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Justitia et Pace

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Rôle et signification du consensus dans l'élaboration du droit international

The role and significance of consensus in the ~~framing~~ forming of international law

*Sixième Commission**

Rapporteur : *Louis B. Sohn***

* Au 1er août 1996, la Sixième Commission était composée de : M. Louis B. Sohn, *Rapporteur*, MM. Anand, Barberis, Bennouna, Bernhardt, Mme Bindschedler-Robert, MM. Caminos, Diez de Velasco y Vallejo, Müllerson, Orrego Vicuña, Pinto, Schachter, Skubiszewski, Stevenson, Torres Bernárdez et Wang.

** Lors de la création de la Commission, en 1987, le Rapporteur a été désigné en la personne de M. Erik Suy ; après la session de Milan (1993), M. Louis B. Sohn a été appelé à lui succéder.

Note du Rapporteur Louis B. Sohn aux Membres de la Sixième Commission

19 June 1995

Dear Confrères,

I am writing to you in my new capacity as the Rapporteur of the Sixth Commission of the *Institut de Droit international* that was given the task to prepare a report on the topic "The Role and Significance of Consensus in the Forming of International Law".

As you know, this topic was connected with the study made by the Thirteenth Committee on the "Resolutions of the General Assembly of the United Nations", which in turn was part of an even more ambitious project on "The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective".

Our Colleague, Krzysztof Skubiszewski, prepared three excellent reports on the resolutions, which dealt incidentally with the topic of consensus. As these reports and comments thereon are relevant to our task, I have digested the relevant sections and comments as prolegomena for the accompanying Preliminary Exposé.

My predecessor, Erik Suy, also prepared a preliminary report on the subject, which has been published in the volume of essays in honour of Roberto Ago, our President whose loss we have recently suffered. As some of you have probably forgotten it after eight years, I am taking the liberty of enclosing a copy of it for your consideration, as well as the questionnaire he has prepared. In paragraph 3 of my report, I enclose a short summary of the discussion by Mr Suy and the four commentators, whose observations were sent to me, of the issues raised by the questionnaire (also enclosed).

Finally, I enclose a short memorandum concerning possible guidelines for a Preliminary Report. I would like to discuss it at the preliminary meeting that Mr Dominicé, the Secretary-General of the Institute, has kindly agreed to arrange during the Lisbon Session of the Institute. I hope that this meeting will facilitate the preparation of a Preliminary Report for the next session of the Institute. I hope you will

be able to send me by August 15, 1995, a few comments on the very provisional materials I am sending to you with this letter, and some suggestions about further issues that need to be researched. Such comments will be especially welcome if you are not able to attend the Lisbon Session.

With thanks for your cooperation, I remain

Sincerely yours,

Louis B. Sohn

Annexes :

Etude de M. Erik Suy

"Rôle et signification du consensus dans l'élaboration du droit international"[1]

Septembre 1986

Occasionnelle à ses débuts, la procédure du consensus est devenue aujourd'hui pratique courante dans la recherche de solutions pour les grands problèmes internationaux, surtout pour ceux — et ils sont très nombreux — qui divisent le monde selon le clivage soit est-ouest (accord d'Helsinki) soit nord-sud (Conférence des Nations Unies pour le Commerce et le Développement). Il est permis de dire que dans un monde divisé, le consensus est probablement la seule méthode permettant d'arriver à des arrangements, fût-ce au prix de la précision et de la clarté des textes. Mais n'a-t-on pas dit qu'il vaut mieux avoir un accord défectueux que pas d'accord du tout ? Une des caractéristiques de la communauté internationale universelle moderne est que la prise de décisions sur des questions globales par vote majoritaire apparaît de plus en plus comme une défaite pour les uns et les autres ou, en tout cas, comme un aveu de l'impuissance à trouver une solution, même si la majorité peut se réclamer d'une victoire facile qui représente "en quelque sorte des coups d'épée dans l'eau".[2]

La recherche du consensus est donc devenue une nécessité et il est, par conséquent, impératif de se pencher sur les divers aspects de ce phénomène relativement nouveau afin d'éviter des malentendus sérieux et échapper à une tendance à le considérer comme un slogan qui, par quelque effet magique, pourrait créer l'illusion que, dorénavant, un remède a été

1 Etudes en l'honneur de Roberto Ago, Milano, Dott. A. Giuffrè Editore, 1987, pp. 520-542.

2 A. Cassese, *Le droit international dans un monde divisé*, Paris, Berger-Levrault, 1986, p. 178.

trouvé aux maux de ce monde. Certes, le consensus a des avantages énormes sur les procédures habituelles et il a, sans doute, changé le visage de la diplomatie multilatérale, mais il ne faut pas qu'on en exalte trop les mérites. Par ailleurs, la notion est en pleine évolution et plusieurs études y ont été consacrées afin d'en saisir, à tel ou tel moment de son évolution, à la fois son image, ses dimensions et ses conséquences.[3] Cette étude-ci se situe à un moment critique de l'évolution de cette procédure car les diplomates et les juristes s'interrogent de plus en plus sur l'utilité, la portée et la signification exacte de l'exercice consensuel et de ses fruits.

Avant d'aborder la question de la définition proprement dite du consensus, il convient de souligner que l'expression est utilisée dans le langage diplomatique pour désigner plusieurs phénomènes. C'est ainsi que se rencontre très souvent la phrase : "La conférence (le comité, etc.) prend ses décisions par consensus" ou encore : "Tous les efforts seront entrepris pour que les décisions soient prises par consentement général". Il est évident que le consensus signifie ici la *procédure* utilisée pour la prise des décisions et, dans tous les cas où le consensus est incorporé dans un règlement intérieur, on le retrouvera sous la rubrique ou l'article relatif à la prise des décisions.[4] Mais il arrive très souvent d'entendre l'expression : "L'organe est arrivé à un consensus" ou encore "un consensus a été obtenu", "le consensus suivant s'est dégagé" ou d'autres formules

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3 Pour la bibliographie voir M. Bedjaoui, *Pour un nouvel ordre économique international*, Paris, UNESCO, 1979, p. 171, note 2, et E. Suy, Consensus, in *Encyclopedia of Public International Law*, vol. VII. I. Seidl-Hohenveldern, Consensus in den Vereinten Nationen und in den europäischen Gemeinschaften, in *Rechtsvergleichung, Europarecht und Staatenintegration Gedächtnisschrift für L.-J. Constentinesco*, 1984, pp. 695-706. K. Zemanek, Majority rule and consensus technique in law-making diplomacy, in *The Structure and Process of International Law* (R. Macdonald/D.M. Johnston, ed.), 1983,pp. 857-887. N.F. Kassjan, *Consensus in Modern International Relations* (en russe), Moscow 1983, Z. Haquani, La conciliation et le consensus dans la pratique de la C.N.U.C.E.D. in *New Directions in International Law. Essays in Honour of W. Abendroth*, 1983, pp. 100-117.

4 Voir par exemple le règlement intérieur de la Conférence des Nations Unies sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales (tenue à Vienne du 18 février au 21 mars 1986), Section XI : Promotion of General Agreement, article 63, paragraph 1 : "The Conference shall ... make every effort to reach general agreement on matters of substance ... and there shall be no voting on such matters until all efforts to that end have been exhausted". Voir également le Projet de règlement intérieur provisoire de la Conférence internationale sur l'abus et le trafic illicite des drogues, section VIII : Prise des décisions, article 32 : La Conférence doit s'efforcer dans toute la mesure du possible de mener à bien ses travaux et d'adopter son rapport par accord général. "A/CONF.133/PC/5 du 20 janvier 1986."

qui se réfèrent à l'*accord général*, fruit des délibérations et produit final d'un processus de négociations tout au long duquel la procédure du consensus a été utilisée. Malgré cette distinction entre la procédure et le résultat obtenu, il nous paraît évident que le consensus est avant tout une procédure utilisée dans la diplomatie multilatérale afin d'arriver à des conclusions (décisions, recommandations, textes, etc.) qui reflètent l'accord général des participants. En fait, en analysant cette procédure de plus près, il serait plus correct et approprié de parler d'une *technique de négociation et de prise de décision*[5] *caractérisée par l'absence*, tout au long du processus, *de recours au vote* — bien qu'il puisse y avoir des sondages informels — ainsi que l'absence *d'objections fondamentales*.

Cette définition est corroborée par les quelques définitions —rares il est vrai — qui ont été formulées dans des textes officiels. Ainsi, la *Conférence européenne sur la Sécurité et la Coopération* (CSCE, Helsinki) adoptait en 1973 son règlement intérieur dont l'article 69 dispose que "le consensus sera entendu comme l'absence de toute objection formulée par un représentant et représentée par lui comme constituant un obstacle à l'adoption de la décision en question". En 1974, la *Conférence mondiale de la population*, réunie à Bucarest, définissait le consensus comme signifiant "conformément à la pratique des Nations Unies : *un accord général en l'absence de vote, mais non nécessairement l'unanimité*". La *Convention des Nations Unies sur le droit de la mer*, adoptée à Montego Bay le 10 décembre 1982, contient plusieurs références au consensus et définit celui-ci dans l'article 161 (8)(e) comme signifiant "l'absence de toute objection formelle".

Pour des raisons que nous exposerons au cours de cette étude, il nous paraît que la première de ces définitions est de loin la plus proche des réalités.

Quels que soient le rôle, l'importance et la fonction du consensus dans la formation des décisions dans les sociétés nationales ou locales, voire même au sein d'associations d'intérêts[6], le phénomène du consensus se fait de plus en plus jour dans les relations internationales. En vérité, il est devenu un élément important dans toutes les relations multilatérales tant nationales qu'internationales et il semble, de plus en plus, remplacer la prise de décisions par vote majoritaire.

Pour le sociologue, le consensus est sans doute un phénomène intéressant, et l'observateur des relations internationales, où le consensus

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5 A. Cassese, *op. cit.* (note 1), p. 179.

6 Voir à ce sujet le remarquable ouvrage collectif *Le Consensus et la Paix*, Paris, UNESCO, 1980.

s'est introduit depuis à peu près deux décennies, s'interroge sur l'influence que ce type de prise de décisions dans les sociétés dites primitives peut avoir sur le développement, voire l'acceptation, de ce phénomène dans les relations internationales. Il constatera que la règle de l'unanimité, consacrée par le Pacte de la Société des Nations, a été remplacée par celle de la majorité, fondement de la Charte des Nations Unies. Mais il observera en même temps que, peu à peu, dans la prise des décisions au sein de l'ONU, les participants se sont écartés de plus en plus du système de vote pour embrasser celui de l'adoption des textes par "accord général". On s'interrogera donc à la fois sur l'*origine* et les *motifs* qui ont amené les responsables (les *decision-makers*) à préférer cette technique à celle qui prônait soit l'unanimité, soit le vote majoritaire. Quelles sont les raisons pertinentes qui poussent les Etats à rechercher cet accord général, plutôt que ce que l'on pourrait appeler "la chirurgie par le vote" ? Quels sont les motifs incitant les représentants des différents groupes nationaux, groupes d'intérêts, groupes régionaux, etc. ... à rechercher cet accord général au détriment de multiples obstacles, nonobstant une solution claire, que peut fournir le vote de la majorité contre la minorité ?

Origine et motifs

Avant de s'interroger sur ces motifs, il faudra peut-être essayer de déceler l'*origine* du consensus tel qu'il se pratique actuellement dans la diplomatie multilatérale. On admet généralement que l'origine du consensus se situe au début des années soixante lorsque l'Assemblée générale des Nations Unies fut paralysée à la suite de l'application de l'article 19 de la Charte de l'Organisation.[7] Certains Etats, dont la France et l'Union soviétique, se trouvaient, à la suite de leurs arriérés en matière de contribution au budget de l'Organisation, sous le coup de l'interdiction du droit de vote. Après de longues tractations, il fut convenu que l'Assemblée continuerait ses travaux en procédant à l'adoption des résolutions — là où elle s'avérerait possible — *sans objection*, ce qui éliminerait le fait de procéder au vote tout en permettant la participation continue des Etats qui, techniquement et juridiquement, tombaient sous le coup de l'article 19.

Notons, en passant, que ce fut l'époque de la décolonisation où l'on assista à l'accession à l'indépendance et, par conséquent, à l'accession à la qualité d'Etat membre de l'ONU de la plupart des Etats africains où la technique du consensus est une pratique habituelle et coutumière

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7 J. Charpentier, la procédure de non-objection, in *Revue générale de droit international public*, vol. 70 (1966), pp. 862 et ss.

dans la prise des décisions sur le plan interne. Rien d'étonnant dès lors que cette technique soit essayée sur le plan des relations internationales, surtout après qu'elle ait contribué à résoudre l'épineuse question de l'application de l'article 19 de la Charte. Il est, en effet, intéressant de constater comment, dans les années qui suivirent, les présidents de l'Assemblée générale et de ses grandes commissions s'efforcèrent de faire adopter les résolutions "sans vote", "sans objections", "par acclamation", l'expressions "consensus" n'apparaissant pas encore. Mais tout indiquait déjà que le ton y était. L'apparition de nouveaux Etats à l'Assemblée générale entraînait cependant une autre conséquence, à savoir, qu'au fur et à mesure que ces Etats s'ajoutaient à une majorité n'appartenant désormais plus aux fondateurs de la Charte — qui représentaient une majorité largement pro-occidentale —, l'ancienne majorité (occidentale), à laquelle il faut ajouter la minorité des pays de l'Est, se trouvait dans une situation minoritaire chaque fois qu'il s'agissait de discuter et de trancher des problèmes qui intéressaient la communauté devenue universelle. Alors quoi de plus normal que les minoritaires "automatiques" s'efforcent d'éviter le vote en recherchant des solutions acceptables pour eux, ainsi que pour la majorité. Ainsi, à la suite de la décolonisation et de l'admission aux Nations Unies de ces nouveaux Etats, appartenant au Tiers Monde, comment ne pas comprendre que, face à cette nouvelle majorité, les *minoritaires*, c'est-à-dire les Etats appartenant au Groupe des Occidentaux et autres, ainsi que les pays de l'Est, ne saisissent pas l'avantage de cette technique ou procédure nouvelle, dite de la non-objection, pour éviter que, d'une manière systématique, leurs points de vue soient écartés ou niés.

C'est ainsi que cette technique est devenue une nécessité pour ceux des Etats qui s'étaient retrouvés relégués dans la minorité soit de l'Est, soit de l'Ouest, vis-à-vis de la majorité des pays du Tiers Monde. Cette constatation mérite cependant que l'on s'interroge davantage sur les mérites de la technique du "consensus". En particulier, il est important de savoir en quoi cette procédure peut être attrayante pour la *majorité* des Etats de la communauté internationale, majorité qui peut très facilement faire prévaloir ses vues par le procédé classique du vote.

Il y a, semble-t-il, au moins deux raisons importantes qui induisent la majorité à accepter la procédure du consensus. Tout d'abord, elle se rend compte que la prise des décisions par vote serait de nature à aliéner la minorité dont la collaboration est essentielle au bon fonctionnement de l'Organisation. En effet, frustrés par la minorisation systématique — ou la mise en minorité — les Etats de l'Est et de l'Ouest, contribuant pour la plus grande part au budget de l'Organisation, pourraient un jour réviser leur attitude vis-à-vis de celle-ci. La majorité en nombre réalise, par conséquent, qu'elle constitue une minorité tant en ce qui concerne les contributions financières que pour ce qui est du poids politique. Il ne

sert à rien de triompher par le vote si la coopération de la minorité importante n'est pas assurée. La technique du consensus est donc devenue indispensable pour maintenir le dialogue et, par là même, un minimum d'efficacité dans l'Organisation mondiale.

La seconde raison pour laquelle la majorité estime que le consensus peut lui être avantageux, doit être recherchée dans la nécessité qui s'impose pour elle d'obtenir des concessions de la part de la minorité. En effet, cette minorité a, dans une très large mesure, dominé l'évolution de la création du droit des relations internationales avant l'accession à l'indépendance des Etats appartenant à la majorité. Estimant que, dans presque tous les domaines, l'ordre existant avait besoin d'être adapté en tenant compte des aspirations, intérêts et exigences des nouveaux Etats, il est indispensable de maintenir le dialogue avec la minorité afin de la convaincre de la nécessité d'établir un ordre nouveau. Les ajustements nécessaires ne sauraient se réaliser par des procédures brusques, mais par un processus beaucoup plus lent de consultations, de négociations prolongées et de tractations subtiles où la majorité est partie demanderesse et où la minorité réalise qu'il faut composer. Par conséquent, la thèse de M. Bedjaoui pour qui le consensus constitue, de la part des Etats du Tiers monde, une concession majeure qui pourrait à tout moment être retirée pour forcer une décision[8], ne correspond guère aux besoins de la vie internationale moderne.

Il apparaît ainsi que, la communauté internationale ayant atteint l'universalité tant souhaitée, le consensus est devenu le moyen idéal — on pourrait même dire nécessaire — par lequel tous les membres, tous les groupes et groupements peuvent réaliser, de la manière la plus efficace, leurs objectifs communs dans une société qui, depuis la création des Nations Unies, s'est transformée comme jamais auparavant. Citons à ce propos I. Claude :

> "Majoritarianism serves the world badly when it puts a premium upon the unacceptable proposal which can be voted over minority opposition rather than the bargaining proposal which may be tailored to agreement with the minority".[9]

Cette conclusion ne signifie pas toutefois qu'il n'y ait pas d'obstacles à réaliser ce consensus tant vanté. Toute innovation dans le processus de la prise de décisions pose des problèmes sérieux d'adaptation par rapport aux procédures en vogue surtout si celles-ci ont été consacrées dans les textes constitutionnels. On peut discerner deux types de problèmes. Il y

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8 M. Bedjaoui, *op. cit.* (note 2), pp. 171-172.

9 I. Claude, *Swords into Ploughshares : The Problems and Progress of International Organization*, 4ème éd., 1971, p. 140.

a tout d'abord celui de la technique du consensus. Dans ce domaine, la diplomatie multilatérale a acquis une expérience déjà solide au cours des deux dernières décennies. Ensuite, il y a toute une série de problèmes juridiques très délicats qui se situent tant au niveau constitutionnel qu'à celui de la procédure et qui se rapportent tous à la distinction entre la prise de décisions par vote, d'une part, et l'absence de vote, d'autre part.

Abordons tout d'abord le problème de la technique du consensus.

La technique du consensus

La question de savoir comment on réalise un consensus ou accord général dans une négociation multilatérale équivaut à se demander comment on parvient à un accord entre les membres d'une société ou d'une association dont les intérêts sont opposés et disparates au possible mais qui ont en commun — espérons-le — le sentiment d'être interdépendants et que, faute de leur accord, il ne peut exister que le chaos et l'anarchie. Il est donc indispensable qu'il y ait ce sentiment et cette conviction commune qu'un arrangement et qu'une accommodation sont indispensables pour que la société puisse fonctionner de manière efficace et dynamique. En d'autres mots, il faut que soit présente la volonté d'éviter la confrontation ce qui ne signifie pas nécessairement que les parties en présence aient abandonné, à l'avance, leurs positions de principe.

En règle générale, la décision de travailler vers un consensus est prise à l'avance par les participants à une négociation multilatérale. Ceci constitue déjà un engagement. Parfois, cependant, cet engagement reste sujet à des réserves permettant un recours à un vote au cas où un consensus s'avérerait impossible. On y reviendra dans l'analyse des aspects juridiques de la procédure du consensus.

Le consensus étant accepté comme méthode de travail, les délégations se réunissent, non pas selon le schéma habituel des conférences diplomatiques, mais selon un programme assez hétéroclite afin de définir, en premier lieu, les positions des groupes soit régionaux, soit d'intérêts. Il n'est pas indispensable que toutes les délégations participent à l'élaboration de la prise de position par groupe. Souvent, ces positions sont élaborées par des délégations représentatives dans chacun des groupes.

Ensuite s'instaure généralement un dialogue entre les représentants des divers groupes afin de rechercher s'il existe un dénominateur commun entre les positions. C'est ici qu'intervient le rôle important du ou des présidents de ces réunions. Car c'est à celui-ci (ou ceux-ci) qu'incombe, tâche très délicate, la perception d'un accord général. Ayant écouté les parties dans l'exposé de leurs positions, la présidence peut entreprendre des consultations supplémentaires afin de rechercher sur quels points il

existe un accord général ; quant aux délégations, elles attendent de cette même présidence cet effort de distillation des points communs et convergents. A la lumière de ces consultations, la présidence annoncera le consensus. Cette procédure est à la fois beaucoup plus longue et beaucoup plus complexe que celle d'une conférence de plénipotentiaires où l'on discute un texte, paragraphe par paragraphe, après quoi, on procède au vote. Dans la recherche d'un consensus, les négociations, tractations, consultations sont plus longues afin de pouvoir éliminer des textes les points d'opposition, afin de permettre des ajustements et *package deals*. Résultat : on se met généralement d'accord sur un dénominateur commun le plus bas, c'est-à-dire sur un texte acceptable pour tous, mais qui ne satisfait personne entièrement. On reste en deçà de ce qui avait été recherché, et on est allé au-delà de ce qui avait été avoué.

Une fois la méthode du consensus adoptée, le juriste commence à se poser une série de questions que nous essayerons de développer dans les sections ci-après.

Aspects juridiques

L'observation du phénomène du consensus, de sa technique et de son évolution soulève certaines questions d'ordre juridique tant sur la constitutionnalité du consensus que sur ses effets.

I. Problèmes constitutionnels

Presque toutes les organisations internationales ont adopté la règle de la prise de décision par vote majoritaire. Il en est de même des grandes conférences internationales organisées sous les auspices de ces organisations. Les constitutions, chartes et règlements intérieurs en témoignent. On est donc amené à se demander dans quelle mesure un organe d'une institution internationale peut valablement décider que ses décisions seront prises par consentement général et, par conséquent, sans avoir recours au vote. L'organe en question peut-il, en dépit d'une prescription constitutionnelle, décider qu'il ne sera pas procédé au vote ? Un participant peut-il insister à ce qu'il y ait vote ?

