, Principles, Standards and Institutions”, in F. Weiss et al., *International Economic Law with a Human Face*, The Hague: Kluwer Law International, 1998, pp. 13-30.

⁴² The UN Declaration on the Right to Development describes development as “a comprehensive economic, social and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”. UNGA Res. 41/128, 4 December 1986.

Operative part: specific principles

Next, it is proposed to include a number of specific principles, with a brief commentary on each of them. Obviously, the Declaration has to be of a limited length and not all principles of public international law with a bearing on sustainable development can be included. Hence, it is proposed that the Declaration should focus on the ones of direct, specific relevance and not contain more than approximately twelve principles.

The following ones could qualify:

1. The duty to co-operate for global development and protection of the environment
2. The principle of observance of human rights, both socio-economic and cultural rights and civil and political rights (including the gender issue)
3. Sovereignty over natural resources and the duty of sustainable use of natural resources
4. Inter- and intragenerational equity
5. Common but differentiated obligations
6. Recognition of the special needs and interests of economies in transition and least developed countries and peoples
7. Common heritage/common concern of humankind
8. Precautionary principle
9. Public participation and access to information and justice
10. Good governance.

IV. WORKING PROGRAMME

The Committee will now concentrate its efforts on identifying, in more specific terms, existing and emerging principles of public international law in the field of sustainable development, with a view of providing substance to the envisaged Declaration. To this end further replies to the questionnaire, perhaps in a somewhat amended version, will be sought as well as first reactions to the outline and early drafts of the Declaration. The newly-established Amsterdam Institute for International Development (AIID), a joint institution of the Vrije Universiteit Amsterdam and the University of Amsterdam, intends to host a research seminar on *Sustainable Development in International Law: Principle and Practice* in May or June 2001. It would be relevant to convene at least one other Committee meeting during the period 2000-2002. Suggestions by members for a meeting place are most welcome. All these activities are scheduled with a view to present the Committee's Fifth, and, if possible, Final Report at the ILA Conference in New Delhi in 2002. The Committee sincerely hopes that it will be able to present at this Conference its Draft Declaration for adoption, undoubtedly upon further discussion and, if necessary, amendments, as the *ILA New Delhi Declaration on Principles of International Law in the Field of Sustainable Development*.

ANNEXES

Annex 1: Questionnaire of the ILA Committee on Legal Aspects of Sustainable Development

Annex 2: Reply of the Working Group of the Japanese Branch

Annex 3: Reply of the Working Group of the Netherlands Branch

Annex 1

Questionnaire of the ILA Committee on Legal Aspects of Sustainable Development

1. Please identify some or all of the main elements of the emerging international law of sustainable development.
2. Which principles, rights and rules included in the 1986 ILA Seoul Declaration (headings attached) or others should in your view be part of a new Declaration on international sustainable development law and which should not?
3. Taking the Rio principles as a main point of reference, which principles of international environmental law would lend themselves in your view for inclusion, perhaps in an amended form?
4. Who should in your view be the addressees (States, peoples, business, civil society?) of a declaration on international sustainable development law?
5. In 1995, an ad hoc group of experts (incl. the Chairman and the General Rapporteur of the ILA Committee) identified 5 categories with a total of 19 principles and concepts of international law for sustainable development. Those already included in the Seoul Declaration (see the Appendix of this Annex), albeit sometimes in a somewhat different formulation, are marked with an asterisk. Please list a maximum of 12 principles for inclusion in a future ILA Declaration.
 - (A) *Principles of interrelationship and integration*
 - (1) Principles of interrelationship and integration*
 - (B) *Principles and concepts relating to environment and development*
 - (2) Right to development*
 - (3) Right to a healthy environment
 - (4) Eradication of poverty
 - (5) Equity*

- (6) Sovereignty over natural resources* and responsibility not to cause damage to the environment of other States or to areas beyond national jurisdiction
 - (7) Sustainable use of natural resources
 - (8) Prevention of environmental harm
 - (9) Precautionary principle
- (C) *Principles and concepts of international cooperation*
- (10) Duty to cooperate in the spirit of global partnership
 - (11) Common heritage of humankind*
 - (12) Cooperation in a transboundary context
- (D) *Principles and concepts of participation, decision-making and transparency*
- (13) Public participation
 - (14) Access to information
 - (15) Environmental impact assessment and informed decision-making
- (E) *Principles and concepts of dispute avoidance and resolution monitoring and compliance*
- (16) Peaceful settlement of disputes* in the field of environment and sustainable development
 - (17) Equal, expanded and effective access to judicial and administrative proceedings
 - (18) National implementation of international commitments
 - (19) Monitoring of compliance with international commitments
6. What would, in due course, at the intergovernmental level be the best form of progressive development of international sustainable development law and its codification: further declarations, elaboration in specific treaties, general framework treaty? And what would be the most appropriate bodies within the United Nations—the ILC, Sixth Committee of UNGA, UNEP, UNCTAD, Commission on Sustainable Development or others?—for discussion on the need for progressive development and codification of international sustainable development law?
 7. What in your view is the current status of the right to development in international law? What positive measures can be taken to promote implementation of the right to development?
 8. What steps should be taken to integrate gender issues with sustainable development, taken into account the commitments by States in inter alia Agenda 21 (see chapter 24) and the Beijing Platform for Action (1995)?

9. What is your view on the relationship between the concept of good governance and sustainable development?
10. What steps should be taken to improve access by governments, industries and others to technology and science?
11. What views do you have on the draft Multilateral Agreement on Investment as an instrument for global development?
12. What legal mechanisms should be developed to ensure implementation of the Climate Change Convention and its Kyoto Protocol?

Appendix:
PRINCIPLES, RIGHTS AND RULES OF THE 1986 ILA SEOUL DECLARATION

The rule of public international economic law in international economic relations

Pacta sunt servanda

The principles of equity and solidarity and the entitlement to development assistance

The duty to cooperate for global development

Permanent sovereignty over natural resources, economic activities and wealth

The right to development

The principle of the common heritage of mankind

The principle of equality or non-discrimination

The principle of participatory equality of developing countries in international economic relations

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

The right of every State to benefit from science and technology

Principles of interpretation and application

The principle of peaceful settlement of disputes.

Annex 2

Reply of the Japanese Branch to the Questionnaire of the ILA Committee on Legal Aspects of Sustainable Development

by Prof. Yoshiro Matsui, chairman

Introduction

The Japanese Branch of the ILA established, in April 1999, a National Committee on Legal Aspects of Sustainable Development.⁴³ Nine replies to the questionnaire were received. Below a summary of these replies is provided followed by observations by Prof. Matsui.

General Observations

Before entering into each question, it seems appropriate to present general observations on the nature, scope and contents of our proposed Declaration on the Law of Sustainable Development.

We have not yet an agreed or authentic definition of the concept of sustainable development, much less the definite contents of the law of/for sustainable development. Two key components of sustainable development seem to be environment and development, but these two notions cover almost all of human life, and therefore, international law of/for sustainable development may extend to international law in general. But it goes without saying that we do not intend here to codify or develop progressively the entire field of international law.

In this respect, Kanehara presents two alternatives for the level of abstraction of principles to be included in the future Declaration, and for its coverage. According to Kanehara, our future Declaration may prescribe a sort of “framework” principles on a high level of abstraction, or it may inductively “crystallize” some essence of those principles, which have been established by positive international law. As for the coverage of proposed Declaration, possible choices are between all inclusive or selective, she argues.

Analyzed from this perspective, the questionnaire itself seems to be based on a premise that our future Declaration will be rather abstract and all inclusive. And, this presumption is accepted by Iwama, Takashima and Nishiumi among the members of Japan’s National Committee.

But, some members are critical to this approach. Murase sees very little utility in enumerating “empty” principles as in the case of Seoul Declaration, and submits that our future Declaration should address concrete problems with appropriate focuses. He strongly advocates an inductive approach based on pos-

⁴³ The following members participated: Professor Ryuichi Ida, University of Kyoto (Vice Chairman); Professor Toru Iwama, Seinan Gakuin University; Professor Atsuko Kanehara, Rikkyo University; Professor Yoshiro Matsui, Nagoya University (Chairman); Professor Shinya Murase, Sophia University; Professor Maki Nishiumi, Chuo University; Professor Haruo Saburi, Nagoya University; Professor Tadayoshi Takashima, Aichi Prefectural University; Professor Masashi Tomioka, Nagoya Keizai University (Secretary); Professor Kimio Yakushiji, Ritsumeikan University.

itive international law. Ida also argues that we should concentrate our attention on some core principles of sustainable development law. Too many wide and general principles may make us lose sight of the precise substantive elements of this branch of law, he warns. Referring to “Legal Principles for Environmental Protection and Sustainable Development” proposed by the WCED Experts Group on Environmental Law in 1987 as an example, Tomioka also argues for limitation of our subjects.

My own opinion in this respect is as follows:

At the outset, we have to reconfirm the nature of our proposed Declaration. Being a product of an academic association, it cannot have a direct legal effect like treaties or even resolutions of international organizations. We expect, however, that our future Declaration may serve as a stimulus and source of inspiration for States and international organizations in their work of codification and progressive development of international law in the field of sustainable development. It may also be useful in raising the public consciousness in this field as well as in promoting movements by NGOs for sustainable development.

Bearing the nature and objectives of our Declaration in mind, I submit that it should not be confined to the codification in its narrow sense as a restatement of existing law, but should proceed to the progressive development of international law for sustainable development. Even the codification work by the International Law Commission, a predominantly technical organ composed of legal specialists, cannot be devoid of elements of progressive development.

Two more points may be pertinent here. Firstly, as pointed out above, sustainable development or its two key components, environment and development, covers almost all of the human life, and therefore, international law of/for sustainable development may extend to almost all the fields of international law. Therefore, in order not to diffuse our attention, we should concentrate on some concrete principles directly pertinent to sustainable development. Many general principles of international law, such as the principles of non-intervention, respect for human rights in general, peaceful settlement of disputes, and so on, may be of some relevance to sustainable development, but, they would preferably be referred to in the preamble to the proposed Declaration.

Secondly, as the history of discussion in our Committee shows, there have been two lines of argument concerning sustainable development, one is that of environment and the other is that of development. And, to our regret, so far we could not find out the meeting point of these two lines of argument. However, sustainable development must be a concept for coordination or integration of environment and development. Therefore, we have to deal with environment and development in an integrative manner, not separately.

Question 1. Please identify some or all the elements of the emerging international law of sustainable development.

Some members of Japan’s National Committee make general comments on this question. Kanehara points out that if we choose the “all inclusive” approach,

the 19 principles identified by the ad hoc group of experts in 1995 will be pertinent, and, if we choose the “selective” approach, the future Declaration will confine itself to principles not adequately dealt with in the individual fields of international law, such as environment, economy and human rights. Tomioka argues that the purpose of sustainable development is to satisfy the human needs under the harmonization of environmental protection with development, and that for developing countries satisfying basic human needs and eradication of poverty will be an indispensable precondition for sustainable development. From this standpoint, he proposes some elements of emerging international law of sustainable development, introduced below. On the other hand, Ida does not find any new elements for international law of sustainable development. He takes the view that refinement and reevaluation of existing international law principles concerning development and environment would be indispensable as well as sufficient. And Murase is of opinion that the most important element of the notion of sustainable development is the objective standards established by scientific evidence. Thus, he is highly critical to the so-called “precautionary principle”, because it is self-defeating as a legal norm due to the lack of objective clarity and predictability.

The following elements of the emerging international law of sustainable development are given by the members of Japan’s National Committee, though not necessarily in the identical terms:

A. General Principles

- (1) principle of integration of environment and development
- (2) principle of equity among nations as well as of intergenerational equity
- (3) principle of prevention of environmental harm
- (4) precautionary principle
- (5) polluter-pay principle
- (6) principle of sustainable use of natural resources
- (7) principle of common but differentiated responsibilities
- (8) principle of peaceful settlement of disputes

B. Rights of Peoples and Individuals

- (9) right to development
- (10) right to enjoy a decent environment

* These two rights may be integrated as one right of peoples and individuals to sustainable development.

C. Rights and Duties of States in General

- (11) permanent sovereignty over natural resources and the responsibility not to cause damage to the environment
- (12) principle of good neighbourliness and international cooperation
- (13) principle of good governance including participatory democracy
- (14) duty to take measures of remedy for environmental victims

D. Rights of Developing Countries

- (15) special and preferential treatment for developing countries in the field of environment and development
- (16) eradication of poverty. * Item (7) may be included here.