Afin de répondre à ces questions, il faut distinguer entre toute une série d'hypothèses très complexes :

a) Dans une organisation internationale, telle que l'ONU, qui reconnaît dans sa constitution le principe de la prise de décisions par vote, rien n'empêche les Etats membres de parvenir à des "décisions", sans qu'il soit nécessaire de procéder à un vote. Dans la pratique des organes principaux, l'Assemblée générale, le Conseil de Sécurité, le Conseil Economique et Social, il existe de très nombreux cas où des textes ont

été adoptés sans vote. C'est ainsi que le professeur Charpentier écrit à juste titre : "Le vote n'est pas une condition de validité d'une résolution ; ce n'est qu'une technique permettant de dégager la volonté générale. Mais il reste vrai que, dans ces organes, on devra obligatoirement procéder au vote si un seul des membres l'exige".[10]

b) Chacun des organes principaux a le droit, selon la constitution, de créer des *organes subsidiaires*. Si ces organes subsidiaires travaillent sous le règlement intérieur de l'organe principal, la solution proposée au paragraphe a) s'applique. Il se peut, cependant — et c'est ici que le bât blesse — que l'organe subsidiaire, en organisant ses travaux, décide de travailler sur la base de l'accord général et que, par conséquent, il ne soit pas procédé au vote. Faute d'un règlement intérieur propre — qui constitue en fait un accord international — peut-on considérer que la décision éventuelle de ne travailler que sur la base du consensus soit obligatoire ?

On peut arguer que cette décision constitue un engagement international et que, par conséquent, la règle *pacta sunt servanda* s'applique, même si la participation à ces organes est variable. En devenant membre de l'organe, on accepte d'en respecter les procédures. D'autres pourraient cependant avancer l'argument que l'organe subsidiaire, sans règlement intérieur propre et, par conséquent, soumis au règlement de l'organe principal, ne saurait se priver valablement du recours à la procédure du vote. La pratique semble être en faveur de la première solution car, faute d'un règlement intérieur complet, la décision de travailler par consensus peut être considérée comme un règlement intérieur partiel et embryonnaire. Il convient toutefois de tenir compte également de la formulation de cette décision, car souvent il est attendu que l'on "recherchera" le consensus, l'accord général, "dans toute la mesure du possible", ce qui laisse évidemment la porte ouverte à un retour au vote. La pratique nous fournit beaucoup d'exemples à ce sujet.

Ainsi, la Commission des Nations Unies sur le droit commercial international (CNUDCI) décida, lors de sa première réunion, que les articles relatifs à la procédure des commissions de l'Assemblée générale s'appliqueraient à la procédure de la Commission. Mais la Commission décidait qu'elle adopterait, dans toute la mesure du possible, ses décisions par assentiment général mais qu'en l'absence d'un consensus les décisions seraient prises par voie de vote conformément aux dispositions du règlement intérieur relatif à la procédure des commissions de l'Assemblée générale.[11]

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10 J. Charpentier, *op. cit.* (note 7), p. 868.

11 Rapport de la Commission des Nations Unies pour le droit commercial international sur les travaux de sa première session, 29 janvier - 26 février 1968, Assemblée générale, Documents officiels : Vingt-troisième session, Supplément N° 16 (A/7216), paras. 16 à 18 et para. 35.

A propos des travaux du Comité spécial des principes du droit international touchant les relations amicales et la coopération entre les Etats, l'Assemblée générale des Nations Unies, lors de sa vingt-deuxième session, exprima la conviction "qu'il importe de continuer à s'efforcer de parvenir à un accord général dans le processus d'élaboration des sept principes de droit international, mais sans préjudice de l'applicabilité du règlement intérieur de l'Assemblée, en vue de l'adoption d'une déclaration qui marquerait une étape décisive dans le développement progressif et la codification de ces principes".[12]

Mais déjà en 1962, le Comité des utilisations pacifiques de l'espace extra-atmosphérique avait décidé que "le but de tous les membres du Comité et de ses sous-comités accompliraient le travail du Comité d'une manière telle que ce dernier serait susceptible de parvenir à un accord sans avoir besoin de recourir au vote".[13]

Dans sa résolution 3356 (XXIX) du 18 décembre 1974, portant sur la création du Fonds spécial des Nations Unies, l'Assemblée générale avait prévu que les décisions sur toutes les questions seraient prises dans toute la mesure du possible par consensus tout en préservant la possibilité de recourir au vote (Article IV, para 3). Le règlement intérieur du Fonds reprend cette disposition dans son article 34. Une disposition similaire se trouve également dans l'article 30 du Statut et du Règlement intérieur de la Commission pour la fonction publique internationale ainsi que dans les articles 23 et 25 du Règlement intérieur du Conseil de l'Université des Nations Unies.

De ces quelques exemples on peut tirer la conclusion que les organes subsidiaires de l'Assemblée générale qui sont soumis au règlement intérieur de celle-ci peuvent décider et ont décidé de procéder par voie de consensus sans toutefois exclure la possibilité d'un recours au vote. Par conséquent, la Charte des Nations Unies, sans interdire d'autres moyens d'arriver à des conclusions, garantit le droit au vote, et les organes subsidiaires, tout en exprimant le voeu de ne pas faire usage du vote, ne peuvent pas exclure cette possibilité au cas où l'assentiment général (le consensus) serait impossible à atteindre.

c) Toutes les *conférences internationales* convoquées sous les auspices de l'Organisation internationale dont la Charte prévoit la prise de décisions par vote, adoptent leur propre règlement intérieur et qui reprend, en règle générale, les dispositions du règlement intérieur de l'organisation-mère ou de son assemblée. Ces conférences peuvent-elles se départir du règlement

12 Résolution 2327 (XXII) du 18 décembre 1967.
13 A/AC.105/PV.2, p. 8.

intérieur de l'Organisation sous les auspices de laquelle elles ont lieu ? La pratique donne une réponse affirmative à cette question. En effet, toutes les conférences internationales convoquées sous les auspices de l'ONU adoptent leur propre règlement intérieur et elles peuvent décider librement de la façon dont les décisions seront adoptées. A cet égard on constate à la fois une grande variété et une évolution.

Traditionnellement, le règlement intérieur des *conférences de codification* prévoit que les décisions de la Conférence sur toutes les questions de fond soient prises à la majorité des deux tiers des représentants présents et votant alors que les décisions sur les questions de procédure sont prises à la majorité[14]. Signalons cependant que la Troisième Conférence des Nations Unies sur le droit de la mer avait modifié le projet de règlement intérieur "classique" soumis par le Secrétaire général afin de tenir compte du *gentlemen's agreement* approuvé par l'Assemblée générale le 16 novembre 1973 et aux termes duquel la Conférence devait entreprendre tous les efforts afin d'arriver à un accord sur les questions de fond par consensus et qu'il ne serait procédé au vote sur ces questions qu'après épuisement de tous ces efforts. Signalons enfin qu'en vue de la Conférence des Nations Unies sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales, l'Assemblée générale avait, dans sa résolution 39/86 du 13 décembre 1984 fait appel aux participants de la Conférence pour se consulter sur les méthodes de travail, y compris sur le règlement intérieur, afin de faciliter le succès de ses travaux par la promotion d'un accord général. Ces consultations ont abouti à un projet de règlement intérieur dont l'Assemblée générale a recommandé l'adoption par la Conférence en spécifiant cependant que ce règlement intérieur avait été rédigé uniquement pour cette Conférence, eu égard à sa nature particulière et à la matière dont elle devait s'occuper.[15] L'article 63 du Règlement intérieur de la Conférence est rédigé comme suit :

"XI. Recherche d'un accord général

Article 63

1. La Conférence, tant en séance plénière qu'en Commission plénière, fait tous ses efforts pour parvenir à un accord général sur les questions

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14 Règlement intérieur de la Conférence des Nations Unies sur les relations et immunités diplomatiques (1961), article 36 ; Règlement intérieur de la Conférence des Nations Unies sur le droit des traités (1968-1969), article 36 ; Règlement intérieur de la Conférence des Nations Unies sur la succession d'Etats en matière de traités (1977) article 34 ; Règlement intérieur de la Conférence des Nations Unies sur les contrats de vente internationale de biens (1980) article 34.

15 Résolution 40/76 du 11 décembre 1985.

de fond, et plus particulièrement sur les résultats finaux de ses travaux ; ces questions ne peuvent faire l'objet d'un vote qu'après que tous ces efforts ont échoué.

2. Tous les moyens disponibles sont utilisés pour parvenir à un accord général. Les membres du Bureau de la Conférence président selon qu'il convient, coordonnent et supervisent les séances en vue d'accroître les perspectives d'accord général.

3. Si, lors de l'examen d'une question de fond, aucun accord général ne semble se dégager, le Président de la Conférence fait savoir au Bureau que les efforts faits pour parvenir à un accord général ont échoué. Le Bureau étudie alors la question et peut recommander qu'elle fasse l'objet d'un vote — en indiquant la date à laquelle le vote aura lieu — et soumettre la question à la Conférence en séance plénière ou à la Commission plénière, selon le cas".

Il paraît que la procédure du consensus a été utilisée pendant cette Conférence afin de pallier à des difficultés spécifiques à savoir : la nécessité pour des organisations internationales de participer à part entière et sur un pied d'égalité avec les Etats, ainsi que le problème que cette participation poserait lorsqu'il s'agirait de déterminer les voix à attribuer à ces organisations au moment du vote. C'est à ces difficultés que s'est référée l'Assemblée générale en utilisant les expressions "nature particulière" de la Conférence et "la matière" dont celle-ci devrait s'occuper. Lorsque l'Assemblée a spécifié en outre que la procédure du consensus avait été rédigée uniquement pour la Conférence en question, elle doit avoir réalisé qu'en des circonstances normales, les Conférences de codification des Nations Unies prennent leurs décisions par la procédure classique du vote. Reste à savoir si, à l'avenir, d'autres circonstances exceptionnelles ne seront pas invoquées à l'occasion de conférences sur la codification de matières encore plus délicates (par exemple la responsabilité des Etats) afin de justifier à nouveau un recours à la procédure du consensus surtout lorsque celle-ci aura fait la preuve d'être mieux à même de combler les divergences de vues que la procédure habituelle.

Si l'Assemblée générale convoque de temps en temps des conférences destinées à finaliser le processus de développement progressif et de codification du droit international, elle convoque régulièrement des conférences dont le but est de sensibiliser l'opinion publique mondiale sur un problème actuel. Ces conférences mènent en règle générale à des textes politiques sous la forme de Déclarations et de Plans d'action. Citons comme exemples récents : la Conférence internationale sur la question de Palestine (1983), la Conférence mondiale pour revoir et évaluer les résultats de la Décennie des Nations Unies pour les femmes (1985), les Conférences

mondiales sur la population (1974, 1979, 1984), la Conférence internationale sur l'abus et le trafic illicite des drogues (prévue pour 1987), la Conférence internationale sur la relation entre le désarmement et le développement (prévue initialement pour 1986, mais reportée à 1987).

Ainsi le règlement intérieur de la Conférence internationale sur la question de Palestine (Genève, 29 août - 7 septembre 1983) prévoit dans son article 30 : "La Conférence doit faire tous ses efforts pour que les travaux de la Conférence et l'adoption de son rapport s'effectuent par accord général". Mais l'article 32 complète cette disposition générale en laissant la porte ouverte à la prise de décisions à la majorité des deux tiers pour les questions de fond et à la majorité simple pour les questions de procédure.[16] Le règlement intérieur de la Conférence mondiale sur la décennie des femmes (Nairobi, juillet 1985) contenait des dispositions identiques[17], qui ne donnèrent cependant pas satisfaction à plusieurs délégations qui insistèrent sur le consensus. Après l'intervention personnelle du Secrétaire général de l'ONU, Mr. J. Perez de Cuellar, qui mena les consultations avec les principaux groupes, la Présidente de la Conférence, Mme Nargare W. Kenyatta, fit la déclaration suivante après l'adoption du règlement intérieur :

> "Without prejudice to the Rules of Procedure of the Conference which have been adopted, in particular rule 34, and without setting a precedent, a general understanding has emerged as a result of consultations whereby all documents of the Conference, in particular the Forward-looking Strategies document under item 8 of the Conference, should be adopted by consensus".

Le projet de règlement intérieur provisoire pour la Conférence internationale sur l'abus et le trafic illicite des drogues (Vienne, 1987) contient également, dans ses articles 32 et 34, des dispositions identiques à celles contenues dans le Règlement intérieur des deux conférences susmentionnées. Signalons enfin un développement intéressant intervenu récemment à propos du règlement intérieur de la Conférence internationale sur la relation entre le désarmement et le développement (qui aurait dû se tenir à Paris en 1986, mais qui a été reportée à 1987). L'Assemblée générale de l'ONU avait décidé que la Conférence "devrait prendre ses décisions par consensus" et avait chargé un comité préparatoire "d'élaborer et de soumettre par consensus à l'Assemblée générale" des recommandations portant sur ... la procédure. Le Comité préparatoire avait, lors de la quarantième session de l'Assemblée générale, soumis ses recommandations comprenant notamment un Règlement intérieur provisoire.[18] L'Assemblée a

16 A/Conf. 114/12.

17 A/Conf. 116/2.

18 Assemblée générale, Documents officiels : quarantième session, Supplément N° 5, A/40/51.

pris acte du rapport du Comité préparatoire et a notamment recommandé à la conférence d'adopter les propositions relatives à la procédure.[19] Or, que prévoit ce règlement intérieur provisoire ? Sous la rubrique VII, Prise de décisions, on lit ceci :

"Consensus

Article 28

La Conférence mène ses travaux et adopte ses décisions par consensus"

Ni plus, ni moins. Dans le rapport on retrouve cependant la phrase suivante : "L'article du règlement intérieur relatif à la prise de décisions par consensus ... ne devrait pas être considéré comme un précédent pour d'autres conférences internationales qui se tiendraient sous les auspices de l'Organisation des Nations Unies".[20]

Cette formule n'est cependant révolutionnaire qu'en apparence, car il est important de noter que le Rapport du Comité préparatoire a été discuté en Première Commission de l'Assemblée générale qui s'occupe de tous les points à l'ordre du jour de l'Assemblée qui concernent les questions du désarmement. Or, en cette commission siègent des représentants qui sont en même temps les ambassadeurs de leurs pays à la Conférence du désarmement, qui se tient à Genève et dont le règlement intérieur contient une phrase identique qui est d'ailleurs reprise du Règlement intérieur de l'ancien Comité du désarmement.[21] La Conférence du désarmement prend, en effet, toutes ses décisions — qu'elles portent sur des questions de substance ou de procédure — par consensus et cette pratique semble donner entière satisfaction.

A la lumière de ces quelques exemples tirés de la pratique, il est donc permis de conclure qu'il n'y a aucun obstacle à ce que des conférences réunies sous les auspices de l'Assemblée générale des Nations Unies adoptent, dans leur règlement intérieur, le consensus soit pour la prise des décisions, soit comme mode de travail. Généralement cependant, le consensus est mitigé par la possibilité d'avoir recours, en dernière instance et après épuisement de tous les moyens pour arriver au consensus, à la procédure classique du vote. L'*ultima ratio* du vote doit être vue non seulement comme une concession au principe démocratique selon lequel la majorité décide, mais également comme une hésitation à faire

19 A/RES/40/155 du 16 décembre 1985.

20 A/40/51, partie E, p. 4.

21 CD/8/Rev. 1 du 1er mars 1979, article 18, et CD/8/Rev. 2 du 15 février 1984, article 18.

totalement abstraction de la disposition fondamentale de la Charte de l'ONU contenue dans son article 18. On peut, par conséquent, douter si, à l'Assemblée générale et dans ses organes subsidiaires, on pourrait valablement décider qu'il ne sera plus fait usage du droit de vote et que tout se fera par consensus en dépit des dispositions pertinentes de la Charte et du Règlement intérieur. La même question peut d'ailleurs se poser pour d'autres organes principaux tels le Conseil de Sécurité et le Conseil Economique et Social.

II. Questions procédurales

La prise de décisions (dans le sens le plus large) par consensus n'étant qu'une procédure — sauf dans les cas où l'on assimile le résultat ("il y a un consensus") au moyen — soulève certains problèmes assez délicats à propos de la distinction entre cette procédure de *non-objection* et celle, plus nette et tranchante, de l'adoption d'un texte *sans vote* et à l'*unanimité*. Généralement, les comptes-rendus ou procès-verbaux de réunions où ces questions font l'objet de discussions n'en font pas état ce qui n'est pas un motif pour les négliger, bien au contraire.

a) Dans la pratique, la question de la différence entre le consensus et l'*absence de vote* s'est posée à plusieurs reprises. Telle délégation s'opposera à l'adoption d'un texte par consensus, alors que cette même délégation ne verrait pas d'objection à ce que le texte en question soit adopté "sans vote". A mon avis, cette dernière formule est beaucoup plus souple puisqu'elle est moins engageante. En effet, les participants à la négociation et à la prise de décision ne se prononcent pas, et l'absence de vote peut être interprétée soit comme un consentement, soit comme une abstention, soit encore comme une attitude négative qui, pour des raisons avouées ou non-avouées, ne veut pas être formalisée. On laisse passer le texte avec plus ou moins d'enthousiasme ou d'indifférence. Et il n'est pas rare que des délégations indiquent que, si le texte avait été soumis aux voix, elles auraient voté contre ou se seraient abstenues, en indiquant leurs réserves. L'adoption d'un texte "sans vote" permet des explications de vote qui, très souvent, constituent en fait des réserves et des prises de position négatives.

En revanche, le consensus traduit une prise de position positive vis-à-vis du texte adopté. Par définition, les objections de substance font défaut et les réserves ne devraient pas être permises. Même si, lors de l'adoption par consensus, il n'est pas rare de faire des déclarations, celles-ci ne sauraient être interprétées comme des réserves ou des rétractations car elles fausseraient le consensus qui implique un engagement positif de tous les participants à la négociation. Il est vrai que des déclarations interprétatives peuvent être faites, mais celles-ci ne sauraient être des objections fondamentales. Consensus et réserves sont des notions qui

s'excluent mutuellement. M. Amadeo écrit à ce sujet : "Cette pratique (d'émettre des réserves) annule en fait la valeur du consensus ... Il faut dénoncer avec énergie cette pratique, car elle pourrait rendre caducs tous les efforts qui sont tentés pour que le consensus devienne efficace et crédible".[22]

b) Une des questions que l'on se pose très souvent à propos du consensus est celle de savoir si elle se distingue de l'*unanimité*, et en quoi, et si cette technique de prise de décision permet à un seul participant d'empêcher la réussite de la négociation par l'exercice d'un veto.

Lorsqu'en 1974, lors de la Conférence mondiale sur la population, l'ONU s'est efforcée de donner une définition du consensus, celui-ci a été défini comme signifiant, selon la pratique des Nations Unies, un accord général sans vote mais pas nécessairement l'unanimité.[23] Si on lit cette définition conjointement avec celle adoptée en 1973 par la Conférence européenne sur la sécurité et la coopération selon laquelle "le consensus sera entendu comme l'absence de toute objection formulée par un représentant et considérée par lui comme constituant un obstacle à l'adoption de la décision en question", on devra en conclure que le consensus peut effectivement signifier unanimité lorsque la partie qui formule une objection au texte, considère celle-ci comme étant si fondamentale qu'elle empêche l'accord général. La pratique nous fournit en effet des exemples où un seul Etat était en mesure d'empêcher le consensus ce qui revient en fait à un veto. Evidemment, si on entend par unanimité l'accord total obtenu par un vote, le consensus ne signifie pas unanimité car il n'y a pas de vote. En revanche, le consensus est une unanimité négative en ce sens qu'il y a absence d'objection fondamentale même par un quelconque des participants.

Dans ce contexte, un problème pourrait surgir lorsque, sans pour autant faire valoir formellement une objection fondamentale, un des participants déclare, à propos d'un consensus obtenu, qu'il n'y a pas participé. Quelle est la portée d'une telle déclaration ? Constatons tout d'abord que le consensus n'est pas rompu car le participant n'a pas indiqué que telle était son intention. L'attitude ambiguë de la *non-participation* n'empêche donc pas l'accord général mais peut en affaiblir

22 M. Amadeo, Le consensus dans les relations internationales, in *Le consensus et la paix*, *op. cit.* (note 5), p. 137. Voir également les propos très pertinents de M. Bedjaoui, *op. cit.* (note 2), p. 174, K. Zemanek estime cependant que "(t)his possibility of making reservations is a necessary feature of consensus procedure and the existence of reservations does not invalidate the consensus achieved", mais il admet que ces réserves ne sauraient porter que sur des détails. Majority Rule, etc. ... (note 2), p. 875.

23 E/CONF. 6/2.

considérablement la valeur et la portée surtout si le non-participant s'avère être, selon l'objet de l'accord général, un "acteur" important. Ce dernier sera considéré comme étant absent lors de la prise de décision qu'il ne saurait cependant, par la suite, remettre en question étant donné l'absence d'une objection de fond. Généralement, cette attitude ambiguë est inspirée par des aspects secondaires ou par l'utilisation dans le texte de certaines expressions ou références à des faits ou situations qui, sans affecter pour autant la substance de la décision, en impliqueraient une reconnaissance implicite ce à quoi le "non-participant" ne serait pas prêt.

III. Le consensus et la valeur des textes

On peut, enfin, s'interroger sur l'impact que peut avoir la procédure du consensus sur la valeur des textes ainsi adoptés. A cet égard il convient peut-être de procéder à une distinction entre la valeur éthico-politique et la valeur juridique. Mais avant tout il paraît indispensable d'affirmer que la distinction que font les chartes et constitutions des organisations internationales entre les actes décisionnels et les recommandations n'est en aucune manière affectée par la façon dont les négociateurs sont arrivés à finaliser les textes. A. Cassese écrit à ce propos : "Le consensus, n'étant qu'une modalité de négociation et de prise de décision, n'a aucune influence sur la force juridique de la décision obtenue".[24] En d'autres termes, les résolutions, recommandations, même adoptées à l'unanimité, n'en obtiennent pas pour autant un caractère obligatoire bien que des propositions et des suggestions en sens inverse aient été faites, notamment au sein du Comité spécial sur la Charte et sur le raffermissement du rôle de l'Organisation.