These elements seem to be of a diversified nature: some form the core elements peculiar to the notion of sustainable development, others may be derived from these core elements, and still others are norms of general international law or of another field of international law, though closely related to sustainable development. Therefore, it may be appropriate here to identify some core elements peculiar to the emerging international law of sustainable development. They are, I venture to say, elements (1), (2), (3), (6), (7), (9), (10), (11) and (14).

Question 2. Which principles, rights and rules included in the 1986 ILA Seoul Declaration or others should in your view be part of a new Declaration on international sustainable development law and which should not?

Ida makes two reservations in drawing rights and rules from the Seoul Declaration: the principles enounced in it emphasize much more the developmental aspects than the environmental ones. Therefore, we should combine these two aspects so as to generate principles of sustainable development; a wide coverage of the Seoul Declaration presented some difficulties in identifying the substance of a NIEO law, and this experience teaches us that we should concentrate our attention on some core principles of sustainable development law. Murase's critical comment on the Seoul Declaration is also referred to in the General Observations above.

Many members of the Japan's National Committee enumerate rights and rules from the Seoul Declaration to be included in our future Declaration without making general observations on this question. They are as follows (numbers are those of the Seoul Declaration): 3. (some emphasize 3.3.), 4., 5., 6., 7., 8., 9., 10., 11., 12., and 13. On the other hand, some members suggest the following deletion from the Seoul Declaration: 1., 2., 3., 4.3., and 12.

Obviously, the authors of the questionnaire intend to draw some elements of development from the Seoul Declaration, on the one hand, and some elements in the field of environment mainly from the Rio Declaration (see Question 3). Based on this understanding, I would like to mention some provisions of the Seoul Declaration to be included in our proposed Declaration on Sustainable Development Law. It goes without saying that these provisions must be integrated with those in the field of environment, but this process will be the subject of our later deliberations. They are as follows: 3. (especially, 3.3.), 4. (with deletion of reference to liberalization of trade in 4.3.), 5., 6. (with the understanding that the right to development is a human right of peoples and individuals), 9., 10., and 11.

Question 3. Taking the Rio principles as a main point of reference, which principles of international environmental law would lend themselves in your view for inclusion, perhaps in an amended form?

Murase criticizes this question to be a "pick and choose" exercise, which

would cut off the intrinsic linkages and destroy the established balances in such a document as Rio Declaration drafted after a long and heated debate at a UN forum. Though perhaps from a different standpoint, Iwama advocates the inclusion of all the 27 principles of Rio Declaration into our future Declaration. However, all other members of Japan's National Committee who gave their opinion on this question choose a "selective" approach and take up the following principles from the Rio Declaration: Principles 1-8, 10-12, 14-22, and 24-27. Principles 4, 7 and 15 get unanimous support among these members.

I share Murase's concern about a "pick and choose" approach to an international instrument like Rio Declaration, but I think we can certainly derive inspiration from the principles listed in that Declaration, or make them our main point of reference in enumerating principles of international environmental law to be included in our proposed Declaration. From this standpoint, I choose the following principles of Rio Declaration (standards of selection and classification follow those used in Question 2):

A. General Principles

Principle 4: Principle 25 may be a part of this Principle.

Principle 15.

B. Rights of Peoples and Individuals

Principle 1.

Principle 3.

C. Rights and Duties of States in General

Principle 2.

Principle 7: This principle here involves responsibility of developed countries. In this sense, Principle 8 may be classified here.

Principle 11: Principles 10, 16, 17, 20, and 22 may be sub-categories of this Principle, involving the notion of good governance.

Principle 27: Principles 12, 14, 19, 23 and 24 may be sub-categories of this Principle.

D. Rights of Developing Countries

Principle 7: This Principle here implies preferential treatment for developing countries. It may contain Principles 5, 6 and 11 (second sentence) as its sub-categories.

Please note that the same proviso as stated in the reply to Question 3 is applicable here too.

Question 4. Who should in your view be the addressees (States, peoples, business, civil society?) of a Declaration on international sustainable development law?

At the outset of the reply to this question, I would like to point out that there may be two possible kinds of "Declaration" to be taken into consideration here: one is our proposed Declaration, and the other is a Declaration (or Convention) to be negotiated and adopted on an intergovernmental level in the future, for

which the former Declaration would be a stimulus, we hope. As for the former, the problem of addressees seems to be simple: they are States, international organizations, NGOs, peoples, business, civil society, individuals and alike: in short, those who can have a say, directly or indirectly, in the future law-making processes.

However, what this question has in mind is surely a Declaration, and all the members of Japan's National Committee who responded this question did so on this premise. Their common position is that the addressees of a future Declaration on sustainable development law would mainly or primarily be States, the predominant subject of international law in the present state of international relations. They also admit that, depending on the nature of rights and duties to be included in the Declaration, entities other than States, such as NGOs, peoples, multinational corporations, and so on, may be addressees. But, in the case of entities other than States as addressees, there may well arise a difficult problem of applicability of international law to them. Some legal basis or appropriate procedural guarantee would be necessary for the solution of this problem, as particularly Ida and Kanehara point out.

Question 5. In 1995, an ad hoc group of experts identified 5 categories with a total of 19 principles and concepts of international law for sustainable development. Please list a maximum of twelve principles for inclusion in a future ILA Declaration.

As stated in the General Observation and replies to Questions 1-3, here also seems to emerge a problem of standard for selection. Ida chooses some principles relating specifically to sustainable development law (introduced below), and suggests that principles of more general or wider range of application are to be stated either in general provisions or in a preamble. Here as elsewhere, Murase is highly critical to the approach of this Question, and argues for the concrete rules applicable in the actual relations of States rather than high-sounding empty principles. At the opposite end, there is Iwama's opinion that we should include all the 19 principles instead of selecting 12 principles. Selection by individual members of Japan's National Committee who responded to this Question is reported in the full text of this report as reproduced in the compilation of replies.

In my own view, principle 1 seems to be the most important cardinal principle underlying the concept of sustainable development, and, therefore, must surely be a part of our proposed Declaration, though its legal formulation may encounter some difficulties. Principle 2 is also one of the main component of sustainable development seen from an angle of development. Understood as a human right of peoples and individuals, the right to development (Principle 2) may be combined with the right to a healthy environment (Principle 3) so as to formulate a "right to sustainable development". I would like to suggest this formulation to be considered in our future discussion. Principle 4 would be a sub-

category of Principle 2 and thus not to be included as an independent principle in our Declaration. Principle 5, as understood to mean equity among nations as well as intergenerational equity, is also one of the important components of the concept of sustainable development. However, we will also encounter here difficulties in formulating it in legal terms. Principle 6 is without doubt a principle of positive international law and, therefore, has to be incorporated in our future Declaration as one of the basic principles, to which Principles 8 and 9 may be attached as sub-categories. Principle 7 seems to be an important principle to be included as well. However, it may well be considered to be a sub-principle under Principle 6.

Principle 10 is a central principle without which the concept of sustainable development as such could not stand. Thus, it has also to be included in our future Declaration. Principle 12 may be one component of Principle 10. Principle 11 seems to belong to another branch of international law. As for Principles 13-15, I think it better for them to be combined to one principle, called, for instance, "principle of good governance", rather than three independent principles. Principles 16 and 18 are surely principles of general international law not specifically related to sustainable development. However, it is also true that dispute avoidance and resolution, and monitoring and compliance of obligations, in the field of sustainable development have some distinctive features. Therefore, it would be advisable to include them in their peculiar formulation, perhaps incorporating Principles 17 and 19. Last but not least, I have to express my surprise and despair that I cannot find the principle of common but differentiated responsibilities among the 19 principles enumerated. This principle is certainly one of the most cardinal principles in the field of sustainable development. Without it, our future Declaration would be pointless.

Question 6. What would, in due course, at the intergovernmental level be the best form of progressive development of international sustainable development law and its codification? And what would be the most appropriate bodies within the United Nations for discussions on the need for progressive development and codification of international sustainable development law?

In view of its focused and precise formulation, this question obtains more concrete answers from the members of Japan's National Committee. As to the form(s) of progressive development and codification, there are two groups of ideas. Iwama and Tomioka suggest a single document, namely a declaration (by the UN General Assembly). Kanehara presents an alternative: a treaty in case of a limited set of principles inductively deduced from international practice; or a declaration in other cases. The other group advocates a three-stage development. According to Nishiumi and Takashima, the first stage would be a declaration, the second a general framework treaty, and the third specific treaties. In case of Ida, the second and the third would be reversed. And as to the appropriate forum, Ida, Kanehara and Murase recommend the ILC, assisted by some

technical bodies such as CSD or UNEP, because the work would be centred on law. On the other hand, Takashima advocates the UN General Assembly assisted by CSD in the first stage, the ILC in the second, and UNEP in the last stage.

Considering the present state of international law pertaining to sustainable development or, environment and development, and taking into account the extremely diversified interests and opinions on this problem, it would in my view seem impossible for States to agree on some concrete principles and rules of international law in this field in the near future. Therefore, the starting point for codification and progressive development of international law of/for sustainable development could be at best a Declaration adopted by the UN General Assembly or by an International Conference like the Rio Conference held in 1992. Preparation of a draft Declaration may be entrusted to some ad hoc group composed of experts in the field of environment, development and international law, perhaps under the auspices of the CSD. This Declaration has to include some process for review of its implementation, which would make it possible to show the degree of agreement among States on the principles stipulated and to address difficulties they encounter in implementing those principles.

In this manner, it would be possible to enter the second phase of the codification and progressive development of international sustainable development law, i.e. the phase of concrete law-making in the individual fields of sustainable development. The best forum for this stage would differ according to the problems to be dealt with, but in my view the ILC would not necessarily be a suitable body for this purpose. Surely, it is a technical body composed of international law experts, but its members do not always have detailed knowledge on environment and development as exemplified in its deliberation on the topic of "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law". A general framework convention in the field of sustainable development, as suggested by some members of Japan's National Committee may be impossible to realize in the near future for the confines of sustainable development are too wide to be able to make up a single convention and the interests and opinions of States are too diverse in this field to attain agreement.

Question 7. What in your opinion is the current status of the right to development in international law? What positive measures can be taken to promote implementation of the right to development?

Ida expresses doubt on the appropriateness of Questions 7 through 12 as such, because the substance of the principles concerned are not yet defined, and because we have not yet identified the principles to be included in the future Declaration. Thus, he hopes the Bureau to postpone the occasion of putting these questions before us in a later stage of our deliberation. I myself share this doubt of Ida. However, some members of Japan's National Committee replied to these questions, and hence I will summarize them and present my own opinion.

As to the current legal status of the right to development, Murase is of opinion that the right is not yet established as *lex lata*, remaining to be a *lex ferenda* proposition. On the other hand, Iwama, Nishiumi and Takashima see the right to development to be an emerging or a nascent principle of international law. With regard to measures for its implementation, Iwama stresses the need for assistance to the needed and for a participatory democracy, while Takashima emphasizes the necessity to clarify the contents of this right.

Nishiumi provides a somewhat detailed analysis on the two-level implication of the right to development: for developing countries, it implies the right to pursue their own national development and to require developed countries or the international community to cooperate for the purpose of facilitating their national development; for the people of developing countries, it implies the right to realize their potentiality to the fullest possible extent. This second-level implication, i.e. the aspect of a collective human right, is primordial for the realization of sustainable development, because it orientates the internal regime of developing countries towards democratization and makes redistribution of wealth possible. And in this sense, it relates very closely to the Category D principles referred to in Question 5 above, he argues.

My own understanding of the right to development corresponds to that of Seoul Declaration and is elaborated in a book chapter.⁴⁴ However, a word of concern about changing the meaning of the right to development may be pertinent here. Apart from a controversial aspect of the right of States, the right to development as originally understood in the Declaration on the Right to Development (A/Res/41/128), was a human right of individuals as well as of peoples. Through the latter it had an aspect of a collective right. But recent developments concerning the right to development seem to have neglected this collective aspect. For example, both the Vienna Declaration and General Assembly resolution 48/141 which established the post of UNHCHR referred to the right to development as a right of a "human person" without mentioning its aspect of peoples' right. And successive reports of the UNHCHR seem to have reduced this right to a mere sum total of economic and social rights of individuals. This tendency might have a negative effect of depriving the right to development of its dynamic character as a medium of structural change of the international community.

Question 8. What steps should be taken to integrate gender issues with sustainable development, taken into account the commitments by States in inter alia Agenda 21 and the Beijing Platform of Action?