Une deuxième remarque s'impose et qui a trait à un aspect assez négligé de l'utilisation de l'expression consensus. Il me semble qu'on ne saurait, voire, ne devrait parler de consensus qu'à propos des cas où la technique de négociations et de consultations — telle que décrite plus haut — a été suivie pour aboutir à des textes substantifs qui tendent à servir, soit comme instruments normatifs ou lignes de conduite générale pour les Etats (conventions, décisions, déclarations de principes), soit comme programmes d'action thématiques qui sont devenus pratique courante dans la concertation multilatérale (désarmement, population, commerce et économie internationales). En dehors de ces cas, l'usage de l'expression "consensus" devient abusif et tend à en diluer la signification et l'importance. C'est ici que les expressions d'adoption sans vote ou sans objection seront plus appropriées.

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24 A. Cassese, *op. cit.* (note 1), p. 181. K. Zemanek, *op. cit.* (note 2), p. 872.

C'est à la lumière de ces deux remarques que l'on appréciera mieux la véritable portée du consensus et son impact sur la valeur des textes adoptés selon cette méthode.

Indépendamment de la valeur intrinsèque des textes normatifs et de décisions, il va sans dire que le fait qu'ils aient été établis par consensus est une garantie que leurs dispositions seront effectivement appliquées (décisions) où qu'ils seront ratifiés et mis en oeuvre (traités et conventions) d'une façon beaucoup plus expéditive que des textes adoptés dans la controverse et assortis de réserves et d'objections. Quant aux autres textes, leur valeur d'engagement moral et politique sera rehaussée précisément parce qu'ils ont fait l'objet de négociations intenses ayant abouti à un accord général sur les lignes de conduite à suivre par les participants et auxquelles devrait s'appliquer le principe de la bonne foi.

Le consensus joue, en outre, un rôle important dans l'évaluation et l'appréciation de la valeur juridique de textes qui, sans avoir un effet contraignant, n'en établissent pas moins des principes. Le fait que la communauté internationale dans son ensemble soit parvenue à l'élaboration de principes auxquels les participants n'ont pas opposé d'objections fondamentales peut être interprété comme reflétant l'*opinio juris* qui, lorsqu'elle se greffe sur une pratique concordante des états, donne lieu à la formation d'une coutume que l'on ne saurait qualifier d'instantanée puisqu'elle n'émergera qu'à la suite de ce processus relativement long qu'est celui du consensus.

Dans son arrêt du 27 juin 1986 sur *les activités militaires et paramilitaires au Nicaragua et contre celui-ci (fond)*, la Cour internationale de Justice a dit que l'*opinio juris* "peut se déduire entre autre, quoiqu'avec la prudence nécessaire, de l'attitude des parties et des Etats à l'égard de certaines résolutions de l'Assemblée générale ...". Et elle poursuit : "L'effet d'un consentement au texte de telles résolutions ... peut ... s'interpréter comme une adhésion à la valeur de la règle ou de la série de règles déclarées par la résolution et prises en elles-mêmes".[25]

Si la signification du consensus pour le processus d'ajustement de la communauté internationale aux exigences de la vie internationale moderne est réelle, voire même, indispensable, il n'en reste pas moins vrai que certains aspects de cette procédure sont parfois décevants, surtout pour le juriste, aussi fasciné soit-il par cette innovation dans la technique de la négociation multilatérale. Mentionnons tout d'abord que, de l'avis de la plupart des observateurs du phénomène du consensus, les textes élaborés au moyen de cette technique, ne reflètent que le minimum — le soit-

25 Paragraphe 188 de l'arrêt.

disant "dénominateur commun le plus bas" — sur lequel les parties ont pu se mettre d'accord. Ces textes, ainsi que les engagements qu'ils contiennent, sont le plus souvent vagues, généraux, ambigus, car ils doivent, en fin de compte, contenter tout le monde, sans pour autant satisfaire complètement chacun. Ceci restera le sort inévitable de toute négociation globale, c'est-à-dire sur des problèmes intéressant la communauté internationale dans son ensemble, qui doit tenir compte à la fois des spécificités de chaque région et, donnée plus importante, des différences dans les systèmes politiques, économiques et sociaux auxquels appartiennent les participants. Cette conséquence est de nature à créer une tendance à résoudre les problèmes sur une base régionale et par des instruments juridiques plus précis. C'est ainsi qu'en essayant de vouloir résoudre des problèmes globaux par consensus, on tombe, par la frustration que celui-ci provoque, tant du point de vue de l'effort que du point de vue de la qualité du résultat, dans la tendance à chercher des solutions plus fermes sur le plan régional, faisant fi de l'universalité du droit international. Nous ne voyons cependant pas de mal à cette évolution, car il est admis que le droit international général ne saurait être qu'un minimum acceptable pour tous et que chaque membre de la communauté internationale, s'inspirant de ces directives générales, peut les élaborer à la lumière de son degré de développement politique, social et économique. Les normes et lignes de conduite élaborées par consensus constituent, à un moment donné de l'évolution des relations internationales, un accord commun sur la base duquel s'établiront les rapports réciproques et qui serviront de dispositions minimales à partir desquelles les états élaboreront des dispositions plus détaillées adaptées aux exigences spécifiques de leurs rapports réciproques.

La nature même de la procédure du consensus avec ses longues négociations et ses interminables consultations entre groupes et à l'intérieur de ceux-ci et qui se déroulent le plus souvent à huis clos ou d'une façon informelle, a pour conséquence que seuls les participants directs ont une idée et une connaissance précises de l'évolution d'un texte. En d'autres mots, les travaux préparatoires, si indispensables dans l'interprétation de textes peu clairs et ambigus, font généralement défaut ou ne sont en tout cas pas aussi élaborés et précis que ceux d'une négociation au sein d'une conférence diplomatique de type classique. Il serait par conséquent souhaitable qu'à défaut de procès-verbaux, des rapports officiels circonstanciés soient établis régulièrement par le ou les présidents, dont le rôle prépondérant dans la procédure du consensus est reconnu ; que ces rapports fassent état de l'avancement des travaux et qu'y soient signalés, d'une façon aussi complète que possible, tous les éléments de discussion qui sont à même d'éclairer l'observateur étranger sur l'évolution exacte de la négociation.

Conclusion

Ayant esquissé ainsi les aspects les plus saillants de la procédure du consensus, il paraît difficile d'en tirer des conclusions générales. Alors que les diplomates estiment souvent que le consensus est la technique qui convient le mieux pour la solution des questions dans un monde divisé, certains juristes se sont montrés assez sceptiques quant à l'utilité de cette procédure dans la rédaction de textes normatifs. Si le consensus se prête parfaitement à l'adoption de textes généraux devant servir comme lignes de conduite, il ne constitue peut-être pas le moyen idéal, surtout lorsqu'il s'agit de rédiger des textes plus précis sous forme de traités et de conventions, ne fût-ce qu'en raison de la possibilité de faire des réserves, bien qu'il y ait des exceptions notoires précisément à propos de matières où il existe à l'avance un consentement général.[26]

La recherche de solutions à des questions globales, telles le désarmement, l'espace extra-atmosphérique, l'environnement, les relations économiques et commerciales et la paix, demande à ce que l'accord de tous les membres de la communauté internationale soit acquis. Mais l'effectivité et la durabilité de ces solutions sont conditionnées par un encadrement normatif des plus précis et la procédure du consensus s'y prête peut-être moins bien. Nous avons cependant l'impression que le consensus, en raison des particularités de sa technique, débouchera, fût-ce parfois au détriment de la précision de son résultat, à des normes générales, c'est-à-dire coutumières, dont l'importance reste primordiale.

Septembre 1986.

26 Exemples chez K. Zemanek, (note 2), p. 863.

Observations de M. Krzysztof Skubiszewski

13 novembre 1986

Cher Confrère,

1. Votre étude sur le consensus est excellente par sa clarté et par sa présentation concise. En même temps, vous traitez votre sujet à fond, ce qui n'est pas facile vu sa nature souvent insaisissable.

2. Il faut, tout d'abord, souligner l'importance (et le succès) de votre effort de préciser la notion de consensus, notamment à la lumière de la pratique. Ainsi vous vous référez aux deux significations de l'expression, à savoir le consensus en tant que procédure et en tant qu'accord. J'ajouterais ici encore une troisième signification, celle de consensus considéré comme une source autonome du droit, autre que la coutume et le traité. Il y a des auteurs qui opposent ce consensus au consentement. Le consensus dans ce sens constitue principalement un concept de la doctrine, ne trouvant que peu d'écho dans les attitudes des Etats (*cf.* certaines déclarations de l'Ethiopie et du Libéria dans les affaires du *Sud-Ouest africain, deuxième phase*, Cour Internationale de Justice, Plaidoiries, vol. 9, pp. 345 et 351-352). Cette troisième signification du mot consensus fut mentionnée dans les matériaux de la Treizième Commission (*Annuaire de l'Institut de Droit international*, vol. 61-I, pp. 156-158 ; elle est analysée plus amplement dans la version non-publiée du rapport en question, paragraphe 17).

Revenant aux deux significations dont vous parlez (procédure et accord), c'est à juste titre que vous les séparez l'une de l'autre, quoiqu'il y ait des passages dans votre texte où vous les traitez conjointement. Ceci est dicté, on le voit bien, par les faits internationaux (voir en particulier le paragraphe sur "La technique du consensus" et le paragraphe sur les "Aspects juridiques", chiffre 1 *in fine*).

3. Je partage votre opinion que l'universalité de la communauté internationale contemporaine a fait de la procédure du consensus un moyen nécessaire par lequel on essaye d'atteindre des objectifs communs. D'autre part, j'hésiterais à dire que le consensus constitue un moyen "idéal". En tout cas, les Etats souvent ne disposent pas, sur le plan de la négociation, d'un moyen alternatif.

4. Je n'exclurais pas l'admissibilité des réserves aussi longtemps qu'elles ne touchent pas à ce qui est fondamental ou essentiel dans l'engagement positif de tous les participants à la négociation. D'ailleurs, nous savons très bien qu'au cas de certains instruments tels que les

résolutions non-obligatoires, y compris les déclarations de principes, le terme réserve acquiert un sens moins précis que dans le droit des traités. Les déclarations interprétatives (que vous admettez) ne sont parfois qu'une forme particulière qu'on utilise pour exprimer une réserve. Ceci s'applique également aux observations, explications ou autres prises de position par les représentants des Etats. Evidemment, dans chaque cas concret il faut se pencher sur la question si la position individuelle d'un Etat ne va pas trop loin et, en effet, ne détruit pas l'engagement. Par conséquent, le consensus deviendrait faux ou au moins équivoque (*cf.* nos Confrères Schwebel et Virally, *Annuaire*, vol. 61-I, p. 212).

5. Vous expliquez la formule de l'adoption d'un texte sans vote. Je me demande si dans cette procédure, à côté de nuances que vous indiquez, il y a aussi de la place pour une attitude négative (que vous admettez). Enfin, l'Etat participe à l'adoption du texte ce qui semble exclure une position négative. Il se peut que l'Etat, par l'intermédiaire de son explication, déclare son opposition au texte. Mais dans une telle hypothèse il serait difficile de compter l'Etat au nombre de ceux qui ont occasionné l'adoption de celui-ci. Bien sûr, vous avez raison en distinguant le consensus de l'adoption sans vote et en soulignant le caractère plus souple de cette dernière formule.

6. Ce que vous dites à propos de l'unanimité est fort pertinent. Il est préférable de distinguer l'unanimité du consensus et de la prise d'une décision sans vote. Il est vrai que le consensus revient à l'unanimité quant à l'accord général, mais le contenu et les bornes de celui-ci sont souvent vagues. Par conséquent, la question sur quoi exactement les Etats sont unanimes peut parfois conduire à des réponses diverses. Et la pratique montre que les décisions adoptées par consensus sont souvent assorties de différentes explications, observations, interprétations ou même réserves, ces dernières ne pouvant toucher que des points non-fondamentaux. Mais tout cela est autre chose que l'unanimité tout court. Cette observation s'applique également à la notion d'unanimité négative (c'est-à-dire absence d'objections).

Je suggère donc qu'on ne parlât de l'unanimité que dans les situations suivantes :

a) Tous les Etats habilités à participer au vote ont voté d'une façon identique : pour ou contre la décision ou ils se sont abstenus.

b) Tous les Etats présents et votants ont voté d'une façon identique : pour ou contre la décision. C'est le sens de l'unanimité dans le droit et dans la pratique des Nations Unies où les abstentions et les cas connus sous le nom de la non-participation ne comptent pas.

c) Par contraste avec les hypothèses (a) et (b), le vote n'a pas eu lieu mais tous les Etats habilités à participer à la prise de décision sont d'accord qu'ils sont unanimes. Une constatation de l'unanimité peut être faite par le président ou par le bureau au nom de l'organe ou de la conférence, conformément au règlement de délibérations.

Krzysztof Skubiszewski

Questionnaire établi par M. Suy

13 octobre 1988

1. Estimez-vous que l'Institut de Droit international devrait s'efforcer d'élaborer sa propre *définition* du "Consensus" ?

   a) Si oui, laquelle ?

   b) Etes-vous d'accord pour que l'Institut adopte la définition élaborée par le règlement intérieur de la CESC, Helsinki (p. 523, Vol. I, des *Etudes Ago*) qui me paraît la plus appropriée.

2. Est-ce que, à votre avis, le consensus est essentiellement *une procédure* de non-objection, ou conviendrait-il d'élaborer l'idée du consensus-résultat ?

3. Estimez-vous qu'un organe des Nations Unies — où le vote par majorité est la règle — peut décider valablement de remplacer cette méthode de prise de décision par la procédure du consensus ?

4. Estimez-vous qu'il y a lieu de distinguer entre le consensus et l'*unanimité*, et quelle serait cette distinction :

   a) purement *formelle* : vote ou absence de vote

   b) de *substance ?*

5. Y a-t-il une distinction entre l'adoption d'un texte par consensus et l'*absence d'un vote* ? Cette question a été soulevée dans la pratique.

6. Je soutiens la thèse que l'adoption d'un texte par consensus ne permet pas de réserves sur la substance :

   a) ces réserves sont-elles possibles, à votre avis ?

   b) Estimez-vous que des explications de vote, des déclarations ultérieures peuvent affecter le consensus ?

7. Tout en admettant que des résolutions (recommandations) n'ont pas de force obligatoire ou ne sauraient être considérées comme éléments d'une *opinio juris*, dans quelle mesure est-ce que le fait de leur adoption par consensus permet de conclure à une affirmation d'une règle existante ou naissante ?

8. Est-ce que l'Institut devrait adopter une *résolution* contenant des

principes sur tous ces problèmes, ou devrait-elle se borner à formuler des "voeux" ou des "directives" ?

9. Avez-vous d'autres suggestions concernant cette matière ?

*

Réponses et observations des membres de la Commission

Réponse de M. Shabtai Rosenne

8 January 1989

Dear Friend and Colleague,

Owing to great pressure of work, I regret that at this stage I can do no more than answer your questionnaire in a summary form. I will preface my answers by recording that I have read with appreciation your preliminary report with which, on the whole, I respectfully find myself in disagreement. The ambiguity over consensus, is it a procedure or is it the result of a procedure, while interesting academically, is of little real importance. That ambiguity itself serves a major diplomatic function not unlike the function of the so-called unanimity rule (as applied in practice) in the League of Nations, and I do not think that it is either necessary or wise, in this age of revolution and transition, to rush into forcing it into "un encadrement des plus précis".

Accordingly, I answer your questions as follows :

1. No.
2. Irrelevant.
3. Yes.
4. No.

5. I have given up trying to find out what the difference is. I have raised the question more than once as a point of order, and the Chairmen, or the delegations proposing one or the other alternative, have each always found some way of not giving a clear answer. In point of fact, I think the Chair was usually right in not answering the question !

6. My view is the exact opposite of yours. However, a word of caution. "Reservation" is a technical term of the law of treaties. Is it correctly used in relation to an instrument which is not a treaty in the formal sense ? What does it mean in that context ?

With regard to point (c), surely the answer is quite emphatically in the negative in the formal sense : substantively, however, those pronouncements may weaken the political weight of the "consensus".

By the way, can you have an explanation of vote if there is no vote ? My recollection is that the United Nations current terminological usage is "explanation of position". What is more, Rules 88 and 128 of the Rules of Procedure of the General Assembly, prohibiting the proposer of a proposal or an amendment to explain his vote on his own proposal or amendment, seems not to be applicable in the case of an "explanation of position" when there is no vote. This might have some political importance.

7. The eighth preambular paragraph to General Assembly resolution 3232 (XXIX) of 12 November 1974, coupled with the various statements made at the time in the Sixth Committee, adequately states the position. That paragraph reads :

> "The General Assembly,
>
> ...
>
> *Recognizing* that the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice."

In that connection, I was glad to read the prudent conclusion of Blaine Sloan in his important article "General Assembly Resolutions Revisited (Forty Years Later)" in 58 *British Year Book of International Law* 39 at 142 (1987), reading :

> "The General Assembly resolution as an independent source of international law still awaits the imprimatur of the community of States, but in the meanwhile resolutions draw strength from and contribute to other sources of law. They have many and varied effects not confined to those normally associated with resolutions. Beyond, the potential is there for statesmen who have the foresight and will to grasp it and for scholars to show the way."

8. I am still keeping an open mind until I have the advantage of learning the views of Confrères associated with the Sixth Committee and of reading your next report.

9. Not at this stage.

Shabtai Rosenne

Réponse de M. Santiago Torres Bernárdez

20 janvier 1989

Mon cher Confrère, cher Erik,

J'ai bien reçu votre lettre du 13 octobre 1988 et je vous en remercie.

Votre rapport préliminaire sur le rôle et la signification du "consensus" dans l'élaboration du droit international m'a beaucoup plu. Je l'ai lu avec intérêt et plaisir et je vous félicite de votre clarté et de votre esprit de synthèse.

Ainsi que vous me le demandez, je tâcherai de répondre ci-dessous à votre questionnaire. Veuillez, cependant, ne voir, dans ces réponses, aucune prise de position dogmatique de ma part. Je reste entièrement ouvert aux développements que vous-même et les autres membres de la Commission ferez sur la question à l'occasion de la prochaine réunion de l'Institut à Santiago de Compostela.

Première question

Il me semble judicieux que l'Institut adopte une des définitions du *consensus* déjà élaborées par les Etats. La définition formulée dans l'article 69 du règlement intérieur de la CESC (Helsinki) me paraît très appropriée, tout au moins comme point de départ des travaux de notre Commission. Elle a le mérite de souligner que le "consensus" est, avant tout, une méthode d'adoption de décisions, et le fait de mettre en relief que son trait le plus caractéristique est l'absence d'objection de la part de ceux qui sont appelés à participer à l'adoption de la décision. Je partage donc entièrement ce qui me semble être votre point de vue sur cette première question.

Question 2

Vous posez ici une question de toute première importance pour la suite des travaux de notre Commission. De la réponse que l'on donne à la question dépendra l'ampleur de notre tâche. La pauvreté relative du langage juridique fait que le terme "consensus" est effectivement employé avec la double signification que vous signalez, fort justement, dans votre rapport provisoire. Le terme est donc devenu ambigu, car le sens et la portée que l'on doit lui attacher ne peuvent souvent être dégagés qu'en tenant compte du contexte dans lequel le terme est employé. Il faudra donc tenir compte de cette situation dans nos travaux. Quant au fond de la question, le "consensus" est pour moi "juridiquement" parlant *une procédure* d'adoption de décisions et rien d'autre. Le soi-disant "consensus-résultat", défini dans votre rapport provisoire comme *l'accord général"*

fruit des délibérations et produit final d'un processus de négociations tout au long duquel la procédure du consensus a été utilisée", est une notion qui, à mon avis, concernerait plutôt des questions essentiellement relatives à "la fermeté" du contenu de l'accord adopté en vertu de la décision en question.

Cela dit, je ne m'oppose pas, cependant, à ce que notre Commission examine aussi, le moment venu, certains aspects du soi-disant "consensus-résultat" dans la mesure où certains éléments de cette dernière notion s'avéreraient utiles pour compléter un texte sur le "consensus-procédure", cette dernière question restant au centre de nos préoccupations. Ma position s'explique par le fait que je ne suis pas convaincu, malgré certaines définitions, qu'il y ait une relation nécessaire de cause à effet entre "consensus-résultat" dégagé par une procédure d'adoption autre qu'un "consensus-procédure". Il est toujours possible d'envisager des situations dans lesquelles le fait que la décision soit intervenue moyennant une procédure de consensus ne serait pas nécessairement suivi d'un "consensus-résultat" et vice-versa. Une certaine prudence à cet égard me semble donc s'imposer en l'occurrence.

Question 3

Ma réponse à cette question dépend du sens que vous attachiez dans la phrase au verbe *remplacer*. Il est vrai que le vote majoritaire est, en principe, de règle dans l'Organisation des Nations Unies, mais la Charte elle-même prévoit, dans certaines hypothèses, une "majorité pondérée", sans parler de la règle particulière dite du "veto" du Conseil de Sécurité. Il est vrai également que la règle constitutionnelle du vote majoritaire en est venue, par la suite, à faire partie des règlements intérieurs des différents organes, y compris des règlements intérieurs applicables à des organes subsidiaires. Toutefois, la Charte n'impose pas le recours à la technique de vote, qu'il soit ou non à la majorité simple, si la volonté de l'organe peut constitutionnellement se dégager autrement que par un vote. C'est ce qui explique que la procédure d'adoption de décisions par "consensus" ait pu se développer également au sein des organes des Nations Unies, malgré les règles de vote de la Charte et des règlements intérieurs. Mais la règle du vote — à la majorité simple, à la majorité pondérée ou à une majorité particulière — demeure la règle constitutionnelle de base que tout Etat Membre a le droit d'invoquer à tout moment, indépendamment du fait que pour la négociation d'une question déterminée, les délégations ont pu se mettre d'accord pour appliquer une procédure de consensus. Il est évident que ces accords *ad hoc* sur la procédure à suivre pour décider une question déterminée ne peuvent, en tant que tels, déroger ni à la Charte ni aux règlements intérieurs des différents organes. Il n'est pas non plus sans intérêt de noter ici que le "consensus" est

étranger aux procédures et pratiques d'un organe principal de l'Organisation des Nations Unies, à savoir de la Cour internationale de Justice.