Only three members of Japan's National Committee forwarded replies on this question. Among those who responded, Murase argues that the proposed

⁴⁴ See Y. Matsui, 'The road to sustainable development: evolution of the concept of development in the UN' in Ginther, Denters and de Waart (eds), *Sustainable development and good governance*, Dordrecht: Martinus Nijhoff, 1995.

rules on sustainable development are presumably applicable to both sexes, and that gender problems should be treated as a separate issue by a separate committee. On the other hand, Iwama is of opinion that gender issues are closely related to participatory democracy, particularly participation in decision-making, information disclosure and benefit sharing. And, as Takashima points out, there is the necessity of more theoretical analysis of the structural linkage between gender issues and sustainable development.

Considering Principle 8 of the Rio Declaration, which refers to “appropriate demographic policies”, as well as its Principle 20, it seems to be difficult to deny a close interrelationship between gender issues and sustainable development. In fact, “Women in Development” has been hotly debated in UN fora. And, as stated by Iwama, gender issues are integral components of the notion of good governance. However, it may not be practicable for us to do more than paying reference to the importance of gender issues in our future Declaration because of the wide and diversified implications.

Question 9. What is your view on the relationship between the concept of good governance and sustainable development?

Except for Murase, who rejects the concept of good governance to be a legal one and warns not to smuggle such an ambiguous and subjective notion into the Committee’s work, all other members of Japan’s National Committee who responded to this question stress the indivisible relationship between good governance and sustainable development. Tomioka argues that good governance and sustainable development have the same objective in common, because the former concerns the problem of how to manage our society in order to attain better living conditions for us and the latter seeks to realize the optimum point of harmony between environmental protection and resource development. Tomioka and Takashima state that sustainable development would ultimately be achieved by good governance. For Nishiumi, good governance is a very important principle in so far as it enables peoples to participate in decision-making and also gives opportunities for NGOs to develop and enrich the law in this field. In addition, he is of opinion that good governance is operational in the decision-making and institutional arrangements for international organizations.

However, it must be noted that some cautions are voiced on the notion of good governance. Takashima notes that we would encounter political difficulties in the process of consolidation of the concept of good governance, because it requires some democratic system, upon which there seems to be no agreed definition in the present international community, in both domestic and international society. Kanehara argues that in order to fully realize the objects and purposes of international environmental law and international law of development — that may take essential parts of would-be sustainable development law — international law is indispensably required to touch upon the domestic structure of sovereign States as an issue of good governance, and this would be an impor-

tant step forward to a new era of international law. But at the same time, she points out that it would require us to reconsider such relevant traditional principles and notions as sovereignty, domestic jurisdiction, and non-intervention.

I also have an ambivalent feeling toward the notion of good governance. On the one hand, understood as a concept enabling peoples to participate in decision-making in diversified fields and at every level of social organization, good governance is undoubtedly a corollary or an indispensable component of the right of peoples to self-determination. In this sense, its invaluable importance for sustainable development has been unanimously accepted. But, on the other hand, as pointed out by some members of Japan's National Committee, there has been no agreement on the content and scope of good governance among various actors of present-day international community. Moreover, it has not been uncommon that some developed countries as well as international organizations utilize good governance as a pretext to press their own notion of "human rights, democracy and market economy" upon developing countries and countries undergoing the process of transition to a market economy. This seems to be a violation of the right of peoples to self-determination. Thus, the first thing to do on the concept of good governance is to clarify its meaning and contents in order to attain consensus among various actors of international community. This would be an indispensable precondition for us to successfully incorporate this concept into our future Declaration on Sustainable Development Law.

Question 10. What steps should be taken to improve access by governments, industries and others to technology and science?

Only a few remarks of a general nature were forwarded on this question by the members of Japan's National Committee. Whereas Murase discusses the question, Iwama points out the necessity of examination on the applicability of a notion of "common goods". Kanehara cites finance mechanisms and technology transfer system established under several global environmental law treaties as good examples for this purpose. Takashima argues for strengthening the technical cooperation through the UN and ODA, and also for promoting transfer of appropriate technology owned by corporations.

As stated in paragraph 11 of the Seoul Declaration and Principle 9 of the Rio Declaration, transfer of technology is an indispensable component of the concept of sustainable development. And Chapter 34 of Agenda 21 proposed a wide range of policy measures for this purpose. But, in legal terms, we have not enough materials in this field except for some provisions provided for in some treaties for global environmental protection, as pointed out by Kanehara. Therefore, our starting point here seems to be a comparative analysis of these relevant provisions, from which we will be able to deduce some precepts to be utilized for our future Declaration.

Question 11. What views do you have on the draft Multilateral Agreement on Investment as an instrument for global development?

Perhaps because it proved to become an aborted enterprise, this question on MAI got only four replies from the members of Japan's National Committee. Nishiumi gives two reasons which explain this failure. First, the contents of the proposed MAI were so favourable for foreign investors (i.e., multinational enterprises, hereafter, referred to as MNEs) and so restrictive on the sovereignty of host countries that the latter could not take, for example, any legislative measures for labour or environmental policies. Second, thanks to the activities of NGOs publicizing these deficiencies of the proposed MAI, the EU countries, especially France, voiced strong protests against this project. He argues that, should there be a negotiation on a MAI within the WTO, much more concern would be required about sustainable development, such as the right to development and sovereignty over natural resources. Also Takashima, though admitting growing importance of private investment for global development in the view of the decrease of ODA, notes the necessity for exercising control over the ever-spiralling movement of transnational investment. And Iwama proposes to examine the necessity for inclusion of a provision on environmental impact assessment into a future MAI.

My own view is that the draft MAI prepared by the OECD seems to have been based on a premise that international investment has contributed, and will contribute automatically, to the development of recipient countries. It would have introduced a wide range of prohibition on employment requirements and other performance requirements, thus depriving recipient countries of measures to ensure that investment would contribute to the development of their own. There was no hint of consideration here for developing countries.

As for labour standards, only the preamble would have referred to the observance of internationally recognized "core labour standards", still within square brackets. An operative provision on prohibiting the lowering of labour or environmental standards as an encouragement of investment had not yet been agreed to. Apart from a passing reference in the preamble, also in square brackets, to environmental protection and conservation as well as to Rio Declaration and Agenda 21, the operative part of the draft contained only a GATT Article 20 (a), (d) and (g)-type saving clause for environmental protection, which has proved to be ineffective. There would have been no clause imposing some discipline for MNEs, except through the incorporation into an Annex of the non-binding OECD Guidelines for MNEs. Thus, the draft MAI would have been a document of MNEs, by MNEs (considering that the drafting forum was the OECD, composed of the mother countries of MNEs), and for MNEs.