Pour ce qui est des "conférences" convoquées sous les auspices de l'Organisation des Nations Unies, il faut, tout d'abord, distinguer entre les vraies "conférences" et les "organes subsidiaires" d'organes principaux de l'Organisation, que l'on appelle parfois "conférences". Pour les premières, la question se pose tout autrement que pour les organes de l'Organisation, car elles sont normalement habilitées à adopter leur règlement intérieur en toute liberté, pouvant de la sorte, si cela est la volonté de la "conférence", insérer dans leur règlement intérieur le "consensus" à la place du vote majoritaire ou en combinaison avec ce dernier.

Question 4

Pour ce qui est du "consensus-procédure", j'estime que, juridiquement en ce qui concerne l'acte même de l'adoption de la décision, il ne se distingue de l'unanimité que pour une question de pure forme, à savoir l'absence de vote. Mais le"consensus-procédure" n'est pas seulement un *acte d'adoption* de décisions, mais une méthode qui comporte également une *certaine façon de négocier*, caractérisée par l'intensité, la longueur et l'intimité de contacts entre les délégations participantes, ce qui n'est pas, pour ainsi dire, inhérent aux méthodes d'adoption de décisions qui font appel au vote. Il se peut qu'une décision adoptée par un "vote unanime" ait été précédée d'un type de négociation similaire à celui qui caractérise le "consensus-procédure", mais il n'en est pas toujours ainsi. De ce dernier point de vue, il y aurait donc une distinction de substance àfaire qui peut avoir des conséquences pour ce qui est de l'élaboration du droit international. En ce qui concerne la notion de "consensus-résultat", la distinction entre "consensus" et "unanimité" pourrait s'avérer être aussi, dans certaines circonstances, une distinction de substance mais de signe contraire, en ce sens que l'unanimité comporterait, en principe, une attitude psychologique plus positive à l'égard de l'accord qui constitue le contenu de la décision adoptée que le "consensus".

Question 5

La distinction peut avoir une certaine portée en ce qui concerne l'appréciation du degré d'acceptation réelle par les participants à la décision de l'objet ou contenu de celle-ci, en particulier lorsqu'un tel objet ou contenu comporte un texte qui énonce des règles à vocation normative. Un texte énonçant des règles à vocation normative adopté par une procédure de consensus me paraît être, en principe, plus à l'abri de changements de positions particulières, tout au moins au départ, qu'un texte qui, tout en ayant la même vocation, aurait été adopté en l' "absence de vote".

En tout cas, le "consensus-procédure" n'implique pas seulement l' "absence d'un vote" mais également, et surtout, l' "absence d'objections" à l'adoption de la décision.

Question 6

Il m'est difficile de partager entièrement, à ce stade, votre thèse. Cela est dû au fait que, pour moi, il faut toujours faire une *triple* distinction : a) processus suivi dans la négociation ; b) acte d'adoption de la décision ; c) acceptation par les Etats comme règle de conduite de ce qui est énoncé dans le texte qui fait l'objet de la décision. Si, par exemple, le contenu de la décision est un texte ayant une vocation normative quelconque, je ne vois pas, pour le moment, comment on justifierait le fait que les Etats ne puissent pas donner des explications ou faire des déclarations ultérieures, voire formuler des réserves, aux règles de conduite énoncées dans la décision du fait que le processus de négociation et l'acte d'adoption ont suivi une procédure de "consensus". La pratique montre que les Etats ne renoncent pas, même dans le cadre d'une procédure de consensus, à donner des explications, faire des déclarations ultérieures ou formuler des réserves. Je me souviens, par exemple, que cela a été fait par certains Etats lors de l'adoption par l'Assemblée générale de la Déclaration sur les relations amicales ainsi que dans beaucoup d'autres occasions. Ces derniers jours nous avons tous pu lire dans les journaux que l'accord qui vient d'être conclu à Vienne, dans le cadre de la CSCE, a fait l'objet d'une certaine mise au point de la part d'un Etat membre de la Conférence. Ce que ces sortes de situations révèlent, c'est que le but visé par un "consensus-procédure" déterminé peut parfois ne pas être complètement atteint, sans que pour cela les Etats participant au processus estiment que l'adoption de la décision doit, de ce seul fait, être ajournée.

Question 7

Je partage le point de vue que le fait que des textes à vocation normative aient été adoptés sans objections fondamentales, et après une négociation intense qui écarte toute idée de surprise, est un élément de preuve puissant si, dans l'espèce, cela n'est pas infirmé par d'autres circonstances, du fait que ces textes reflètent l'*opinio juris* des Etats. La Cour internationale de Justice, comme vous le signalez, a eu l'occasion en 1986 d'en faire usage. En tout état de cause, il est évident que l'appréciation de l'élément subjectif de la règle coutumière est de nos jours facilitée par le recours que les Etats font au "consensus-procédure". C'est ici que je vois la principale contribution du "consensus" à l'affermissement et au développement du droit international dans ce moment historique que nous vivons, contribution qui s'étend d'ailleurs au-delà de

la question du problème des "règles naissantes" car elle concerne également et surtout la démonstration de l'existence de l'*opinio juris* par rapport à des règles coutumières qui n'ont rien de nouveau, comme ce fut le cas dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (fond).*

Question 8

L'Institut ne devrait pas exclure *a priori* la possibilité d'adopter en la matière une "résolution" contenant des principes.

Question 9

L'étude de la signification du "consensus" dans l'élaboration du droit international doit, à tout moment, faire les distinctions qui s'imposent du fait a) que la nature de la décision adoptée n'est pas toujours la même, ce qui a des conséquences sur la valeur à attribuer au contenu de la décision et b) que les effets de la décision ne sont pas non plus les mêmes selon que l'on se place sur le plan du droit international général ou sur le plan de l'ordre juridique particulier d'une organisation ou d'un système international déterminé.

Quant aux raisons politiques et sociologiques qui expliqueraient l'essor du recours au "consensus" comme méthode d'adoption de décisions, je voudrais ajouter qu'il s'agit d'une procédure qui facilite, en dernière analyse, que les chefs de file d'un groupe déterminé maîtrisent la négociation au sein de leur propre groupe. A cet égard, le "consensus" a un aspect positif, car il contribue à organiser plus raisonnablement la négociation, mais aussi un aspect négatif, en ce sens qu'il contribue à maintenir la fiction des "blocs" comme élément moteur du développement du droit international au détriment des sujets primaires de ce droit, à savoir des Etats.

Veuillez croire, mon cher Confrère, à mes sentiments distingués.

Santiago Torres Bernárdez

Réponse de M. Krzysztof Skubiszewski

8 mai 1989

Comme suite à mes observations du 13 novembre 1986 je vous adresse les réponses ci-dessous.

1. L'Institut, ou au moins la Commission, devrait élaborer la définition du consensus en distinguant les diverses acceptions du mot.

La définition à laquelle vous donnez votre préférence, à savoir la définition adoptée par la Conférence sur la sécurité et la coopération en Europe (CSCE), ouverte en 1973 à Helsinki, se concentre sur le consensus en tant que procédure. Le consensus devient ici une méthode de négociation et surtout de prise de décisions. Mais vous-même parlez, dans votre rapport et dans le questionnaire, de l'idée du consensus-résultat, constituant un acte (un accord). Ainsi, la définition de la CSCE n'épuise pas notre sujet.

Il y a encore la possibilité d'une troisième signification, moins claire que les deux précédentes. Elle trouve sa réflexion presque uniquement dans la doctrine : c'est le consensus à effets normatifs, le consensus qui gravite vers la catégorie de source du droit, quoiqu'il ne soit encore reconnu ni par les Etats ni par la science dans son ensemble comme constituant une source tout court, comparable à la coutume ou au traité. Je me réfère en particulier aux écrits d'Alfred Verdross et à sa conception du "consensus sans formalités" (*formloser Konsensus*).

Je pense que la Commission doit se pencher sur toutes ces significations de la notion de consensus.

2. Dans la vie internationale, le consensus n'est, le plus souvent, qu'une procédure de non-objection. Mais de temps à autre, comme il s'ensuit déjà de votre rapport et de ma réponse à la première question, le terme est utilisé pour décrire la conclusion des délibérations. Le président de l'organe ou de la conférence établit la substance de cette conclusion (*cf.* G. De Lacharrière, AFDI, t. 14, 1968, pp. 13-14). Il s'agit d'un acte qui constitue la décision de l'organe délibérant ou un accord atteint par les participants aux négociations. Si, au point de vue de droit de l'organisation, l'auteur de l'acte est celui-ci, l'acte est néanmoins le résultat d'une négociation et, le plus souvent, d'un accord entre les Etats membres.

3. Dans les organisations internationales contemporaines, y compris les Nations Unies, malgré les dispositions constitutionnelles sur la prise des décisions par le vote, la méthode du consensus et ses variations sont admissibles, pourvu que tous les Etats membres soient d'accord qu'on se serve de cette procédure dans un cas concret. Le consensus est le résultat d'un choix *ad casum*, non pas d'un remplacement définitif. Un tel remplacement n'est possible que par la voie d'un amendement de la constitution.

L'admissibilité du consensus est le résultat d'une pratique universellement approuvée qu'on est arrivé à considérer comme étant compatible avec les dispositions sur le vote.

4. La distinction entre le consensus et l'unanimité n'est pas uniquement celle de procédure. Il y a aussi une distinction de substance.

Le consensus signifie qu'il y a absence d'objections fondamentales, tandis que d'autres objections peuvent être formulées et maintenues. Les obligations (juridiques ou politiques) qui découlent de l'adoption de l'acte, sont plus restreintes au cas du consensus. La participation au vote unanime couvre le texte dans son ensemble et dans tous ses détails.

Mais il est vrai que les déclarations interprétatives ou les explications de vote, si elles indiquent des points de désaccord, diminuent ou même suppriment la différence entre l'unanimité et le consensus. L'unanimité devient problématique et douteuse quand l'acte est assorti des interprétations et des explications qui démontrent des divergences entre Etats se déclarant unanimes. Si de pareilles prises de position accompagnent le consensus, celui-ci est également incertain.

5. Quant à la distinction entre le consensus et l'absence d'un vote, je partage votre opinion que cette dernière formule "est moins engageante". En effet, il est parfois difficile de déterminer quelle est l'attitude, vis-à-vis d'un texte, de certains Etats qui ont participé à son adoption sans vote. S'ils le désirent, cette procédure leur garantit une mesure considérable de liberté.

6. Les réserves qui ne touchent pas aux dispositions essentielles du texte sont admissibles, le consensus signifiant l'absence d'objections fondamentales. Par conséquent, d'autres objections, moins importantes, ne sont pas exclues. C'est dans cette limite que je me rallie à votre vue selon laquelle "l'adoption d'un texte par consensus ne permet pas de réserves sur la substance". Je dirais peut-être : sur la substance fondamentale ou essentielle.

D'autre part, toutes les réserves sont automatiquement exclues si le texte fut adopté "sans objection". Cette formule semble éliminer n'importe quelle restriction.

Quant à la pratique, il y a des cas où les Etats, malgré leur consensus antérieur, émettent des réserves, se servant des formes différentes, y compris les explications ou déclarations ultérieures. Le cas échéant, on peut même douter que le consensus soit là. Il faut toujours étudier les circonstances dans lesquelles le texte fut négocié et adopté. Séparée des circonstances, la formule de consensus en elle-même peut s'avérer trompeuse et détachée de la réalité qu'elle essaie de recouvrir.

7. Certaines résolutions non-obligatoires des organisations ou des conférences internationales peuvent être ou en effet sont un moyen de détermination de l'*opinio juris*, tandis que d'autres résolutions peuvent jouer ou en effet jouent un rôle dans la création ou dans la cristallisation de l'*opinio juris*. Aucune constatation simple et générale à ce propos n'et possible, car les facteurs pertinents sont multiples et leur influence varie d'un cas à l'autre.

Le problème que vous posez a déjà attiré l'attention d'une commission de l'Institut, à savoir de la Treizième Commission, dissoute le 19 septembre 1987 au Caire. Je me réfère à l'*Annuaire* de l'Institut, vol. 61-I, 1985, en particulier aux pages 100, 101, 154-158, 169, 198-202, 230, 236, 238, ainsi que, tout spécialement aux réponses que les membres de la Treizième Commission ont données à la dix-neuvième question du questionnaire (p. 82), cette question soulevant, entre autres, le rôle du consensus dans le processus de la création du droit, donc aussi du droit coutumier et de ses éléments constitutifs.

8. L'Institut devrait adopter une résolution expliquant les différentes significations de la notion de consensus et, autant que possible, portant la solution des problèmes que vous posez.

Krzysztof Skubiszewski

Réponse de M. Manuel Diez de Velasco Vallejo

17 février 1992

Mon cher Confrère,

Avant tout je voudrais m'excuser de vous envoyer ci-joint avec un délai de plus d'un mois, ma réponse au questionnaire si intéressant sur "Le rôle et signification du consensus dans l'élaboration du droit international" que vous — en tant que Rapporteur de la Sixième Commission — avez eu la gentillesse de me rendre personnellement au cours de notre agréable session à Bâle. L'origine de ce retard a été une surcharge de travail.

J'ai réfléchi sur ce sujet, que je considère très intéressant pour notre Institut, et j'ai donné les réponses suivant l'ordre et numérotation du questionnaire.

Dans l'espoir que les réflexions provisoires exprimées dans l'annexe ci-jointe pourront être utiles.

Première question

Oui, l'Institut de Droit international doit s'efforcer d'élaborer une définition du consensus. La nécessité de traiter du consensus est imposée par la réalité même, c'est-à-dire, par la pratique diplomatique, où cette technique joue de jour en jour un rôle toujours plus important.

a et b) La définition suivante proposée par le rapporteur dans les *Etudes Ago* (vol. I, p. 523) : "Une technique de négociation et de prise

de décision caractérisée par l'absence ... de recours au vote ... ainsi que l'absence d'objections fondamentales ...", peut servir de point de départ au débat. C'est là une notion qui rejoint celle qui a été établie dans ce domaine par l'article 69 du règlement intérieur de la CSCE en 1973, comme le Rapporteur lui-même le reconnaît.

Question 2

Il nous semble que la distinction entre "procédure" et "résultat" est simplement une question de fait et d'application. Ce sont les deux faces d'une même pièce de monnaie, ce qui est mis en évidence par la définition proposée par le Rapporteur et reprise ci-dessus, et cela indépendamment des différences engendrées par la pratique quotidienne entre le consensus en tant que méthode ou technique de travail et le consensus en tant que mode d'adoption de décisions, différences qui tiennent à une atténuation appréciable des effets de cette technique et permettent in extremis le recours à la procédure classique du vote en vue de l'adoption de décisions une fois que les voies utilisables pour aboutir à un consensus ont été épuisées sans succès. A titre d'exemple, c'est là ce qui s'est passé en ce qui concerne la Convention de 1982 sur le droit de la mer.

Question 3

Le Rapporteur expose une pratique très riche à cet égard dans les *Etudes Ago* (vol. I, pp. 529 à 536) et je suis, pour l'essentiel, d'accord avec son analyse. La procédure de prise de décisions prévue par la Charte des Nations Unies ne peut être remplacée sans que la Charte ait été révisée au préalable. C'est là tout autre chose que la pratique suivie par les organes principaux et subsidiaires des Nations Unies, et tendant en fait à recourir au consensus, qui est une technique aussi légitime que celle du vote pour l'adoption de décisions si c'est là la volonté de l'organe en cause, étant entendu qu'elle ne peut exclure ni entraver l'exercice du droit de vote que la Charte elle-même garantit (voir, par exemple, les articles 18 et 27 de la Charte), soit que la procédure de consensus ait échoué soit qu'un Etat membre l'exige.

Question 4

Il y a tout lieu de distinguer entre le consensus et l'*unanimité*, puisque même si ces deux notions supposent l'existence d'un accord, l'unanimité implique en outre un accord sans réserve entre les parties, parce que c'est là ce qu'exprime formellement le vote (unanime) correspondant. L'absence de vote dans la technique du consensus empêche de mettre sur le même plan les deux procédures de prise de décisions.

L'hypothèse selon laquelle une seule objection essentielle risque de faire obstacle à la formation du consensus ne permet pas d'assimiler le

consensus à l'unanimité. La technique du consensus est apparue précisément comme une voie de conciliation et de compromis qui évite la confrontation démocratique sous forme de vote en vue de l'adoption d'accords, quoique le contenu de ces accords en subisse les effets et n'exprime habituellement qu'un "plus petit dénominateur commun", très éloigné sans aucun doute des intérêts et des penchants de la majorité et de la minorité théoriques qui se formeraient au cas où il serait recouru à la procédure du vote. Il serait paradoxal que le simple risque qu'une seule objection fasse obstacle au consensus permette d'assimiler *in genera* le consensus à l'expression plus radicale dégagée de la procédure de vote, c'est-à-dire le vote àl'unanimité.

a et b) En outre, il ne s'agit pas d'une distinction purement formelle mais portant sur la substance, qui concerne avant tout les différences sensibles existantes entre les deux procédures de prise de décisions : l'une, qui est éminemment démocratique, fondée sur le vote collectif et sur la règle de la majorité ou de l'unanimité et l'autre qui infléchit et qui limite le principe démocratique de la prédominance de la majorité afin de protéger des intérêts minoritaires et de favoriser ainsi l'accord général entre les parties, en utilisant à cette fin une méthode de travail basée sur les consultations officieuses et l'action des organes qui y président et dont la tâche est de dégager les points de convergence rendant possible un accord général minimum entre les parties. Enfin, en examinant les procédures, nous constatons que le consensus est assimilable dans une certaine mesure à l'unanimité pour la prise de décisions dans le cadre de la diplomatie multilatérale.

Question 5

Toujours dans la ligne de la conception du consensus proposée par le Rapporteur, ses réflexions au sujet de la distinction entre consensus et *absence d'un vote* exposées dans les *Etudes Ago* (vol. I, p. 537) paraissent pertinentes. Il faudra approfondir ces aspects afin d'éviter les risques d'*atténuation* des effets juridiques du consensus, ce qui se passerait probablement s'il n'était pas fait obstacle au développement incontrôlé de cette conception au point qu'elle finisse par englober des procédures apparentées — tout en restant distinctes —telles que l'adoption de décisions *sans vote*.

Question 6

Je me rallie à la thèse suivant laquelle, par définition, un texte adopté par consensus ne permet pas de réserves, mais uniquement des déclarations interprétatives. Il conviendrait d'étudier cependant la pratique dans ce domaine. On sait que des réserves sous la forme de déclarations interprétatives ont été formulées au sujet de la Convention de 1982 sur

le droit de la mer. Bien qu'il ne soit pas facile d'éviter ces légers réflexes de fuite devant le consensus, il est improbable qu'ils puissent priver de sa substance ce consensus s'ils ne se produisent que rarement, et si la formulation d'objections à ces réserves (sous la forme de déclarations supposées) est permise. C'est là ce qui s'est également passé pour la Convention de 1982 (voir par exemple *Multilateral Treaties Deposited with the Secretary-General*, situation au 31 décembre 1988, doc. N.U. ST/LEG/SER.4/7, aux pages 756 et 757, 764 et 765, 768 et 773).

Question 7

Je me rallie à l'avis du Rapporteur suivant lequel il ne suffit pas d'adopter par consensus une résolution de l'Assemblée générale des Nations Unies pour qu'elle se voie attribuer la force obligatoire dont elle manque par définition. Ce consensus traduirait en effet une *opinio juris* qui nécessiterait une pratique conforme aux lignes de conduite prévues dans la résolution (voir *Etudes Ago*, vol. I, p. 540). Si la pratique conforme était antérieure dans le temps à l'adoption de la résolution, celle-ci contribuerait à la *cristallisation* d'une coutume en voie de formation (*in status nascendi*) parfois dans un laps de temps très bref. En revanche, si la pratique conforme était postérieure dans le temps à l'adoption de la résolution, il faudrait attendre que cette pratique s'affirme ou, ce qui revient au même, qu'elle soit potentielle ou relativement uniforme et constante, ainsi que suffisamment générale et durable, avant d'affirmer qu'une coutume s'est *créée*. Il existe des exemples très instructifs à cet égard dans le récent droit de l'espace.

En particulier, une des conséquences les plus intéressantes du développement de la pratique du consensus au sein des Nations Unies a été le renforcement de l'élément spirituel (l'*opinio juris*) dans la formation de la coutume, grâce aux effets normatifs de *cristallisation* et d'*émergence* ou de *formation* exercés par certaines résolutions de l'Assemblée générale adoptées par consensus.

Question 8

En principe, je crois que la pratique est déjà suffisante dans ce domaine pour que l'adoption d'une résolution soit envisagée.

Question 9

Il conviendrait peut-être de creuser davantage la question des risques (mis en évidence par le Rapporteur dans les *Etudes Ago*, vol. I, p. 541) que fait courir à la fiabilité de l'interprétation de textes adoptés par consensus le caractère informel et confidentiel des consultations et des négociations qui lui sont consubstantielles, et aggravent l'obscurité qui

entoure les travaux préparatoires parfois au point de les faire perdre de vue. Néanmoins, étant donné le caractère propre de la technique du consensus, il semble légitime de réclamer plus de clarté sur la procédure qui le rend possible.

En outre, à vrai dire, il existe un risque que cet *obscurcissement progressif* touche également les travaux de codification de la Commission de droit international, dans la méthode de travail de laquelle la technique du consensus s'est incorporée principalement à la suite de l'augmentation du nombre de membres de la CDI. Cela étant, il conviendrait d'étudier l'établissement de quelque règle au sujet de la *publicité* et de l'*établissement des comptes rendus officiels* des travaux préparatoires au moins dans le cas des conférences de codification, étant donné le caractère incontestablement normatif des instruments adoptés au cours de ces conférences et les exigences de méthode qu'impose leur interprétation ultérieure en cas de doute ou de conflit à cet égard.