We have to learn lessons from this experience. First of all, the forum of drafting was absolutely inadequate. There was hardly a possibility for developing countries to make their views known and interests reflected during the process of deliberation. I wonder whether even the WTO, the proposed next forum for deliberation,

is the best place for such a project, considering its strong inclination towards liberalization, though surely it is a more representative body than the OECD.

Question 12. What legal mechanisms should be developed to ensure implementation of the Climate Change Convention and its Kyoto Protocol?

For the purpose of ensuring implementation of the Climate Change Convention and its Kyoto Protocol, Iwama and Takashima propose to establish a non-compliance procedure such as provided for in the Montreal Protocol, as amended in 1992, to the Vienna Convention for the Protection of the Ozone Layer. Kanehara recommends to introduce more substantial and effective reporting and review procedures. Murase presents some important problems concerning the relationship between environmental protection and trade, with special reference to the Climate Change Convention and its Kyoto Protocol.

In my own view this question may be too concrete in relation to our proposed Declaration on the Law of Sustainable Development. Abstract and too general formulations are not desirable for our future Declaration. However, it is also clear that we cannot propose legal mechanisms for more effective implementation of all conventions in the field of environment and development. Therefore, what we rather should do is to undertake a comparative analysis of these conventions in order to find out a general formula of legal mechanisms for more effective implementation of treaty obligations in this field.

Annex 3

Reply of the Dutch ILA (NVIR) Working Group on Legal Aspect of Sustainable Development (chairman Prof. Paul de Waart) to the ILA Questionnaire

Compiled by Dr Karin Arts, Secretary

Introduction

The Dutch Working Group on Legal Aspects of Sustainable Development strongly supports the initiative of the international ILA Committee to issue a questionnaire on legal aspects of sustainable development. It sees the questionnaire as a useful instrument to take stock of the current state of affairs in and opinions about, legal aspects of sustainable development. The resulting inventory of existing and possibly new principles of international law in the field of sustainable development will serve as a relevant basis for preparing a ILA Declaration of Principles of International Law on Sustainable Development.

The substantive responses of members of the Dutch Working Group to the questionnaire are reproduced below. A valuable input was also provided by the Dutch ILA (NVIR) Working Group on Feminism and International Law, which is integrated in the overview presented below.

Question 1. Please identify some or all of the main elements of the emerging international law of sustainable development.

While considering this question, one needs to keep in mind that there are still very different views as to what sustainable development is and entails. One should therefore see this question 1 in close relation to question 5. Also, there may be complications in using the notion of 'rights' altogether in the spheres of (rights to) development or environment, given their imprecise definition and limited justifiability.

Nevertheless, according to the Dutch Working Group on Legal Aspects of Sustainable Development, three main fields are of crucial importance in this context. Firstly, the international economic law of development. Secondly, international environmental law as far as relevant to development, for example concerning sustainable use of natural resources and inter-generational equity. Thirdly, the area of human rights and development. Much of the existing work on international law and sustainable development is heavily biased to the environmental/ecological dimensions only. The challenge and way forward lie in the integration of the three areas mentioned, in other words by adding the economic and human rights/social dimensions of sustainable development to the already articulated environmental ones. Both an integration of and a balancing between various interests, sometimes conflicting, are required. Failing such integration, the practice of liberalisation will continue to undo the progressive development in theory. The European Union is a case in point. While sustainable development was incorporated relatively prominently in the Treaty on European Union (Maastricht Treaty, 1992), liberalisation for the purpose of achieving as much economic growth as possible dominates in practice.

Reflecting on this question, the Dutch Working Group on Feminism and International Law too finds it crucially important to take into account some more general trends in the development of international law, in particular those pertaining to a more holistic and multi-faceted approach. Obviously, sustainable development cannot be narrowed down to being primarily an economic and environmental problem, but should include the social and political/institutional domains as well. Sustainable development cannot be achieved without realising a minimum level of basic human rights for all. In fact, it would be perverse to speak of sustainable development as long as large numbers of people all over the world are suffering from structural forms of oppression, extreme poverty or violence and the like. At the same time, sustainable development will ultimately depend on whether people live and act responsibly in their daily lives.

Question 2. Which principles, rights and rules included in the 1986 ILA Seoul Declaration (headings attached) or others should in your view be part of a new Declaration on international sustainable development and which should not?

It is the opinion of the Dutch Working Group on Legal Aspects of Sustainable Development that, by and large, the content of the Seoul

Declaration still stands relatively strongly. While it certainly needs some updating and broadening in order to reflect more recent developments concerning international law and sustainable development, it is much more difficult to point out elements of the Seoul Declaration that should no longer be seen as part of the frame of reference anymore. Two elements were explicitly discussed in this context: the *pacta sunt servanda* rule, and the right to benefit from science and technology. Concerning the former, the view was expressed that *pacta sunt servanda* is part of general international law and not specific to sustainable development law. One should be cautious not to develop artificially distinguished principles positioned exclusively in international sustainable development law, which are similar to, but not quite the same as, parallel rules of general international law. Concerning the latter element, (a right to) transfer of technology has perhaps lost its strength since Seoul. It would not qualify as 'emerging law' anymore, but perhaps rather as 'disappearing law'.

Among the other Seoul principles, rights and rules, equity and solidarity and the entitlement to development assistance, the duty to cooperate for global development, participatory equality in international economic relations and principles of substantive equality are by some members seen as temporary principles in the sense that they are only needed as long as there is a fundamental imbalance in the distribution of the world's wealth. In other words, these principles will not be needed when developing countries attain a level of development that enables them to participate in international economic relations on equal footing with the industrialised world. Parallels could perhaps be drawn with the concept of positive discrimination and affirmative action at the national level, which should be applied with restraint as it inherently confirms weaker positions, and which should not be applied as soon as parties have become sufficiently strong to compete on the footing of general principles such as non-discrimination.

In line with the response to question 1, it is emphasised here again that integration is the crux of the matter. Hence, a major challenge is to combine sustainable development with free trade and economic growth, also through organisations like the WTO, EU and IMF.