Manuel Diez de Velasco Vallejo

Preliminary Exposé

19 June 1995

The Role and Significance of Consensus in the Forming of International Law

Le rôle et la signification du consensus dans l'élaboration du droit international

1. Introduction

This topic was put on the agenda of the Institute at its 1987 Cairo Session as a result of the discussion by the Institute of the report of the Thirteenth Commission on "The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective." This report did not cover the whole area but was restricted to "an inquiry into the elaboration of non-contractual instruments that have a normative role", and in particular, to "some resolutions of the General Assembly of the United Nations" that "have that role."[1] In its resolution on the subject, the Institute congratulated the Rapporteur and the Members of the Commission on "having succeeded in elucidating the numerous factors which, depending on the circumstances, allow such resolutions to contribute to a better knowledge of international law, to hasten its development, to enhance its authority and to ensure stricter compliance

1 The documents submitted to the Institute by the Rapporteur (Mr Krzysztof Skubiszewski) consisted of a Preliminary Exposé (PE) with a Questionnaire, a Provisional Report (PR) and a Definitive Report (DR) accompanied by two sets of observations by the members of the Commission (on the Exposé and Questionnaire and on the Provisional Report). The Report was originally presented to the 1985 Helsinki session of the Institute. See *Annuaire*, vol. 61-I, pp. 29-358. Very appropriately, Blaine Sloan called this report "monumental." Sloan, General Assembly Resolutions Revisited (Forty Years Later), *BYBIL*, vol. 58, 1987, p. 41. After a short preliminary discussion, the matter was postponed to the Cairo session. See *Annuaire*, vol. 61-II, pp. 257-67.

therewith." The Institute also expressed the wish that "the work of the Thirteenth Commission in its entirety should be the object of thorough study by all concerned." A comprehensive set of the Commission's twenty-six conclusions was annexed to this resolution of the Institute.[2]

During the discussion of the Skubiszewski report, the Commission des Travaux noted that several issues presented therein deserve detailed consideration by the Institute and proposed, in particular, that a commission be appointed to study "the role and significance of consensus in the forming (*l'élaboration*) of international law."[3] For this purpose, the Sixth Commission was appointed, and Mr Erik Suy was appointed its Rapporteur. After preparing a Preliminary Exposé, a copy of which is attached to this report,[4] Mr Suy found it necessary to resign because of pressure of other business, and after some delay Mr Louis B. Sohn was appointed Rapporteur. As most of the issues were already presented in considerable detail in the reports by Messrs Skubiszewski and Suy, this report is restricted to summarizing the principal issues discussed in these reports, reviewing them in the light of comments made on both reports, and presents a new questionnaire that takes into account recent developments in the international situation and international law, as well as the increased use of consensus not only in United Nations resolutions but also by other international organizations and by international conferences, in developing instruments contributing to the formation of international law.

2. The Skubiszewski Reports and comments thereon

a. Final Conclusions

In the Conclusions of its Definitive Report, the Thirteenth Commission juxtaposed unanimity and majority to consensus. In Conclusion 13, entitled "Unanimous Statement of Existing Law", the Commission expressed the view that a "law-declaring resolution, adopted without negative vote or abstention, creates a presumption that the resolution contains a correct statement of the law", but that this presumption is subject to rebuttal. Conclusion 14 dealt with "Unanimity and the Development of New Law." It considered situations in which "a rule of customary law is emerging from State practice or where there is still doubt whether a rule, though applied by an international organ or by some States, is a rule of law." In such case, a resolution adopted without

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2 *Annuaire*, Cairo Session, vol. 62-II, pp. 274-89.

3 *Id.*, pp. 14, 53-59.

4 The Suy report was published in *Le droit international àl'heure de sa codification : Etudes en honneur de Roberto Ago*, Milano, Dott. A. Giuffre, Editore, 1987, vol. I, pp. 521-42.

negative vote or abstention "may consolidate a custom or remove doubts that might have existed." In Conclusion 15, the Commission pointed out that "the authority of a resolution [of the General Assembly of the United Nations] is enhanced when it is adopted by a representative majority that includes the main legal systems. "It noted, however, that "[i]f the number of negative votes or abstentions is large, or qualitatively significant, the law-stating or rule-developing effect of the resolution is weakened." In Conclusion 16, there is the brief additional statement that the "authority of a resolution is enhanced when it is adopted by consensus." The combined effect of these three conclusions is that the authority of a resolution is more enhanced by consensus than when it is adopted only by a representative majority.[5] These conclusions were the result of prolonged discussions, which the Sixth Commission needs to consider in its work. These discussions are summarized below.

b. Preliminary Exposé

In his Preliminary Exposé, Mr Skubiszewski based the differences among the three methods of decision-making on the process of drawing up the text that preceded them, *i.e.*, "on the degree and measure of negotiation." In some cases, a majority of participants presses for a prompt adoption of its version of the text. In other cases, "the majority does not take advantage of its preponderance and does not seek a vote before all the reasonable possibilities for the negotiation of an agreed text have been exhausted." The participants may even agree that "the discussion must continue until a virtually unanimous consent is reached." As a result, the final text of the resolution "is a compromise or constitutes an amalgam of various proposals."[6]

This analysis led to the following question in the questionnaire :[7]

Question 19.

> Are voting majorities relevant for the determination of the significance of the resolution in the process of law-making ? Has unanimity any special effect ? What is the value of consensus in adopting law-declaring or law-proposing resolutions ?

c. Responses to the Questionnaires

The questionnaire elicited comments from the fifteen members of the Commission, which together were longer than the Rapporteur's

5 See *op. cit. supra* note 2, p. 284.
6 See *Annuaire*, vol. 61-I, pp. 75-77.
7 *Ibid.*, p. 82.

Preliminary Exposé.[8] Most of them dealt with the issue of consensus under Question 19, some mentioned it also in connection with other questions.

While Mr *Bindschedler* agreed that voting majorities are relevant to the significance of a resolution, its significance depends not only on the size of the majority but also on its composition. He added : "La procédure du consensus n'a aucune valeur si les explications de vote avant ou après sont en contradiction avec la résolution, ce qui est souvent le cas."[9]

Mr *Jessup* concurred with Mr Bindschedler on the relevance of the composition of the voting majority. Usually, a Resolution "supported by all the permanent members of the Security Council has more weight than one adopted only by some of them." Unanimity is also of prime significance, but consensus has "only a varying influence depending on the issue involved and indeed on the quality of the President of the General Assembly." He doubted that a Resolution adopted by consensus "can usually attain the strength of a Resolution adopted by registered unanimity."[10]

Mr *McDougal* agreed that "[t]he more unanimous the voting, the more genuine the consensus in support, the more certain and stable the expectations about policy, authority and control."[11]

Mr *McWhinney* disagreed with the insistence on unanimity in view of "the sheer range and size of U.N. membership today", and emphasized instead that "inter-bloc or inter-systemic consensus" is "a prerequisite to the legal efficacy of Resolutions in politically controversial areas", such as law-making.[12]

Unlike most others, Mr *Monaco* ascribed to unanimity only limited importance "au plan des faits", as the regulations of the General Assembly specify the necessary majorities for various resolutions. As far as consensus is concerned, it sometimes weakens rather than strengthens the effectiveness of resolutions.[13]

Mr *Mosler* agreed that a resolution adopted unanimously and without abstentions "is very strong evidence that the resolution is supported by

8 *Ibid.*, pp. 250-304.
9 *Ibid.*, p. 251.
10 *Ibid.*, p. 255.
11 *Ibid.*, p. 258.
12 *Ibid.*, p. 262.
13 *Ibid.*, p. 266.

general opinion", and that "[c]onsent expressed by affirmative vote furnishes stronger evidence as consensus."[14]

Mr *do Nascimento e Silva* dealt with consensus in two different places. First, he observed that the "significance of voting majorities can depend on the interest of delegations during the discussions of the subject", and that, in particular, "[u]nanimity is often an empty victory", and "the same can occur in the case of consensus." Second, in discussing importance of conciliation in reaching a decision, he noted that "practice shows that often such an effort may lead to an excess of conciliation or an abuse of consensus." In addition, the "excessive preoccupation with consensus may result in a resolution devoid of substance."[15]

Mr *Rosenne* pointed out that "[n]ot only numerical majorities, but also their political composition" is significant. The value of consent "depends on how real was the consensus, or how far was it a political gimmick." He also, counselled avoiding "conciliation" as description of the process of drawing up a text ; it is a special instance of normal diplomatic process working well. While a State may use abstention as a way "to leave its options open", more serious is, according to him, "the impact of 'explanations of votes', or. in instances of 'consensus', oral reservations on the record."[16]

Mr *Schachter* agreed that "voting majorities" are relevant for the determination of the significance of a resolution in the process of law-making, but pointed out that "it is necessary to consider not only the number of States, but also their representative character, the extent of their interest and responsibility and any indications as to their expectation of compliance." Generally, unanimity would be a significant factor, but it would not represent a persuasive evidence of a recognized legal obligation, if the resolution is in fact contrary to actual practice and there are no indications of intention of future compliance. Similarly, "consensus" may be used to avoid explicit voting. In each case, it would be necessary to examine the record of negotiations, as well as statements of States as to their practice, in order to ascertain whether the consensus decision can be taken as approval or acceptance by all the States. United Nations' practice shows that consensus "may be a means for avoiding a vote where many States, or a significant group of States, hesitate to express full support for a resolution and have made reservations for the record."[17]

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14 *Ibid.*, p. 269.
15 *Ibid.*, pp. 272, 274.
16 *Ibid.*, pp. 276, 277.
17 *Ibid.*, p. 282.

Mr *Seyersted* limited himself to stating that consensus has great value "if it reflects a real unanimity, but small if it reflects a light-hearted consideration."[18]

Mr *Suy* expressed various doubts about the suitability of the General Assembly resolutions for codifying international law, as they are suitable only for "setting forth broad general principles", while the main purpose of developing international law should be to formulate it "in a more detailed and concrete manner in order to provide an answer to contemporary needs of inter-State relations." But there is a growing tendency to adopt such resolutions by consensus, though "only broad principles led themselves to this adoption procedure." He added that the "value of consensus will depend upon the 'declarations' or 'reservations' made on the occasion of the adoption of the resolution." The best way to increase the evidential value of resolutions is to follow the method developed by the International Law Commission and the United Nations Commission on International Trade Law, *i.e.* preparing drafts on legal topics by organs established by the General Assembly for the purpose of codifying and developing progressively international law. He objects to calling this method "conciliation" ; the agreements reflected in the texts adopted by the General Assembly are the result of negotiations through "consultations.". He ends by stating that "the meaning of consensus should certainly be discussed."[19]

Mr *Ustor* pointed out that, although the General Assembly is not just a judicial body and does not consist of the most qualified publicists, "it virtually represents the community of States." Its resolutions have "at least the same — if not higher — evidential value than the subsidiary means mentioned in article 38 subparagraph 1 d) of the ICJ statute", but only if they are adopted "unanimously or practically unanimously". He considered that a "resolution voted by consensus can be equated to a resolution voted by unanimity, provided such consensus covers genuine unanimity, *i.e.* if it is not destroyed by a series of oral reservations."[20]

Mr *Valticos* started with the premise that the legal effects of a resolution depend on its substantive content, and on the circumstances surrounding its preparation and adoption. In particular, the problem to be considered should be limited to resolutions which may be considered as direct of indirect sources of international law, *i.e.* those that constitute a recognition of the existence of a general legal principle (*e.g.*, those in form of declarations), or may become a step toward establishing a practice leading to formation of a rule of customary law. He considered that it

18 *Ibid.*, p. 285.
19 *Ibid.*, pp. 287, 289-291.
20 *Ibid.*, pp. 291, 292.

would be difficult to contest that a statement in a resolution that it reflects the customary law would not be an important element in recognizing the existence of such a law. "Une résolution adoptée par 150 Etats sur ce point serait d'une plus grande portée qu'une indication dans un traité bilatéral. Par contre, un traité diplomatique multilatéral aurait un bien plus grand poids." Unanimity or quasi-unanimity points out that there is no objection to the recognition or formation of a customary rule. Consensus would also be a positive element in this respect, but clearly to a lesser degree.[21]

Mr *Virally*, in his prefatory remarks, objected to the Rapporteur's statement in the Preliminary Exposé that a custom cannot invest the General Assembly with a law-making competence. While no such custom has yet developed by 1980, such rule may develop in the future "si un consensus apparaissait sur ce sujet et donnait naissance à une pratique suffisament constante et générale." In discussing the issue of the intentions of the "authors" of a resolution, Mr Virally pointed out that usually the negotiation of the text of the resolution is conducted outside the official procedure, first among the States especially interested (les Etats qui "patronnent" le projet), and then with those who vote for the resolution or who accept the adoption of the resolution by the process of consensus.[22]

Mr *Zemanek* distinguished between two kinds of norm-creating or norm-forming resolutions. The function of the first type is "to create and/or build up legal consciousness in a certain matter" (establishing *opinio necessitatis* which has not yet hardened into *opinio juris*), "or to modify one already existing", thus leading to the development of a customary norm or the adoption of a multilateral treaty. A second type of resolution, in most cases called declarations, "establishes the existence of certain *opinio juris* and is thus *prima facie* evidence of it."[23] He pointed out that in both cases the procedure of elaborating such resolutions is extremely important and requires development of consensus. He described the most significant factors as follows :[24]

(a) Since an organ with numerous memberships, such as the General Assembly, is ill-equipped to prepare a meaningful draft out of numerous and often conflicting proposals, the task of preparing a text is normally entrusted to a committee with limited membership. For the purposes discussed here, it is preferable that the committee be composed of representatives of States rather than independent

21 *Ibid.*, pp. 294-96.
22 *Ibid.*, pp. 298, 299.
23 *Ibid.*, p. 301.
24 *Ibid.*, pp. 303-304.

experts. The success of a committee of this type depends largely on the careful selection of its membership, which should include all interests existing in this matter. States which represent these interests should moreover be willing and capable to convince other States with the same interest but not represented on the committee that the finally emerging solution was the best that could be achieved under present circumstances and safeguards the interests in question adequately.

(b) If any lasting effect is to be achieved, the committee should work with consensus procedure. It is true that since representatives of States defend primarily the interests of their countries, they tend to reach compromise mostly on the level of the lowest common denominator. Thus the result is not always satisfactory. Yet no other procedure, and in the least majority decisions, can under present circumstances lead to a generally acceptable result.

d. Provisional Report

Taking into account these comments and the remarks made at a meeting of the Commission held at Athens in 1979, Mr Skubiszewski prepared his Provisional Report.[25] His main comments on consensus were dealt with under two separate headings : on the meaning of consensus,[26] and on the consensus procedure.[27] The Rapporteur noted that consensus has a variety of meanings. The original and most general meaning of consensus is that of concord, accord, or agreement, but in a language of international law and diplomacy, this term acquired other connotations. For the purpose of this report he did consider, however, only three meanings : (a) a rule or principle of consensus, *i.e.* a method of adopting a resolution, a procedural problem ; (b) a kind of agreement, often loosely formulated, which concludes the deliberation of a United Nations organ or of a conference, an act rather than a procedure ; (c) a "law-formative agency" other than a custom or treaty.Thus some consider that consensus represents the will of the international community as distinguished from consent which "is linked to sovereignty-centered conception of an [international] obligation."[28] Members of the Commission were divided on the subject of consensus as a source of international law.[29] In discussing consensus as a procedure, the Rapporteur defined it as a specific method of adopting resolutions by the General Assembly, characterized by "the

25 *Ibid.*, pp. 85-249.
26 *Ibid.*, paragraph 17, pp. 154-58.
27 *Ibid.*, paragraph 26, pp. 210-15.
28 *Ibid.*, pp. 155-156.
29 *Ibid.*, pp. 160-61.

absence of voting linked to the absence of any objection that would constitute opposition to the adoption of the instrument." It differs from unanimity by allowing explanations, comments and even reservations, as long as they "do not amount to the disapproval or rejection of the instrument."[30] The consensus procedure expresses a general agreement on the resolution. The qualification "general" is essential. It indicates two factors : the extent of the approval of the acceptance of the fundamentals of the resolution, and that the opposition, if any, is limited to some specific parts of the resolution.[31]

The report ends with a summary of the preliminary conclusions of the Rapporteur in the form of ninety short points. Point 7, entitled "Consensus", states merely that : "An agreement expressed by consensus procedure, though merely general, can constitute a stage in the elaboration of new law."[32] In Points 51 and 52, the Rapporteur distinguished unanimity from consensus. On the one hand, "[u]nanimity behind the resolution creates a presumption that the resolution contains an exact statement of law" ; on the other hand, "[c]onsensus creates weaker evidence than unanimity." He added in Points 66 and 67 that "[u]nanimity behind the resolution creates an expectation that the practice of States will conform to the resolution and, consequently, new law will crystallize" ; and that in "situations in which a rule of customary law is emerging from State practice or where there is still doubt whether a norm, though applied to some States, is already one of law, a unanimous resolution consolidates a custom and removes the doubt which might [otherwise] persist."[33]

e. Comments on Provisional Report

This report was followed by another set of observations by nine members of the Commission, some of whom did not comment on the first draft.[34]

Mr *Bowett* redefined "normative" resolutions, pointing out that law-making by resolutions can occur at least in the three following ways :

(a) resolutions purporting to formulate general rules of conduct binding on all States

(b) resolutions dealing with specific situations but assuming, expressly or impliedly, a general rule of conduct

30 *Ibid.*, p. 210.
31 *Ibid.*, p. 211.
32 *Ibid.*, p. 230.
33 *Ibid.*, pp. 236, 238.
34 *Ibid.*, pp. 335-58.

(c) resolutions addressed to specific States, but assuming that the rule of conduct required of the State specifically named would be required of all States in a similar situation.

As the topic is controversial, a traditional resolution of the Institute is not likely to be universally supported. Instead, a set of rules or propositions might be produced, with commentaries attached to each rule.[35]

Mr *McDougal* pointed out that the "important question about consensus is the degree to which unanimity is required", because if unanimity is required "a veto over policy, tantamount to the making of policy, is given to a minority."[36]

Mr *McWhinney* noted that the long list of resolutions cited in the report[37] contained resolutions that "clearly were not yet law at the time of their adoption, but have attained a sufficiency of general acceptance by now, to qualify as such today, and some, indeed, would even appear to rank by now, as *Jus Cogens*"[38].

Mr *Monaco* called attention to an apparent discrepancy between the Rapporteur's statement in Point 52 that "consensus creates weaker evidence than unanimity" and the statement in Point 7 that an "agreement expressed by consensus procedure constitutes a stage in the evolution of new law." At the same time Mr Monaco pointed out that the efficiency of rules adopted by unanimity can be diminished by abstentions and reservations.[39] (Perhaps such weakened unanimity is as strong as a consensus the weakness of which is caused by explanation of dissatisfaction with some parts of the rule.)

Mr *do Nascimento e Silva* was surprised by the number of points made by the Rapporteur and would limit the conclusions to the "proclamation of the principal legal consequences of UN resolutions." He considered, in particular, that the "[c]onsensus formulas are quite devoid of significance, and the text accepted is such that it can, with certain degree of ingenuity, fit into the instructions of most of the delegations."[40]

Mr *Rosenne*, in a generally negative comment, noted that "many declarations adopted by the General Assembly may be included in the general thesaurus of international law as indicators of a possible direction for the desired evolution of the law." He remarked also that the Institute

35 *Ibid.*, pp. 335-36.
36 *Ibid.*, p. 338.
37 *Ibid.*, pp. 242-49.
38 *Ibid.*, p. 339.
39 *Ibid.*, p. 343.
40 *Ibid.*, pp. 344-45.

itself operates on the basis of consensus. As he put it : "The function of the free and spontaneous debates to which we are accustomed is precisely to reach a consensus out of the Babel of views, often strongly held, to overcome the adage *quot homines tot sententiae*."[41]

Mr *Torrez Bernárdez*, in his detailed analysis of the ninety points, reserved his views on consensus, except that he questions the statement in Point 44 about the effect of approval of a resolution "by participating in the consensus" on the ground that consensus for certain participants cannot be considered as a positive vote.[42]

Mr *Ustor* suggested that Point 7 be changed to read : "A resolution adopted by consensus procedure, though merely general, can constitute a stage in the development of international law", but queried whether this principle would not apply as well to "a resolution adopted by whatever voting procedure." He disagreed with the statement in Point 47 that "[p]olitical compromise, and the application of consensus procedure as its consequence, is not conducive to exact statements on elements of custom or customary law" ; as it "ignores the outstanding importance of compromise in all walks of life — law-making not excluded."[43]

f. Definitive Report

On the basis of the comments received from Members of the Commission and the guidance received during the two meetings of the Commission held at the 1987 Cairo Session of the Institute, the Rapporteur prepared his Definitive Report.[44] It consisted of a short introduction and thirty-three Conclusions, accompanied by short comments.

While references to consensus abounded in the previous documents prepared by the Rapporteur, the Definitive Report deals with it only in one conclusion and mentions it incidentally in a note to another conclusion. In addition, however, a large part of the report deals with issues which are likely to arise also in connection with a discussion of consensus, and his analysis will be helpful in analyzing the status, role and effect of consensus.

In discussing the "negotiation method", the Rapporteur points out that, "in trying to produce normative tests, whether *de lege lata* or *de lege ferrenda*, little can be attained by a majority decision imposed on a reluctant minority." Principles and more detailed rules are more likely to "result from careful and patient consultations", official and unofficial,

41 *Ibid.*, pp. 346, 348.
42 *Ibid.*, p. 352.
43 *Ibid.*, pp. 356-57.
44 *Ibid.*, pp. 305-33.

open or secret. When such consultations lead to a consensus, it reflects, "in spite of all its shortcomings", an agreed outcome that "can constitute a stage in the elaboration of new law." The Rapporteur admits that a group of U.N. Members which commands a majority "will normally produce a text that is better than an instrument resulting from a compromise." He concluded cautiously that "the support of all is probably to be preferred, even if it is limited to general agreement and does not eliminate the opposition to some specific provisions." He worried, however, that in some instances, "in spite of the external manifestation of consensus [,] the actual operation simply concealed a total lack of fundamental agreement." Nevertheless, he preferred adoption of a resolution by consensus to the adoption of it "without vote", as in such a case "the identification of the normative intention [is] more difficult, if possible at all."[45]

In fact, the Rapporteur had a similar difficulty with "unanimity", as in assessing its value "it is necessary to take into account the abstentions and those reservations which detract from the rules so approved."[46] He commented that unanimity "must be real and not apparent", as abstentions and reservations "can easily weaken or destroy the formal unanimity."[47]

In determining the effect of a unanimous resolution, the Rapporteur distinguished between law-declaring resolutions that would create "a rebuttable presumption that the resolution contains an exact statement of law", and a resolution adopted in a situation "where there is still some doubt whether a norm emerging from State practice is one of law." In the second case, a unanimous resolution can consolidate a custom and remove the doubt which might otherwise persist.[48]

The Rapporteur considered that, to be relevant in the elaboration of normative resolutions, "majorities must be representative", *i.e.*, they must not display any geopolitical gaps and include the major legal systems.[49]

Here again, the Rapporteur cautioned that, if "the scale of negative votes is numerically large or qualitatively significant, the law-starting or rule-making effect of the resolution is weakened or eliminated." He thought that "[a]bstention exercises a comparative influence", in spite of inherent difference between the two.[50]

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45 *Ibid.*, 317.
46 Conclusion 14, *ibid.*, p. 323.
47 *Ibid.*, pp. 323-24.
48 Conclusion 15-16, *ibid.*, p. 323.
49 Conclusion 17, *ibid.*, p. 324.
50 Conclusion 18 and comment, *ibid.*

Returning to consensus, the Rapporteur simply stated that a resolution adopted by a consensus procedure, though expressing an agreement that is merely general, can constitute a stage in the elaboration of new law."[51] He explained that the "consensus procedure consists in the absence of opposition to the adoption of the resolution", which means that there is "general agreement on the content of the resolution, but no more than that." Only objections "which do not concern the fundamentals of the resolution are admissible" He distinguished between two situations : on the one hand, "even an agreement that is merely general can constitute a stage in the elaboration of new law" ; on the other hand, "the generality of the agreement, which is the essence of consensus, may easily make [a resolution] meaningless." It is necessary, therefore, to inquire very carefully into "the circumstances of the adoption of such resolutions before they can be invoked as evidence of law." In particular, there is "political compromise behind any consensus and that compromise is not normally conducive to exact statement of law." At the same time, he pointed out that "no hard or fast rule can be formulated here, and each resolution should be assessed on its own merits." He believed that "occasionally, consensus may prove a useful procedure for stating the law." Its other advantage is that this procedure does not admit abstentions or negative votes, "whereas their presence at the voting of a law-declaring resolution necessarily raises the issue of their admissibility and effect."[52]

g. Final Text of the Conclusions

Between the Helsinki and Cairo Sessions of the Institute, the Conclusions were clarified and simplified, several of them being omitted or combined. It was this revised text that was annexed to the Resolution at Cairo.[53] In particular, Chapter V, dealing with the adoption of resolutions was revised as follows :[54]

Conclusion 13 : Unanimous Statement of Existing Law.

A law-declaring resolution, adopted without negative vote or abstention, creates a presumption that the resolution contains a correct statement of law. That presumption is subject to rebuttal.

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51 Conclusion 19, *ibid.*, p. 325.

52 *Ibid.*

53 *Annuaire*, Vol. 62-II, Session of Cairo, 1987, pp. 274-89.

54 *Ibid.*, pp. 282, 284.

Conclusion 14 : Unanimity and the Development of New Law.

In situations where a rule of customary law is emerging from State practice or where there is still doubt whether a rule, though already applied by an international organ or by some States, is a rule of law, a resolution adopted without negative vote or abstention may consolidate a custom or remove doubts that might have existed.

Conclusion 15 : Majority

The authority of a resolution is enhanced when it is adopted by a representative majority that includes the main legal systems.

If the number of negative votes or abstentions is large, or qualitatively significant, the law-stating or rule-developing effect of the resolution is weakened.

Conclusion 16 : Consensus

The authority of a resolution is enhanced when it is adopted by consensus.

Conclusion 17 : Reservations

Where a resolution may be subjected to reservation either in the explanations of votes or in other statements, the effect of such reservations is to qualify or limit the extent of approval by the reserving State. Depending on its content, a reservation may mean less than rejection of the rule. It may be merely an expression of doubt.

If a resolution expresses existing law, a State cannot exclude itself from the binding force of that law by making a reservation.

According to the new text of Conclusion 13, a law-declaring unanimous resolution of the General Assembly is one that is adopted "without negative vote or abstention." It creates a presumption that it contains a corrected statement of law, but that presumption "is subject to a rebuttal." Similar unanimity is required by Conclusion 14 for a resolution dealing with an emerging rule of customary law and removing doubt about its legal character. According to Conclusion 15, authority of a resolution is enhanced when it is adopted by a representative majority that includes the main legal systems. But the effect of a law-stating or rule-developing resolution is weakened if "the number of negative votes or abstentions is large, or qualitatively significant." Finally, according to Conclusion 16 the authority of a resolution is enhanced "when it is adopted by consensus."

A reservation, an explanation of vote or other statement no longer diminishes the authority of the resolution. Its only effect is that it qualifies or limits the extent of approval by the reservation. It may be merely an expression of doubt, and ordinarily it will not be considered as a rejection of the rule, unless the statement explicitly does it. In addition, when the resolution expresses existing law, a State cannot exclude itself from the binding force of that law by making a reservation. It is not clear what happens if a State, instead of making a reservation casts a negative vote or abstains ; would this act destroy unanimity, or requesting a vote destroy the possibility of adopting a resolution by consensus ? It is not surprising that the Institute found it necessary to arrange for another study focusing on consensus and its role in the formation or — to use the expression preferred by the International Court of Justice — crystallization of international law.

3. The Suy Preliminary Exposé with Questionnaire, and Comments Thereon

a. Preliminary Exposé

Mr Erik Suy prepared a Preliminary Exposé in 1986, which was included in the volume of *Essays in Honour of Roberto Ago* (a reprint is enclosed).[55] The Exposé was accompanied by a Questionnaire, to which four Members of the Sixth Commission replied (copies enclosed).

In the Exposé, Mr Suy pointed out that in a world divided both between West and East and North and South, consensus became the main method for making arrangements acceptable to all concerned. As a result, the texts approved are neither clear nor precise, but such a text is still better than no agreement. A supposedly better text that can be pushed through by a majority is of no value if it is rejected by a powerful minority, it is a "coup d'épée dans l'eau."[56]

As a practical measure, Mr Suy suggested the acceptance of the definition of consensus used by the Conference (now Organization) on Security and Cooperation in Europe (CSCE, now OSCE), which defines it as "the absence of any objection expressed by a Representative [of a

55 Erik Suy, "Role et Significance du Consensus dans l'Elaboration du Droit International", *Le droit international à l'heure de sa codification: Etudes en honneur de Roberto Ago*, Milano, Dott. A. Giuffré, Editore, 1987, vol. I, pp. 521-42.

56 *Ibid.*, p. 521.

participating State] and submitted by him as constituting an obstacle to the taking of the decision in question."[57]

Mr Suy presented many examples of consensus being used for decisions of international organizations and by conferences convened to draft a treaty.[58] He pointed out that sometimes there is insistence on unanimity or consensus, while in other cases decisions are simply adopted "without vote."[59]

At the end of the report, the Rapporteur discussed the question of the effect of the consensus on the value of the text. Some authors contend that consensus does not affect the legal value of the text, that it does not add to the text's importance as far as the development of international law is concerned. Others would reserve the use of consensus to the cases in which there has been a sufficient consolidation process that resulted in finding solutions of various problems to the satisfaction of all concerned. Texts arrived at by this process are more likely to contribute to the development and strengthening of international law, and would lead to the implementation of decisions or ratification of treaties. The value of the instrument will thus be enhanced.[60] Though there is some truth in the objection of some that consensus texts are often "too vague, too general and too ambiguous", this can be remedied by subsidiary instruments prepared, for instance, on a regional basis, that would formulate stronger provisions.[61] Finally, Mr Suy suggested certain technical improvements which would make the process leading to consensus less secret, more transparent.[62] The Rapporteur ended on the pessimistic note that the great problems require precise rules for which consensus is not likely to provide an effective solution, but that it still can assist in formulating general norms of customary international law.[63]

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57 *Ibid.*, p. 523, citing Regulation 69 of the CSCE. For a discussion of that Regulation (or Recommendation), see Erika Schlager, "the Procedural Framework of the CSCE : From the Helsinki Consultations to the Paris Charter, 1972-1990," *Human Rights Law Journal*, Vol. 12, No. 6-7, 12 July 1991, p. 221, at 223-26.

58 See, *e.g.*, United Nations, *The Law od the Sea : United Nations Convention on the Law of the Sea*, U.N. Pub. E.83.V.5, 1983, Article 161(8)(e), pp. 56-57.

59 See, in particular, Suy, *op. cit. supra*, note 55, pp. 529-36. He concludes (p. 536) that there are no constitutional or other legal obstacles to utilizing this procedure.

60 *Ibid.*, pp. 536-38.

61 *Ibid.*, pp. 536-40.

62 *Ibid.*, pp. 540-41.

63 *Ibid.*, pp. 541-42.

b. Observations by Commission's Members

Four replies sent to Mr Suy's Questionnaire were transferred to me. At this time, I would like to report not points of agreement or disagreement, but primarily new ideas or new formulations that should be considered in the future.

Mr *Diez de Velasco Vallejo* would define consensus as a method of negotiation and making decisions the main characteristic of which are the absence of voting and the absence of objections. Consensus is (or involves) a special technique of negotiations, but also a method of decision making. Sometimes it leads to a stalemate, as happened at the Third United Nations Conference on the Law of the Sea, where a vote finally had to be taken that resulted in a long delay in the coming into force of the Convention adopted without consensus.

The voting method is based on the democratic principle that the majority prevails, while consensus limits this predominance of the majority over the minority. Consensus favors reaching a general agreement among the parties through using unofficial consultations and the services of presiding officers who try to find points of convergence that would make possible an agreement. Once consensus is obtained, its effect can be similar to that of unanimity.

The difference between consensus and the adoption of resolutions "without vote" needs to be deepened, as otherwise "no vote" will replace unanimity and consensus.

No reservations should be permitted to a consensus text, only interpretative declarations. Thus declarations may deal with minor departures from the agreed text, but cannot affect the substance. In case of abuse of this limited right, objections to it should be allowed.

A resolution can result in a crystallization of a customary rule, if there was sufficient practice before (*in statu nascendi*) ; or later practice can result in the establishment of a customary rule, if that practice uniformly follows the resolution. Some General Assembly resolutions have already added the "spiritual element" (*opinio juris*) to the formation of international customary law.

The confidential and informal character of the consultations leading to consensus may be necessary at the time of drafting, but the lack of later access to the preparatory materials might result in a misinterpretation of the consensus resolution. More transparency is needed. The International Law Commission, since the increase in its membership, has increased the amount of consultations limited to only some members and, resulting in a progressive blackout of the important part of the work of the Commission. Similarly, it is necessary to provide for the publication of the preparatory

materials of the codification conferences that also produce instruments of clearly normative character. These materials are needed to facilitate the interpretation of the instrument should some doubts or conflicts arise.

Mr *Rosenne* did not consider the ambiguity about the character of consensus — is it procedure or result — to be of real importance ; it is not necessary to make it more precise. Similarly, there is no need to have a definition of consensus to discuss the difference between consensus as procedure or as result, or to distinguish consensus from unanimity or "no vote."

Reservations should be allowed in case of treaties, but the term is not suitable for other instruments. Declarations do not affect the consensus, and there can be no explanation of vote when there is no vote. General Assembly Rules of Procedure 88 and 128 prohibit a delegate making a proposal or asking for an amendment to explain his vote on it, but these rules may not be applicable to "explanations of position."

Mention should be made of General Assembly Resolution 3232 (XXIX), of 12 November 1974, which recognized in the preamble that "the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly, which may to that extent be taken into consideration by the International Court of Justice."

Attention should be called also to Blaine Sloan's recent article in the British Year Book of International Law (vol. 58, 1987, p. 39, at 142), where he states that :

> The General Assembly resolution as an independent source of international law still awaits the imprimatur of the community of States, but in the meanwhile resolutions draw strength from and contribute to other sources of law. They have many and varied effects not confined to those normally associated with resolutions. Beyond, the potential is there for statesmen who have the foresight and will to grasp it and for scholars to show the way.

Mr *Skubiszewski* pointed out that consensus is not only a procedure (as defined in the CSCE provision) but also a "*résultat*", an act, an agreement, as well as a source of law. While the usual meaning of consensus is the procedure of "no objection", it also signifies the conclusion of deliberations, a fact usually established by the President of a conference.

As far as the United Nations is concerned, only a Charter amendment can replace voting with consensus, but universal practice has accepted consensus as being compatible with the voting provision.

There is a substantive difference between consensus and unanimity. Consensus means primarily that there is no fundamental objection, while other objections can be presented and maintained. The obligations, both

legal and political, that flow from the adoption of a decision by consensus are more limited than those based on unanimous acts. A State's participation in a unanimous vote covers the whole text and all of its details. It has to be admitted, however, that interpretative declarations and explanations of vote, indicating points of disagreement, diminish or even abolish the difference between consensus and unanimity. Unanimity becomes problematic and doubtful when it is accompanied with interpretations and explanations that point out the existence of divergencies among States that declared themselves unanimous.

A decision "without vote" is less binding than consensus, as it is difficult to ascertain what was the attitude of a State with respect to the decision when there was no vote. If they so wish they retain considerable freedom in such a case.

Reservations are permissible as long as they do not affect substance, *i.e.*, essential or fundamental provisions. If a text is approved without objections, all reservations are eliminated thereby. When the text is adopted by consensus, some States actually present reservations disguised as explanations or declarations. In such a case, it may be doubtful whether there really was consensus. It is necessary then to study the circumstances surrounding the negotiation and adoption of the text.

Some non-binding resolutions of international organizations or international conferences can be considered as a means of determining the existence of *opinio juris*, while others may play, or in fact play, a role creating or crystallizing the *opinio juris*. It is not possible to determine it simply or in general, as there are many factors that need to be considered and their influence may vary from case to case.

Mr *Torrez Bernárdez* was willing to accept the CSCE definition, as consensus is a method to be used to adopt a decision, and its main element is "no objection." Consensus is a result of long consultations, and provides a firm basis for a general agreement.

From judicial point of view, the consensus is a procedure for adopting a decision and nothing else. The "consensus-résultat", the general agreement, merely relates to the "firmness" of the content of the agreement adopted by the decision in question.

An organ of the United Nations, which is bound by the Charter, cannot replace the majority votes provided by the Charter by consensus. Any member can at any time demand a vote. On the other hand, the Charter does not prohibit using consensus, as long as no member objects.

It may be noted that the International Court of Justice, a principal organ of the United Nations, has never resorted to consensus. As far as conferences held under the auspices of the United Nations are concerned,

they are free to adopt the majority rule or consensus, or a combination of both.

There are two differences between unanimity and consensus. First, consensus has been preceded by protracted negotiations, during which obstacles are removed one after another, while unanimity can often be used without such long negotiations. Second, there is a psychological difference, as there is a more positive attitude with respect to unanimity than with respect to consensus. There are also two differences between consensus and adoption of a resolution "without vote." It seems to be easier to change a "without vote" decision than one adopted by consensus. In addition, consensus not only is adopted "without vote," but also is adopted "without objection."

By not objecting to the adoption of a decision by consensus, States do not renounce the right to make explanations, interpretative declarations or even reservations. It simply means that negotiations were not able to remove all problems, but the States preferred to adopt a decision rather than to postpone it.

The fact that a text having normative context was approved without fundamental objections means that the text reflects *opinio juris* of States. As the International Court of Justice pointed out in the Nicaragua v. United States Case, this is useful not only in a case of rules being born, but also when it is necessary to confirm the existence of important customary rules.

Consensus decisions deal with a variety of issues and may have different impacts. The effect of these decisions depends only on their object — whether they relate to general international law or whether they were adopted within the legal order of a particular international organization or within some international system. The whole development is a positive one, from both a political and sociological point of view. It enables the leaders of various groups of States to manage negotiations within the group, and facilitates further negotiations with other groups. It has, however, also negative aspects, as it perpetuates the idea of "blocs" as the driving forces in the development of international law, to the detriment of the primary actors, *i.e.*, the States.

Propositions

June 19, 1995

Instead of sending another questionnaire, or adding further to the materials already accumulated, it seems more appropriate at this stage to present a set of propositions which, as revised by the Commission, might provide guidelines for a preliminary report :

1. "Consensus" is not an isolated event or act, but a crucial part of a multipartite process used for reaching a generally acceptable text of an important document.

2. It is a result of consultations, often prolonged ones, which are designed to consider the wishes and goals of each participating State and to accommodate them either by making revisions acceptable to other participants or — if absolutely necessary — allowing exceptions that do not affect the core of the agreement.

3. The person in charge of the consultations, a chairperson of a committee or of a working group, or one of his or her trusted associates collects at each stage of consultations the alternative proposals of all the participants, and prepares a single negotiating text accommodating as many points of view as possible.

4. With patience and perseverance a point of diminishing returns is reached, and the participants have to decide whether there is sufficient consensus on all the important issues, and whether any remaining minor issues can be taken care of by allowing exceptions, or at least interpretative or explanatory statements, either oral or written.

5. If such agreement is reached, the whole text can be approved by consensus, without objections, and the chairperson publicly announces that result.

6. The consensus text may contain provisions about its role in developing international law ; for instance, that the document constitutes codification of customary law, or crystallizes it, or at least that it constitutes a step toward such crystallization, which will be completed if the forthcoming practices of States follows the rules included in the text.

Louis B. Sohn

Note addressed by Mr Sohn to the Members of the Commission

20 November 1995

1. At the meeting of the Institute at Lisbon, a meeting was arranged for our Commission on "Consensus", but only a few members were present. Several other members of the Institute were, however, curious about our approach to the subject, and I gave them a copy of the first draft of the guidelines to be discussed by us. Some of them were kind enough to give me a few helpful comments. As a result a few minor changes were made.

2. All of you, who were at Lisbon, have received the set of materials prepared by me, and those absent were also sent these materials. They included Mr Suy's report (in the form later published in the volume in honour of Roberto Ago) and comments of the Commission's members on that report as well as my Preliminary Exposé, dated 19 June 1995. In it, I have tried to summarize the issues that were raised in the Institute, first in connection with the "consensus" provisions in the report of the Thirteenth Commission, prepared by Professor Skubiszewski, and later by Mr Suy in his report and by the commentators on that report. If anyone of you does not have some of those documents, please let me know and a copy will be immediately sent to you.

3. I enclose another redraft of the guidelines and I would appreciate receiving by 30 January 1996, any sugestions for changes, deletions or additions. I am planing to prepare then a comprehensive report, which would be sent to you by the end of March for comments by the end of May.

4. The Eighth Commission (Environment) is planning to meet in Geneva at the end of June. As several members of the Sixth Commission are also members of that Commission, it might be perhaps possible for our Commission to meet there, for a day or two, before or after the Eighth Commission's meeting.

5. If this should not be feasible, we might have to complete the report soon thereafter, by fax and telephone, as it has to be ready for printing at the end of summer 1996 in Volume I of the *Yearbook* for the 1997 Strasbourg Session of the Institute.

Possible Guidelines

1. "Consensus" is not an isolated event or act, but a crucial part of a complex multipartite consultation process used for reaching, without resort to a vote, a generally acceptable text of an important document.

2. Consensus is a result of successful consultations — often prolonged ones — which are designed to consider, to the fullest extent possible, the wishes and goals of each participating State and to accommodate them by either making revisions acceptable to other participants or — if absolutely necessary — by allowing exceptions that do not affect the core of the agreement.

3. The person in charge of the consultations — a chairperson of a conference, assembly, council, committee, or working group — or one of his or her trusted associates, collects at each stage of consultations the alternative proposals of all the participants most concerned in agreeing on the proposed instrument, and prepares a single negotiating text that accommodates as many points of view as possible.

4. When, with patience and perseverance a point of diminishing returns is reached in the consultations, and the participants have to decide whether there is sufficient consensus on all the important issues, and whether any remaining minor issues can be taken care of by allowing exceptions, or at least interpretative or explanatory statements, either oral or written.

5. If such an agreement is reached, the whole text can be approved by consensus, without objections, and the chairperson publicly announces that result.

6. The consensus text may contain provisions about its role in developing international law ; for instance, whether the document constitutes codification of customary law, or crystallizes it, or whether at least it constitutes a step toward such crystallization, that will be completed as soon as it is authoritatively ascertained that the practice of States has been sufficiently following the rules included in the text, and that it has thus become truly "generally accepted".

*

Observation de M. John R. Stevenson

...

With respect to paragraph 4 of the redraft of the Guidelines for Achieving Consensus, I would suggest the following. It seems to me important that we indicate that if any participant objects and is willing

to have his name indicated as objecting, that should prevent the adoption of a resolution by consensus. For instance it may be that you will wish to add a sentence to paragraph 5 of the redraft substantially as follows : "The chairperson shall not announce the approval by consensus if one of the participants objects and is willing to have his name inserted in the report".

Sincerely,

John R. Stevenson

Réponse de M. Sohn

February 12, 1996

...

I agree to your reservation, but we need to discuss how it should be phrased. There is no consensus, when a person requests that his/her negative vote shall be recorded in the proceedings. Sometimes, however, persons agree that the record should merely state that if there were a vote they would have voted against the decision.

Provisional Report

8 July 1996

The Role and Significance of Consensus in the forming of International Law

Le rôle et la signification du consensus dans l'élaboration du droit international

1. Introduction

The Institute's work on consensus can be traced to the 1971 decision that established the program of work for the Thirteenth Commission. It mandated that Commission to supply an answer to the theoretical difficulties that have arisen with respect to "non-contractual instruments having a normative function or objective."[1] The mandate was narrowed down later to "non-binding resolutions of the General Assembly of the United Nations which can lay down rules of conduct for States and thus influence the growth of law."[2] Upon completion of a monumental report by Mr Krzysztof Skubiszewski, the Institute decided to appoint a new Sixth Commission to study specifically an issue raised frequently in discussing that report, mainly "the role and significance of consensus in the forming (*l'élaboration*) of international law."[3] The first rapporteur, Mr Erik Suy, prepared a Preliminary Exposé,[4] accompanied by a questionnaire, and several of the members of the Commission sent comments thereon. After the resignation of Mr Suy, Mr Louis B. Sohn was appointed Rapporteur,

1 *Annuaire de l'Institut de Droit international*, vol. 57, Part II, 1977, p. 96, at 102-103.

2 *Id.*, vol. 61, part I, 1985, pp. 24-31.

3 *Id.*, vol. 62, Part II, 1987, pp. 14, 53-59.