According to the Dutch working group on Feminism and International Law, the Seoul Declaration is now a somewhat narrow, one-dimensional document which does not necessarily square well with the more holistic and multi-faceted approach that is emerging in international law generally.

Question 3. Taking the Rio principles attached as a main point of reference, which principles of international environmental law would lend themselves in your view for inclusion, perhaps in an amended form?

According to some, the Rio Declaration demonstrates the danger of vagueness as a result of incorporating too large a number of principles. The questionnaire in its current form carries no safeguards against this danger. Its question

5, for example, leaves open the possibility of different listings of 12 principles. This can easily lead to inclusion of a number of principles in the ILA Declaration equal to that of Rio, which then unavoidably would be addressed as briefly and vaguely as is the case in the Rio Declaration.

One should consider the importance of the protection of nature as such much more prominently than was done so far in most relevant international instruments/documents. A less anthropocentric approach is highly desirable. In this respect there is a lot to learn from the IUCN draft International Covenant on Environment and Development.

The issue of participation, including the role of non-state actors (major groups, indigenous groups, and women – Rio principles 20-22) lends itself for inclusion. Another area incorporated in Rio that could possibly qualify for this purpose is that of norms concerning the area of sustainable development and armed conflict (Rio principles 24 and 25).

Question 4. Who should in your view be the addressees (States, peoples, business, civil society?) of a Declaration on international sustainable development law?

According to the Dutch Working Group on Feminism and International Law it is not entirely clear what ‘addressee’ means. If this means that the important role of non-state actors in sustainable development should be acknowledged, the Working Group fully agrees to include business, civil society and individuals as addressees. However, if this means to refer to who can be a subject of international *obligations* it would be very wary to extend the scope beyond states. Obviously, rights and duties cannot be limited to inter-state relations, but should include duties of states regarding the internal organisation of the state and its inhabitants.

The Dutch Working Group on Legal Aspects of Sustainable Development largely supports this line and finds it important to keep a distinction between addressees and subjects of international law of sustainable development. In addition to the ones listed, international organisations should also be included. Differentiation between status, role, rights and duties of the various different categories is useful and relevant: states and international organisations are perhaps the primary target group; transnational/multinational corporations, international banks, ‘the market’ (i.e. anything important which falls outside national jurisdiction) the secondary group; and civil society and individuals the tertiary group. Current trends in ‘decent entrepreneurship’ expressed through e.g. codes of conduct for companies operating internationally deserve attention, just like the trend in the European Union to implement binding directives through voluntary covenants with the business sector.

Question 5. In 1995, an ad-hoc group of experts identified 5 categories with a total of 19 principles and concepts of international law for sustainable development. Please list a maximum of twelve principles for inclusion in a future ILA Declaration.

The scores of five members of the Dutch Working Group on Legal Aspects of Sustainable Development are reported in the full compilation of replies.

Attention should be given to the connection between principles A(1), C(10), E and questions 10, 11 and 12 of the questionnaire. Filling-in A(1), according to the example of the 1986 ILA Declaration, would require relatively little space in the new Declaration on Sustainable Development. Principles as referred to under B(2) to B(9) are of course necessary and require relatively much space. This is not the case for principles C(10) and E(16) and the last three questions of the questionnaire. The validity of listing national implementation of international commitments (E18) as a separate principle can be questioned.

The view was expressed that the issue of transparency listed in the title of section D of the list of principles is an absolute requirement for sustainable development. May a country veil or conceal its economic state? (cf. far-reaching proposals concerning Special Dissemination Standards) Such concealing is an obstacle to sustainable development, as proved by currency crises and their disastrous consequences. 'Transparency' is partly covered by 'access to information' (D14), but it is questionable whether that would extend to the distribution of macro-economic data. 'Transparency' is also connected to the relationship between good governance and sustainable development (see remark question 9).

Question 6. What would, in due course, at the intergovernmental level be the best form of progressive development of international sustainable development law and its codification? And what would be the most appropriate bodies within the UN for discussions on the need for progressive development and codification of international sustainable development law?

There is no clear consensus in the Dutch Working Group on Legal Aspects of Sustainable Development on "the best form of progressive development of international sustainable development law and its codification". On the one hand, according to some, yet (an)other Declaration(s) or Framework Treaty is perhaps not the most obvious course of action. Ultimately, detailed treaties with clear-cut rights, duties and responsibilities count. On the other hand, Declarations and especially Framework Treaties can provide a useful frame for coordination of the activities of different organisations/institutions/actors. Moreover, the significant and important advantage of a Declaration is that it requires no ratification procedures. Declarations can also be instrumental in identifying problem areas, stimulating progressive development of law and suggesting action to be taken in formulations to be used later on in binding docu-

ments. An example of the latter is the incorporation of the goal of 'sustainable development', under the influence of the Rio Declaration, in Art. 6 EC of the Treaty of Amsterdam. In fact it is not necessary to take a definite position on this question. Anything that could make a valuable contribution to the indicated goal should be welcomed.

Question 7. What in your view is the current status of the right to development in international law? What positive measures can be taken to promote its implementation?

In essence, the right to development can be viewed as the synthesis of various existing social and economic human rights, for example the right to food and primary healthcare, and civil and political human rights, such as the freedom of expression. The right to development has given rise to considerable ideological controversy. Some governments, most notably the US, have fervently opposed the existence of a right to development, while others considered it as of primordial importance. However, in recent years this divergence of opinion seems to be diminishing. References to the right to development could be included in Rio Principle 3, the Vienna Declaration of Human Rights and the Copenhagen Social Summit. It is also included in some treaties, including the African Charter of Human and Peoples' Rights. Yet, its exact meaning, added value and legal status in international law remain somewhat unclear.

Question 8. What steps should be taken to integrate gender issues with sustainable development?

According to the Dutch Working Group on Feminism and International Law, it would be relevant to formulate general principles which would do justice to the developments in contemporary international law and which would be applicable to all other principles, rights and rules of international law regarding sustainable development.⁴⁵ One of those general principles should cover integrating a gender perspective. This could be achieved by formulating the obligation to make some kind of 'gender impact assessment'. Of course such an assessment would make sense only in combination with the other aspects as advocated by the Working Group. The remarks to be made, however, can only be tentative. A fuller analysis of a gender-sensitive approach would need much more research and reflection.

⁴⁵ There is increasing awareness of the importance of integrating a gender perspective. As gender is a major organising principle in all societies, this means more than 'add women and stir' and/or improve the position of individual women. It entails more structural change e.g. full participation of women in all areas of public life will necessitate a structural reorganisation of a society's care taking arrangements, which are traditionally taken care of by women.

Question 9. What is your view on the relationship between the concept of good governance and sustainable development?

Good governance will involve among others ensuring domestic procedural safeguards, of utmost importance in achieving a balanced approach to development and environmental concerns.

Question 10. What steps should be taken to improve access by governments, industries and others to technology and science?

Sustainable development is concerned with the preservation of the environment as well as economic development. The latter requires (among other things) the enhancement of production of goods and services and investment to that end; the former puts a brake on such production and investment.

Technology and science play a role in both processes: technology and science constitute a major production factor today for industry producing goods and services; and they represent an essential condition for the protection of the environment.

In retrospect it is clear that none of the efforts made in the CERDS and the subsequent attempts to spread technology cheaply and efficiently among all concerned in the developing nations has been successful. This is true also for national legislation introduced in a number of countries, in particular in Latin America, in the 1970s and 1980s. These laws were designed to promote the transfer of technology to developing countries on conditions deemed fair to the recipients, but in practice they proved in many cases to be unduly restrictive and harmful to the interests of industry which owned the know-how; they virtually stopped the transfer of technology instead of promoting it. Many of these laws were abrogated or mitigated after some years and the transfer of technology process started again. In the light of this experience it is submitted that the interests of all concerned—public authority and private interests in developing as well as developed countries—are best served by a liberal regime relying on the market mechanism. There will be abuses from time to time under such a system, as there are bound to be abuses under any other conceivable regime. The best way to deal with abuses would seem to be reliance on impartial, i.e. international, arbitration or conciliation in any agreement concluded relating to international transfers of technology or other transactions about know-how.

Question 11. What views do you have on the draft Multilateral Agreement on Investment as an instrument for global development?

When, in 1995, negotiations started within the OECD, it was clear that the Multilateral Agreement on Investment (MAI) was not meant to be an instrument for sustainable development and fair competition, but primarily a tool for investment promotion and protection. The draft MAI was actually heavily crit-

icised by NGOs and others when the OECD first published it at the beginning of 1997. The criticism concerned, among other things, the lack of references to labour standards and environmental protection clauses, the lack of specific provisions for developing countries, and the unbalanced protection provisions for investors in contrast to the absence of any obligations on their part. Furthermore, the draft MAI was meant to become a global treaty, open for signature to non-OECD countries, but these countries were not allowed to participate in the MAI negotiations. Consequently, various people considered the draft MAI to be an instrument of 'corporate capitalism' imposed by industrialized countries. These critical sounds were echoed by critical questions from the European Parliament and national politicians in European countries. France decided to withdraw from the negotiations, partially for cultural motives. At the end of 1998, the negotiations were suspended because of lack of agreement.

Despite the above developments, many countries, including the Netherlands, keep stressing the importance of establishing a global regime for investment. In 1999, the EU published its priorities for the envisaged Millennium Round of the WTO, and put forward the establishment of a multilateral framework for investment as one of them. Some other countries plead for negotiations within the UN framework (UNCTAD) or within the World Bank Group. It is, however, evident that new negotiations for a multilateral investment framework need the support of developing countries. At this moment such support is not yet assured.

A deeper look into the core criticism on the draft MAI reveals a number of problematic aspects to be considered. A first critique concerns the absolute focus on economic growth as resulting from increased foreign investment. According to the preamble of the draft MAI, foreign investment is intended to elevate the world economy and contribute to the development of the countries involved. It should lead to efficient utilisation of economic resources, create employment opportunities and improve standards. But, to quote the Least Developed Countries 1998 Report of UNCTAD, "the new consensus also recognises that the goals of development extend beyond the relatively narrow objectives of economic growth, to include distribution and poverty reduction, social development and environmentally sustainable development". No further criteria potentially safeguarding the development of countries can be found in the draft text of the MAI.

A second comment relates to the absence of integration of protection of environment and of health within the draft MAI. Effective integration of environmental and health norms seem to be of particular importance in the view of panel awards of the WTO in the hormones disputes. These awards show that measures intended to protect health will easily be overruled by liberalisation concepts, unless these measures are justified by scientific research. The other party, however, often challenges these scientific results. The same could happen to a multilateral investment framework lacking the necessary provisions regarding sustainable development.

Thirdly, provisions that acknowledge the position and particular problems of developing countries in the world economy are lacking. The key concepts of the

draft MAI are the principles of non-discrimination of foreign investment by applying national treatment and most-favoured nation treatment to all investors. Exceptions recognising the concept of states' sovereignty to determine their own development policies and priorities are not provided for. Development policies that stimulate preferential treatment of local communities could well conflict with the non-discrimination concept if no exceptions are made. In case of dispute settlement, it is very well conceivable that awards will give priority to liberalisation concepts over national development policies.

Lastly, the draft MAI protects investors and gives them rights, but does not impose any obligations on them. For another approach reference is made to the OECD Guidelines for Multinational Enterprises but those are not included as binding provisions. The role and behaviour of multinationals is often a key factor for development, especially for least developed countries. A globally controlled competition regime seems to be essential. According to leading economists, without such a regime the dominant tendency of liberalisation will inevitably lead to market distortions, price agreements and change to an increasing number of oligopolistic and even monopolistic national markets. Effectively controlling multinationals at the national level has often proved to be difficult. The realisation of an effective and just global competition regime is therefore particularly urgent.

To conclude, a multilateral investment framework could indeed contribute to development. The draft MAI, however, was unmistakably designed for investment protection rather than to stimulate sustainable development. Too many key issues were not addressed which resulted in an unbalanced draft treaty without care for environment protection, social issues and developing countries. If we want to achieve sustainable development of all countries we need another set-up for such a framework.

Question 12. What legal mechanisms should be developed to ensure implementation of the Climate Change Convention and its Kyoto Protocol?

The legal aspects and implications of the three Kyoto 'flexibility mechanisms', i.e. joint implementation, clean development mechanisms and emissions trading, are believed to be important but are yet to be clarified. In addition, non-compliance procedures modelled upon the Montreal Protocol could also be instrumental in achieving the Kyoto targets.