4 This document was published in *Le droit international a l'heure de codification: Etudes en honneur de Roberto Ago*, Milano, Dott. A. Giuffre, Editore, 1987, pp.521-42, and in reprinted *supra*, pp. 5-34.

and prepared a summary discussing the main issues relating to consensus that were raised in the Skubiszewski and Suy reports, as well as those contained in the comments on these reports.[5] The current report takes account of all these deliberations, and adds a further analytical study of this problem.

2. Role and significance of consensus.

The Sixth Commission was asked to deal with two aspects of consensus, its *role* in the forming of international law and its *significance* in forming that law. The *role* relates to the place of consensus in the process of forming international law ; the *significance* relates to the effect of a consensus decision on the forming of a rule of international law. The first one is connected with the process used in arriving at an international decision, the second one is connected with the effect of a consensus decision on the crystallization of a rule of international law.

The *role* of consensus in the forming of international law has increased in recent years because of dissatisfaction with the attempts in international institutions and at international conferences to impose the will of a majority on reluctant minorities. As two-thirds majorities are usually required, in a world of more than 180 States there can be a dissatisfied minority of more than sixty States, ten more than those that established the United Nations in 1945. It is difficult to force even one relatively small State to accept the dictates of the majority ; to try to force some sixty States to comply with the wishes of the majority is clearly impossible.

To deal with this dilemma two procedural devices were developed over the last fifty years : consultations and consensus. Consultations are used to remove the difficulties, to discover the hidden causes of the problem, to find ways to diminish the objections of major participants by devising mutual concessions or common guarantees, by clarifying the legal issues involved, or by persuading the parties most concerned to submit these issues to a third party or institution for advice, assistance or decision. Step by step the situation is clarified, packages of issues are jointly solved, and a combined instrument emerges that is acceptable to all the parties. This instrument — decision, resolution, recommendation, declaration or formal agreement — is then approved by consensus.

Like the previous stages of the process, *consensus* is also a flexible concept. The Romans who seem to have invented the consensus idea, had developed a variety of its forms. (See Annex 1.) In addition to the consensus in the strict sense of that term, many decisions are taken without

5 See *supra*, pp. 61-91.

a vote, or the chair simply announces the existence of unanimity, without an actual vote being taken, if his query whether there are any objections is met with silence. Similarly, "consensus" is defined in the United Nations Law of the Sea Convention as meaning "the absence of any formal objection."[6] It is this definition that seems to be generally accepted, though various international institutions may use somewhat different formulas for some special purposes. For the purpose of this report, the Law of the Sea Convention's definition seems to be appropriate.

3. Effects of recent changes in forming international law.

The increased use of consensus is the result of recent developments in the international community which have had a great impact on the formation of international law. Originally, rules of international law were developed primarily through practice of States which, when gathered by scholars, resulted in a crystallization of a rule of customary international law. This happened when there was a general agreement among scholars and government officials that there was proof of sufficient practice, and of its acceptance as law. This creative process was recognized by article 38 of the Statute of the Permanent Court of International Justice in 1920 and confirmed in 1945 by the Statute of the International Court of Justice, which only added the prefatory statement that the function of the Court was "to decide in accordance with international law." Both texts authorized the Court to apply in this decision-making process, "international custom, as evidence of a general practice accepted as law."

In both statutes, this provision is preceded by a reference to another possible source : "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states." But only the general conventions may have the force of general law binding all the States. The rules contained only in a "particular" convention, bilateral or regional, are binding exclusively the parties to them ; even they can contribute, however, to the practice that may become crystallized into customary international law. In the *Lotus Case*, the Permanent Court of International Justice cautioned that it was not certain that a rule contained in a convention is to be regarded as expressing a general principle of law "rather than an exception thereto."[7] Most conventions are still bilateral, and they try to solve bilateral problems, regardless of any existing generally accepted rules.

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6 United Nations Convention on the Law of the Sea, 1982, article 161 (8) (e). U.N. Pub. Sales No. E.83.V.5 (1983), p.56.

7 PCIJ, Series A, No. 10, p. 27 (1927).

The situation is quite different as far as multipartite treaties are concerned. In the 1920's there were only a few technical treaties, such as those relating to communications by post, telegraph, telephone and radio, that had global reach. At present, there are hundreds of them, many of them ratified by more than a hundred States. Even when ratifications were slow in coming, as in the case of the 1969 Vienna Convention on the Law of Treaties,[8] the International Court of Justice found it possible to declare in the Namibia advisory opinion that the rule laid down in that convention "concerning the termination of a treaty relationship on account of a breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject."[9] The Court went even further in the *Continental Shelf (Tunisia v. Libya) Case,* where it explained that "it could not ignore any provision of the draft convention [on the Law of the Sea] if it came to the conclusion that the content of such provision is binding upon all the members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law.[10] Thus by a stroke of a pen the Court transformed a draft convention into a binding rule of international law. The connecting link between the two pronouncements was that both provisions in question were adopted by a world-wide international conference "without a dissenting vote," an equivalent to a decision by consensus.

The need for consensus was already mentioned in the *Lotus Case.* The votes of the judges being equally divided, the decision of the Court in that case was given by President Huber's casting vote. This slim majority emphasized that the rules of international law binding upon States "emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law, and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[11] The Court concluded, therefore, that France did not prove that there was no principle of international law precluding the institution by Turkey of criminal proceedings against the French officer of a French vessel which collided on the high seas with a Turkish vessel, resulting in its destruction and the death of eight Turkish nationals.[12] As dissenting Judge Loder, the former President of the Court, stated in his dissenting

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8 Entered into force in 1980. 1155 UN Treaty Series 331.

9 1971 ICJ 16, at 47.

10 1982 ICJ 18, at 38.

11 *Lotus* Case, *supra* n.7, at 18.

12 *Id.*, at 28, 31.

opinion, the majority opinion accepted thus the contention of Turkey that "under international law everything which is not prohibited is permitted." He considered this view was "at variance with the spirit of international law," which "rests on a general *consensus* of opinion; on the acceptances by civilized States, members of the great community of nations, of rules, customs and existing conditions, which they are bound to respect in their mutual relations, although neither committed to writing nor confirmed by conventions." He added that "[t]hese rules may be gradually modified, altered or extended, in accordance with the views of a considerable majority of these States, as this *consensus* of opinions develops." He made clear, on the other hand, that it was "incorrect to say that the municipal law (*droit*) of a minority of States suffices to abrogate or change them."[13]

Another dissenter, Judge Weiss, emphasized that in reality "the only source of international law is the *consensus omnium*." He added that "[w]henever it appears that all nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law."[14] Similarly, Judge Nyholm, also dissenting, pointed out that "the foundation of a custom must be the united *will* of several and even of many States constituting a *union of wills*, or a general *consensus of opinion* among the countries which have adopted the European system of civilization, or a manifestation of *international legal ethics* which takes place through the continual occurrence of events with an *innate consciousness of their being necessary*."[15]

Further research may find many similar statements in other cases. The majority of the Court in the *Lotus Case* relied on the generally accepted statement that the rules of international law binding on the States "emanate from their own free will" ; it found that the existence of such rule was not proven in this case, as some States did not follow the alleged rule. The dissenters, on the other hand, held that a consensus of the international community existed and a few States' contrary practice cannot destroy it. It was the view of the dissenters that was later confirmed by the practice of States, which led to the adoption of several conventions on the subject, the last of which clearly represented general consensus on this topic.[16]

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13 *Id.*, at 34. Italics added.

14 *Id.*, at 43-44. Italics in the original.

15 *Id.*, at 59-60. Italics in the original.

16 Brussels Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation, 1952, 439 U.N.T.S. 233. Convention on the High Seas, 1958, article 11, 450 U.N.T.S.11. United Nations Convention on the Law of the Sea, 1982, article 97, *supra* note 6, at 12.

This result shows that the "free will" of States is a flexible factor, as new circumstances require new approaches. For many centuries, that will of States could be discovered only by painstaking research, which often can be misleading, as other precedents may be found leading to opposite results, or the decision-makers may reject the result for a variety of reasons. For instance, not all drafts of the International Law Commission have found general acceptance, despite the Commission's careful studies. At present, the miracle of modern communications permits, or even requires, faster decision-making. The international legal system cannot rely any more on the work of scholars and the legal advisers of Foreign Offices to keep up with the proliferation of international legal documentation. For instance, in the last fifty years more international agreements were registered with the Secretariat of the United Nations than have been approved in the previous 5,000 years. Perhaps in the not too distant future some smart computers might provide access to this treasure-trove of emerging international law rules, but for the moment nobody even dares to tackle all these volumes.

There is also a possibility that lawyers may discover some other sources of international law. For too long the attention of governments has been concentrated on drafting "binding" treaties, despite the well-known facts that many states do not ratify treaties ; even when they ratify them, their parliaments often refuse or neglect to adopt implementing legislation ; and there is no trained personnel or insufficient funding for monitoring the performance of the States Parties, or to ensure the enforcement of treaty obligations. In addition, quite often there is not an unwillingness to comply but an inability to do so.

Instead of concentrating on binding documents, a more flexible approach has become popular. International conferences and the law-making organs of international organizations have developed a variety of instruments that do not require formal ratification : recommendations, resolutions, declarations, regulations, guidelines, standards, model rules, and other forms. They express the recognition by governments that something needs to be done, and their willingness to do their best to help achieve the goals stated in the instrument and to try in good faith to implement the agreed rules to the greatest extent possible. A State that voluntarily follows these rules in its internationally relevant activities has the additional benefit that no other State can complain that these activities violate international law. The international instrument provides thus a welcome cachet for these activities.

The last fifty years have seen the acceleration of the historic process of international law-making. As was already noted, in the past, scholars laboriously sifted the practice of States, deriving some principles of international law from diplomatic correspondence and international

agreements. Legal advisers of governments and diplomats, in turn, accepted the data collected by the scholars as sufficient evidence of international law and applied the rules found in the books to new situations faced by them. As a result of uniting practically all nations in the United Nations, that organization is able to bring together in the International Law Commission or a special committee of experts, eminent scholars and practitioners of international law representing all the main regions of the world, and assign to these groups of experts the task of preparing a convention or other document on a subject of current importance. The results are then discussed in an appropriate diplomatic forum, a committee of the General Assembly or a diplomatic conference, where diplomats and legal advisers of governments can add their practical wisdom to the process of developing a generally acceptable set of principles or rules. Consequently, the final document represents the consensus of all mankind and can be added to the corpus of international law.

It was in this manner that a special committee established by the General Assembly in 1962 elaborated after seven years of thorough consultations and discussions, the seven basic principles derived by the Assembly from Article 2 of the United Nations Charter and related provisions. This elaboration of rules of international law relating to the maintenance of international peace and security was in turn incorporated in the Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.[17] The International Court of Justice analysed carefully the effect of this declaration in the *Nicaragua Case*.[18] The Court considered that the "effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."[19] The Court added that "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question." The Court then quoted several rules contained in the Declaration which defined the obligation of States to refrain not only from armed attack but also from several "less grave forms of the use of force."[20] The Court thus accepted the fact that this declaration had broadened considerably the

17 This Declaration was annexed to GA Resolution 2625 (XXV), which was adopted by the General Assembly without a vote on 24 October 1970.

18 Case concerning Military and Paramilitary Activities in and around Nicaragua (Nicaragua v. USA), 1986 ICJ 14.

19 *Id.*, at 100, para. 188.

20 *Id.*, at 101, para 191.

range of activities prohibited by customary international law. Dealing later with the principle of non-intervention, the Court noted that, while the United States declared in 1963 that a provision in a prior resolution on this topic was "only a statement of political intention and not a formulation of law," it made no such statement in connection with the 1970 Friendly Relations Declaration which repeated the essentials of the 1963 resolution. The Court ascribed this changed attitude to the fact that in 1970 the General Assembly made clear that it was declaring "basic principles of international law."[21]

This example shows that the Court is willing to accept a resolution adopted without a vote, after prolonged consultations and discussions in which not only experts but also representatives of governments participated, as an important element in the formation of customary international law. The Court also found the existence in this case of *opinio juris* testifying to the formation of a set of rules of customary international law. Thus through consensus the rules of international law are born.

4. Consultations as a prerequisite of consensus.

It is necessary, however, to emphasize again that it is not only the final consensus on a text that matters but also the patient process by which it has been formulated. It is the process of persuasion that slowly removes all the obstacles on the road to consensus. As Mr. Tammes described this process already in 1958, the majority utilizes the gradualness of the decision-making process to persuade the minority :[22]

> In the early stages, in the sub-committee, on the study-group, a draft may be adopted even by simple majority vote. The definite voting in plenary meeting is still far away and, in the meantime, several opportunities will present themselves to a minority to take a firmer stand. Yet, when something substantial has emerged from the early discussions, when amendments have been added and compromises inserted in order to meet the opposition, the final product is the work of the whole, rather than of the majority, and

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21 *Id.*, at 107, para 203. Similarly, the Court considered that the United States acceptance of similar language in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1975), another non-treaty, testified "to the existence, and the acceptance by the United States of a customary principle which has universal application." *Id.*, at 107, para. 204. It may be also noted that in his dissenting opinion in the Nicaragua case, Judge Schwebel also relied on the 1970 Declaration. *Id.*, at 337-38, para. 242-44.

23 A.J.P. Tammes, "Decisions of International Organs as a Source of International Law," 94 A.D.I. Recueil des Cours (1958-II), p. 261, at 287.

> minorities may find it more and more difficult completely to deny or reject that product when, in the course of the successive legislative stages, it gains in weight and approval. The argument will be used, that you cannot permit the result of long preparations, of laborious discussions and of happily reached compromises to be entirely lost in sight of the harbour.

Since 1958, especially in the long negotiations on the law of the sea during the 1970's, some new methods of achieving consensus were invented. Each of the chairpersons of the main committees was encouraged to prepare an informal "single negotiating text" which attempted to provide the first approximation of a generally acceptable document. After comments were received, working groups were appointed to deal with points that were still controversial, and their chairpersons tried to develop "packages" of provisions combining texts which presented a possibility of mutual concessions by the States concerned. After consensus was developed on these packages, they were combined into each committee's "revised single negotiating text." In the next step the committee texts were combined into an "informal composite negotiating text" (ICNT) of the whole draft treaty, and only a few "hard core" issues remained for further consultations through issue-specific groups. At this time the Conference agreed also to the establishment of a "collegium" of top officers of the Conference who assisted the President in the final revisions of the text that took into account the results of the consultations. The collegium ascertained, after a discussion in the Plenary Session of the Conference, which proposed changes received "widespread and substantial support" indicating that they offered a "substantially improved prospect of consensus." These revisions of the ICNT were thus produced before a draft convention was prepared. After eight years of working by consensus, on the last day of the Conference, the United States, which was still dissatisfied with one part of the Convention, requested the first substantive recorded vote. The result was : 130 votes in favor, 4 votes against, with 17 abstaining.[23] Despite disappointment that full consensus was not achieved, the President of the Conference stated that the vote "represented the overwhelming reaffirmation of support for the ideals, principles and goals of new international order for the seas as embodied in the package of the Convention of the Law of the Sea." He also pointed out that this reaffirmation of support was

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23 For a short history of the Conference, see Tommy T. B. Koh, "A Constitution for the Oceans," reprinted in University of Virginia, United Nations Convention on the Law of the Sea, 1982 : A Commentary, Vol. I, pp. 17-28 ; and the more elaborate article by him and Shanmugam Jayakumar, "The Negotiating Process of the Third United Nations Conference on the Law of the Sea," in *id.*, pp. 29-134.

further strengthened by the fact that the majority of States which abstained in the voting later became signatories to the Convention."[24]

It should be also noted that although the main objector to the Convention, the United States of America, did not ratify the Law of the Sea Convention, in March 1983 President Reagan proclaimed a 200-mile exclusive economic zone for the United States and issued a policy statement accepting the substantive provisions of the Convention, other than those dealing with deep sea-bed mining.[25] Similarly, in 1988 President Reagan extended U.S. sovereignty over the territorial sea to twelve nautical miles "in accordance with international law as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea."[26] These two acts made clear that the parts of the U.N. Law of the Sea Convention which represented general consensus have become a part of customary international law applicable to all States.

5. Temporary Conclusions

1. In defining consensus, it would seem both appropriate and necessary to follow the definition contained in the United Nations Convention on the Law of the Sea, which has been generally accepted, namely that consensus means "the absence of any formal objections."

2. Consensus is being generally accepted as the best way of obtaining a lasting decision, as distinguished from a majority decision of an important issue, which is seldom accepted by disgruntled minority. Such a decision is likely to be reversed when the minority wins an election and becomes majority.

3. The lasting character of a consensus decision is due to the process by which that decision is reached. That process is based on consultations which in recent practice are preferred to traditional negotiations. In negotiations, the stronger or smarter party tries to win, and at the end the other party is likely to lose, and to resent it. On the other hand, in consultations the "enemy" is not the other side but their common problem. The goal is to solve it as reasonably and quickly as possible, by a common effort.

4. Resorts to consultations have become most common in a multipartite context, in which several divergent interests have to be reconciled. The

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24 *Id.*, p. 23. The convention was finally signed by 159 States.

25 Weekly Compilation of Presidential Documents 383 (1983), 22 International Legal Materials 464 (1983).

26 54 Federal Register, No. 5, January 9, 1989, p. 777 ; reprinted in Marian Nash, ed., Cumulative Digest of United States Practice in International Law, 1981-1988, Vol. 2, p. 1988 (1994).

goal of consultations is thus to consider, to the fullest extent possible, the needs and wishes of each participating State or group of States, and to accommodate them by presenting to them several alternative proposals for each problem or combined ones for sets of linked problems.

5. In the next stage, the person selected for guiding the group prepares, in the light of comments received singly or derived from the group's discussion, a single negotiating text accommodating as many points of view as possible.

6. After several stages, in each of which consensus has been reached on most issues, some "hard core" issues still remain. They may be solved by combining them into packages and answers may be found by a combination of reciprocal concessions in different areas.

7. When with patience and perseverance all basic problems have been solved, but some minor issues still remain, agreement might be reached on allowing some participants to present interpretative or explanatory statements, either oral or written.

8. In most cases, some States may be persuaded to have their statement recorded in the minutes of the preparatory meeting and not to insist that they must be made at the final plenary meeting.

9. At the end, several alternatives still remain. The presiding officer can announce that no request has been made for a vote, and declare the agreed instrument has been approved by consensus, or without vote.

10. On the other hand, if a vote is requested, the document may be approved by unanimity, if there are no negative votes. The abstaining votes being recorded, the abstainers may be permitted to explain the reasons for their abstentions.

11. Sometimes, even in case of approval by consensus, explanations are permitted, or the presiding person may note that some members' explanations have been previously recorded.

12. Some conferences or international assemblies adopt decisions by "consensus" even when there are a few — one, two, or three —negative votes, but in these cases it is clear that this is only a quasi-consensus.

13. It is generally accepted that from the point of view of forming new rules of international law, the result depends on the extent of real consensus. The more negative or abstaining votes, or explanations or interpretations, have taken place, the less is the law-making value of the decision.

14. If, however, there is a real consensus, and is followed by a practice consistent with both the letter and the spirit of the agreement, it is generally accepted as being crystallized international law on the subject.

Annex to the Provisional Report

A Short Excursion into the History of the Consensus Problem.

As its name indicates, the word "consensus" is a Latin word and was adopted into the French and English languages in its original form. In old Rome it was often used with additional adjectives, indicating to some extent the scope of the existing consensus. In a study presented in 1972 to a meeting at Lausanne of the *Societé des Etudes Latines*, Mr Armand Pittet reported on the use of consensus 2000 years ago by Roman statesmen-scholars, Marcus Tullius Cicero (106-43 B.C.), Lucius Annaeus Seneca (4 B.C. - A.D. 65), and others.[1] He pointed our that Seneca required *consensus multorum* (consensus of many),[2] *magnus consensus* (great consensus),[3] consensus humani generis (consensus of all humanity),[4] and *consensus omnium* (consensus of all).[5] Shifting into the international sphere, Seneca used *omnium gentium consensus* (consensus of all the tribes), *consensus nationum omnium* (consensus of all the nations).[6] He used sometimes even the more ambiguous *omnium quasi consensus* (consensus of almost all). Others have used phrases reflecting the political situation in Rome, such as *consensus populi Romani*[7] (consensus of the

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1 A. Pittet, "Le mot consensus chez Seneque : Ses acceptions philosophique et politique," *Schweizerische Zeitschrift fur klassische Altertumwissenschaft*, October 1982, Museum Helveticum, Basel, pp. 35-46.

2 *Id.*, at 37. This phrase was also used by Cicero, *ibid.*, who also used *maximus consensus* (greatest consensus), *summus consensus* (highest consensus), *incredibilis consensus* (incredible consensus), *singularis consensus* (amazing consensus), *ibid.* Cicero also considered consensus as the best method for finding solutions for difficult political problems (Optimus in republicam consensus). Cassell's New Latin Dictionary (D.P. Simpson, ed., 1959), p. 139.

The Romans used consensus as the best means for legislating (*consensus facit legum*). Putnam's Complete Book of Quotations (W. Gurney Benham, ed., New York, 1926). p. 505a.

3 *Id.*, at 38.

4 *Id.*, at 38-39. Used also by tacitus. Alternatively Seneca used *consensus hominum* (people's consensus).

5 *Id.*, at 38.

6 *Id.*, at 39.

7 *Id.*, at 38.

people of Rome) ; *consensus bonorum* (consensus of the upper classes of Rome),[8] *i.e. optimi* (aristocracy, nobles, politicians), *equites* (knights, rich merchants), as distinguished from the *plebs* (plebeians or proletarians); and *consensus universorum* (universal consensus), or *consensus civitatis* (state consensus).[9] For instance, Emperor Augustus in his biographical *Res gestae* (section 34) relied on *consensus universorum* in the description of his supposed transfer of power to the Senate and people of Rome : *"In consulatu sexto et septimo postquam bella civilia exstingueram, per consensum universorum potitus rerum omnium, rem publicam ex mea postestate in senatus populique Romani arbitrium transtuli."*[10]

Mr Gerald Antoine, also an eminent professor of linguistics, has presented a short history of the different uses of consensus since the Roman and medieval times to its revival in modern France.[11] As far as its use in international bodies is concerned, he concludes that "[t]here is a time and place for the 'majority' to prevail, another for 'consensus' to win through, a third for 'reservations' to be allowed for."[12]

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8 On the use of *consensus bonorum*, see also Neal Wood, Cicero's Social and Political Thought (Berkeley, California, 1988), pp. 196-99, 210.

9 *Id.*, at 43-45.

10 *Id.*, at 45. Translated as follows in Naphtali Lewis and Meyer Reinhold, eds. *Roman Civilization, Sourcebook II, The Empire*, Harper Torchbooks, The Academic Library, New York, 1955, p. 19: "In my sixth and seventh consulship, after I had put an end to the civil wars, having supreme power by universal consent[consensus], I transferred the state from my own power to the control of the Roman senate and people." It seems that this transfer did not in any way diminish his absolute power. For a detailed study of the constant shift from consensus to the use of other means (including military force) to decide crucial issues in the period preceding the establishment by Julius Caesar and Augustus of the Roman Empire, see Jean Rouvier, Du Pouvoir dans la République romaine : Réalité et Légimité : Etude sur le "consensus." (Paris, Nouvelles Editions Latines, 1963), 337 pp.

11 G. Antoine, "Linguistic Aspects of Consensus," in UNESCO, Consensus and Peace (1980), pp. 41-61.

12 *Id.*, at 61.

Observations des membres de la Commission

Réponse de M. Mohamed Bennouna

30 June 1996

Dear Colleague,

I thank you for sending me your provisional report on "the role and significance of consensus in the forming of international law" which I read with great interest.

I agree with the main conclusions while I would have preferred that other examples would have been referred to like the law of self-determination and the space law, particularly the role of consensus in preparing the codification of international law. Some declarations of the General Assembly of the UN open the way to the preparation and adoption of multilateral treaties in due form. This evolution was followed in the space law but also in the condemnation of some international crimes, genocide, apartheid for example as like as international terrorism. One has also to recall that ILC tries to work under the consensus rule for adopting drafts of conventions submitted to States.

At this 1996 session of ILC for example, the draft code on crimes against peace and security of mankind and the draft code on State responsibility were adopted by consensus, even if members of ILC explained their positions on one or another single article or asked for a vote on a specific article.

I am not sure as it is assumed in paragraphs 12 and 13 of the report that the notion of consensus can be conciliated with the presence of negative votes even of a vote in the strict sense. I would like to recall that in the United Nations practice consensus means that a resolution has been adopted "without vote". This cannot prevent scholars, as you did for the Convention on the Law of the Sea, to research partial consensus inside the whole text. But the research can be misleading as the partial agreement is generally linked to an agreement on the whole text.

In the Law of the Sea, as the negotiation took place for about eight years, some aspects were part of the customary law even before

the final adoption of the text. But, considering those particularities of the law of the sea, is it possible to build, departing from this example, general considerations ?

I attract your attention on paragraph 14 where you consider that "if however there is a real consensus, and is followed by a practice consistent with both the letter and the spirit of the agreement ..." which is not completely true as practice can, in some cases precede the emergence of consensus or at least be concomitant with it (self-determination, space law, law of the sea).

Finally I wonder if one has not to recall that in the building of consensus some States or groups of States are "more equal than others" because these are directly concerned (see the negotiating groups in the Law of the Sea Conference) or because of their particular weight in international relations. Generally the small States have to work first for preliminary consensus (to determine their position) inside regional or inter-regional groups.

Is the search for consensus another form of the obligation to negotiate as defined by the ICJ in the continental shelf case in 1969 and in the Iceland fisheries in 1973 ?

These remarks having been done I reiterate my great appreciation of the work you prepared for our Institute which will be of important help in finalizing this debate on consensus.

Waiting to meet you next year,

Sincerely yours,

Mohamed Bennouna

Réponse de M. Tieya Wang

18 July 1996

Dear Colleague,

I acknowledge with great pleasure the receipt of your letter of June 28, 1996 and your Provisional Report enclosed therein on the Role and Significance of Consensus in the Forming of International Law. I appreciate all the efforts that you have put together for such a wonderful report. I find the conclusions of the report most inspiring. Now, please allow me to write a few lines on this subject, hoping that they could reach you before the deadline set out in your letter, that is the end of July.

1. Consensus has various meanings. It mainly means both the procedure of decision making and the result thereof. While it may not be easy to combine these two elements in comprehensive definition, it is equally not satisfactory to me to define consensus solely as "the absence of any formal objection" as adopted in the U.N. Law of the Sea Convention. I am of the opinion that consultation in the procedure and the general agreement as result of that procedure should be included in the definition, though "the absence of any formal objection" is an important criterion of consensus. Therefore, consensus, in my opinion, should be defined as a general agreement reached as a result of the process of consultation.

2. I completely agree to the idea of "consultation" as prerequisite of consensus as mentioned in your Provisional Report. Indeed, consultation in a multilateral process of decision-making is the major feature of consensus. It is true that there are both negotiations and consultations in any multilateral process of decision making and it is also true that the line between consultation and negotiation cannot easily be drawn. Consultation and negotiation are, however, distinguishable, and consultation should be emphasized in consensus as procedure of decision-making. I agree to what you said in points 3 and 4 of the temporary conclusions of your Provisional Report. Consultation is thus the core of consensus, as clearly manifested in the course of the UN Law of the Sea Conference.

3. The result of consensus is a general agreement. On the basis of consensus, participants in a multilateral consultation reach a general agreement. Such a general agreement in turn takes form of a multilateral instrument. It is generally agreed that there must be no formal objection, though sometimes explanations or interpretations are permitted. In this sense, consensus can be described as a decision made in "the absence of any formal objection". Therefore, consensus is not equivalent to unanimity or decisions without vote. This is particularly the case in the decisions made on the basis of consensus as they do not allow reservations or negative votes by participants. This is because reservation or negative vote constitutes an express act of objection of participant to part or the whole of an instrument to be adopted.

4. As practice shows, consensus as procedure of decision-making is increasingly used in multilateral diplomacy. It deals with a variety of issues and raises various political and legal problems. It is advisable that the Institute should limit the study of consensus to its role and significance in the forming of international law. Consensus will become one most suitable means of forming international law in the contemporary international community. I hope that the Institute will make contribution to this study by giving some guidelines for the procedure of consensus

so as to further promote the codification and progressive development of international law.

With by best wishes, I remain,

Sincerely yours,
Wang Tieya

Réponse de M. Francisco Orrego Vicuña

6 August 1996

Dear Louis,

Please find enclosed some brief comments on your report on consensus, hoping that they might contribute to your useful thoughts on the matter.

1. Definition

The definition contained in the United Nations Convention on the Law of the Sea and adopted by the report is an appropriate one. However, the reference to the absence of any formal "objections", in the plural, might pose a problem : is one single objection enough to prevent consensus or more than one objection is required to this effect ? This touches upon a problem of substance with which these comments are concerned. It might be appropriate to consider a reference to the absence of any formal "objection", in the singular.

2. The extent of consultations as the cornerstone of consensus

The report also very appropriately emphasizes the role of consultations and the process leading to consensus. The essential point is how to ensure that this process of consultations is a genuine one and that all views will be sought and accommodated. No doubt those of important and powerful States will be considered since otherwise consensus might not be attained. But will it be the same with small States that might have an equally valid national interest in the matter ? Discussion groups and other forms of consultation not always tend to include the participation of such small States. The report leaves open this possibility in referring to the consideration of views and accommodation "to the fullest extent possible". Could such interests be retained as those of major States ? This would certainly guarantee the genuine character of the process and the ensuing consensual result.

3. Quasi-consensus

Also quite rightly the report explains that when consensus is reached with one, two or three negative votes, this really is a quasi-consensus. Here again the different condition of States will have an influence in the outcome. If those few States are small probably they will be ignored because in fact consensus will be proclaimed in spite of their formal objections. Conversely, if those States are powerful such consensus will not normally be proclaimed until their interests are met. Power politics is one thing but the formation of international law ought to guarantee the equality of treatment. Could it be considered that quasi-consensus has lesser juridical qualities than genuine consensus and be so spelled out in the report ? Furthermore, could such objections be considered enough so as to prevent the formation of a rule of customary law in a manner similar to that of the role of a persistent objector ? Paragraphs 13 and 14 of the conclusions of the report appear to answer these two questions to some extent and it might be useful to elaborate on the matter so as to clarify its implications.

4. *Consensus nationum omnium* v. *Consensus equites*

Wise as the Roman law was and still is the question is how to attain a real *consensus nationum omnium* engaging all nations, as opposed to a *consensus equites* restricted to knights and rich merchants. To this effect, *Lucius Sohn Judis est.*

Réponse de M. Rudolf Bernhardt

14 August 1996

Dear Louis,

Thank you very much for your letter of July 10 with the corrected copy of your Provisional Report on "Consensus". At first, I must apologize for not having responded to your former letters and papers in this matter. My other commitments (in first line the European Court of Human Rights, but also the final work on the Encyclopaedia and some other business) did lead to unpleasant delays.

I find your report extremely useful and convincing in nearly all points. But I think that some clarifications are necessary in respect of one further procedure.

At first, I assume that our intention is — as usual in the Institute — to submit later a draft resolution to be if possible approved and

adopted by the Plenary of the Institute. If this is correct one should probably now see what points should be included in such a Draft Resolution.

Even if one could follow already existing definitions, I think that a Draft Resolution must contain and even start with such a definition.

I would like to raise provisionally another question : resolutions, decisions, etc. adopted by consensus can have different meanings. I am inclined to distinguish :

1) Consensus decisions in an exclusively political context in which no legal conclusions can be drawn.

2) Consensus decisions concerning rules *de lege ferenda* ; this is the area where consensus plays at present probably its main role.

3) Consensus decisions claiming to express already existing international law.

To which of these categories a concrete consensus decision belongs, must probably be decided by taking into account (a) the intentions of the participants ; (b) the surrounding circumstances ; (c) the content of the resolution.

Of the three categories mentioned above, only the second and third should be discussed in a draft resolution. For each of these categories, several questions arise and must probably be answered.

Examples : Must consensus decisions in category 3) be supported by State practice ? What other conditions must be fulfilled in order to regard the consensus decision as expressing binding legal rules.

Are consensus decisions in category 2) capable to lead to valid and binding legal rules if they are not formally "ratified" ? Can such decisions lead to customary law before the respective treaty comes into force (ex. : Law of the Sea Convention) ? Or later in respect of non-parties to a treaty ?

I assume that such questions (and others) must be formulated and if possible answered in a draft resolution.

These are some tentative remarks. Since I am leaving Heidelberg for some weeks, and in order to meet your dead-line, I send you these remarks in handwritten form and with considerable hesitation. But I hope that they be of some use.

Kind regards and good wishes,

Rudolf Bernhardt

Réponse de M. Hugo Caminos

27 August 1996

Dear Louis,

I apologyze for not having communicated with you earlier on your Provisional Report on "The Role and Significance of Consensus in the Forming of International Law". During the last six weeks I have been travelling and have just arrived here to teach in the Fall semester.

I have read your excellent Provisional Report and at this stage I can only suggest that perhaps some reference could be made (in page 13 when you refer to President Reagan's Proclamation in 1983) to the interplay between consensus and the package deal. In an article which I wrote in collaboration with Michael Molitor (79 AJIL 871[1985]) entitled "Progressive Development of International Law and the Package Deal" I touch upon this question (page 885 ss).

As you may know I was elected to the ITLS and look forward to the first session of the Tribunal in Hamburg in October.

With warmest regards,

Hugo Caminos

Réponse de M. Oscar Schachter

3 September 1996

Dear Louis,

Thank you for your draft Provisional Report on "the role and significance of consensus in the forming of international law". I found it a helpful contribution to our consideration of the role of consensus in international conferences and UN meetings. While the paper expresses a benign view of consensus in general, its comments and conclusions are selectively descriptive of procedures. The one general conclusion of law is in paragraph 14 which states that if there is "real" consensus (*i.e.* that a proposition is law) followed by consistent practice the proposition becomes "crystallized law". I suspect no one would disagree with that. It is almost a tautology but one wonders why "crystallized" is used rather than "customary".

It seems to me that the Institute's terms of reference contemplate that the Sixth Commission would go beyond a summary of practice and expressions of approval of some practices. We should at least identify

the main issues of law that are raised and suggest answers or relevant factors. Whether one favors 'consensus' decisions or not (and of course that depends on context), the Commission's report should bring out the problems raised by consensus decisions in the light of international law doctrine and practice.

Some of the legal questions that should probably be considered by the Commission include :

1. *The effect of consensus decisions reached in multilateral treaty negotiations :*

In what circumstances should the adoption by consensus of a draft treaty provision be regarded as a "crystallization" of an emergent rule of international law ? Should the consensus decision be considered as the *opinio juris communis* even if State practice up to that point was inconsistent or sparse ? What if States voting for the provision indicated in discussion that they did so as part of the process of negotiation conditional on the agreement of the entire text ? On the whole, I would not regard a consensus decision on a draft treaty provision in the course of negotiations as *in itself* evidence of an *opinio juris communis*. Whether or not the decision reflects a crystallization of emergent law at the time of its adoption depends on the prior practice and legal convictions of States. It may be that the particular circumstances would support a conclusion that at the time in question the proposed treaty rule expressed a crystallization of emergent law. Even if it did, it might still be open to question whether States that had discordant practice accepted the provision as binding customary law independently of the treaty.

2. *The effect of consensus decisions adopting resolutions that declare principles and rules of international law*

It will be recalled that at the Cairo session the 13th Commission adopted the Skubiszewski Report's conclusions, which can be summarized as follows :

- a law-declaring resolution adopted by the General Assembly without negative vote or abstention creates a rebuttable presumption that the resolution contains a correct statement of law ;
- a resolution may constitute evidence of customary law or of one of its ingredients (*opinio juris*, custom-creating practice), in particular when that has been the intention of States ;
- the authority of a resolution is enhanced when adopted by consensus or by "a representative majority that includes the main legal systems" ;

- principles and rules proclaimed in a resolution may influence State practice or initiate a new practice that constitutes an ingredient of new customary law. They may also contribute to the formation of the *opinio juris communis*.

Although the Commission's Report was endorsed by all of its members, the plenary body refrained from adopting the conclusions as its views.

3. The Thirteenth Commission's conclusion that the authority of a resolution is enhanced when adopted by consensus does not seem to be controversial as a broad generality. However, a problem is presented by the proposition that a law-declaring resolution adopted without objection creates a rebuttable presumption that the resolution contains a correct statement of law. Does this imply that a consensus decision by the General Assembly adopting a law-declaring resolution should as a rule be regarded as confirming that the "law" in question is in effect as of the date of the resolution's adoption by consensus ?

4. In this regard, different situations may produce different answers. For example,

- where the consensus resolutions asserts a rule of law in a matter on which State practice is slight or even non-existent —what is the significance, if any, of treating the resolution as "presumptive evidence" of law. Are States bound or not by the delcared rule prior to the accumulation of practice ?

- Where actual State practice has been substantially inconsistent with the declared rule of the consensus resolution (as in the case of the UN declaration on torture).

- Where the declared rule contravenes a long-standing customary law rule (as if the EEZ had been adopted by the General Assembly).

5. I suppose that a unanimous decision declaring a principle or rule as *lex lata* would almost always influence practice. Such practice may be slow in coming, if it comes at all. In the absence of practice, would State action inconsistent with the consensus resolution constitute a violation ? What circumstances would be relevant in deciding the significance of consensus here ?

Consensus on "general principle of law"

6. Still another question to consider is whether the consensus law-declaring resolution is meant to express a "general principle of law" in the sense of article 38(1)(c) of the Statute. If the General Assembly clearly manifested this view in its resolution or report, would that enhance the

legal effect of the proposition — in particular, would it then be established law as of the time of its adoption ?

Jus Cogens

7. A somewhat related question is whether an Assembly consensus decision would have immediate legal force if it asserted a rule as *jus cogens*. Would it then have legal force irrespective of inconsistent State practice ? To put it another way — consider the position taken by the International Court of Justice in the *Nicaragua* case that instances of conduct inconsistent with the resolutions prohibiting force and intervention did not override a finding of general practice confirming the rules in the resolutions. The question for purposes of this report would be whether there is a legal distinction between "consensus" that requires consistent and widespread practice and "consensus" that would confirm customary law even though State practice showed substantial departures (*e.g.* torture).

Defining Consensus

8. Your first conclusion states that it is both appropriate and necessary to define consensus to mean "the absence of any formal objection" (as defined in the UNCLOS). If the Institute should adopt this definition as "necessary", would it be implying that it is a general legal rule ? Its use in the LOS Convention would not justify a general conclusion to that effect. Questions also arise as to the application of the definition even if it should be adopted. Would it mean that a resolution adopted without objection but with a large number of abstentions would have to be regarded as a consensus ? I doubt that you mean this. It is, of course, understandable that the definition was useful — and even necessary — for UNCLOS but this hardly would hold over the broad range of decisions taken in conferences and UN organs. Even if deliberative organs should adopt the proposed definition, the question of the "reality" of consensus would arise if the issue of its effect on customary law had to be considered. When one considers the great diversity of international conferences and organs that have occasion to formulate and pass on purported rules of law, it seems quixotic to recommend a uniform definition. In addition the "infinite variety" of such rules (to borrow Baxter's phrase) adds a further — barrier to imposing a "necessary" definition.

Relevance of participation and genuine consent

9. In addition to these various questions on the effect of consensus and relevant procedures, we also face the deeper issue of their significance in law-making. One might recall in this regard Rousseau's discussion of the General Will and also of its abuses. As an ideal the General Will presumably expresses the common interest, and some international lawyers

have accepted "consensus" as a means of expressing or confirming the common interest. On that premise, one tends to attribute a superior force to "consensus" in international bodies. However, if one recalls Rousseau, his General Will depended on genuine participation and consent. Both would be relevant in judging the normative force of international consensus. In actuality international conferences are marked by, striking differences in participation and influence. Consent, too, varies in most cases if we look behind the voting ; some States vote in favor on the understanding that the decision is no more than a recommendation ; others abstain because they actualy disagree. Consequently, to conclude that consensus decisions in such bodies approximate the "General Will" or the common interest involves more of a leap of faith than a realistic judgment.

Value of consensus

10. It seems preferable to see the value of consensus in procedural terms — as a way of reaching decisions in various circumstances and for various reasons. It is not always in the general interest ; in some cases, it may give a small minority — even one or two — an effective veto over decisions desired by the great majority. Thus the consequence of requiring consensus can be seen both as advantage and disadvantage. It has been applauded as a way to avoid 'paper majorities' (of the small and weak) ; it has been attacked as a device to frustrate the decisions of the great majority. Obviously, 'consensus' procedure has this dual significance. The Commission may take note of this and still conclude that 'consensus' is generally desirable where participating States are clearly aware of the issues and the legal significance of their agreement.

I hope that these comments will be of some help to you and to the members of the Sixth Commission. I look forward to the comments of the members and to your next Report and draft resolution.

With personal regards,

Sincerely,
Oscar Schachter

Réponse de M. Santiago Torres Bernárdez[1]

6 September 1996

Dear Colleague,

I regret to reply to your letter of 10 July 1996 a few days late, but other work prevented me from doing it by the end of July and I was not in Madrid during the whole month of August. So please accept my apology.

To begin with, I would like to convey to you my compliments for your *Provisional Report* on "The role and significance of consensus in the forming of international law", as well as my agreement with its general approach and contents. I read it with great interest, including its learned *Annex* on the use of the term "consensus" by Roman statesmen and scholars.

This can hardly be a surprise to you, knowing the preliminary comments I submitted in January 1989 to the former rapporteur, Professor Suy. Such preliminary comments continue to reflect my general understanding of the subject-matter and I must say that I do not see any major contradiction of principle between them and your provisional Report of 8 July 1996.

For example, in *Section* 2, you distinguish between the "role" and the "significance" of consensus, underline the essentially "procedural device nature" of consensus and make clear the existing relationship between "consensus" and "consultations". I concur fully with these considerations of yours.

The reference to the number of States existing at present seems to me particularly welcome, because the need to dissipate the idea that cold war and main decolonization being over we could put aside "consensus". In an international community composed by so many independent and sovereign States, the study of the ways and means of reaching and recording the necessary general acquiescence or agreement in the forming of international law rules — universal or world-wide in scope — is undoubtedly a subject-matter of great interest for governments and doctrine. The procedure of consensus being one of those ways and means, the need to study it in depth conserves, in my opinion, all its previous legal meaning and value, notwithstanding the indicated intervening political changes.

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1 Réponse reçue après la rédaction du Rapport définitif.

I agree also with the proposition that consensus is a flexible concept, in the sense that in practice it may adopt or be expressed in a variety of procedural forms. There are, however, some limitations beyond which a given procedure cannot be described, in my opinion, as "consensus". Such limitations should help to define *a contratio* the consensus we are talking about. As indicated at the end of point 3 of your Report, the "absence of any formal objection" and the "absence of voting" are certainly elements of the definition of the procedural device known as "consensus".

These two elements should be in any case present in the definition of the "consensus" to be studied by the Sixth Commission. I mean the two because, for me "unanimity through voting" is not "consensus", even if there is absence of formal objection in both cases. Should other elements be added to our definition of "consensus" ? For example, should the close existing relationship between "consensus" and"consultations" be reflected somehow or other in the definition ? I think so. Why ? Because two main reasons : (a) practice proves that it is the case ; and (b) "consultations" is an element of the highest importance for testing the role and significance of the procedure of consensus "in the forming of international law".

Your Report suggests precisely that. I am therefore very much in favour of keeping the Section numbering 5 in my copy and entitled "Consultations as a prerequisite of consensus". The contents of this Section could even be developed further, if possible, by adding to the Third United Nations Conference on the Law of the Sea other examples of the *modus operandi* of the procedure of consensus in international conferences and organs. But, I would suggest to move up the contents of present Section 5 so as to deal with its subject-matter within present Section 2 or immediately after this latter Section.

I think also that, before entering into Section 3, the Report should contain some developments on the meaning of the expression "in the forming of International Law" for the purposes of the Sixth Commission's work. The mandate of the Sixth Commission is not to study the role and significance of consensus in general, but only in a particular context : in the forming of international law. Without some prefatory clarification concerning this aspect of our mandate the present Section 3 could be misread.

To facilitate progress in the study of the topic it is likewise advisable, in my view, to avoid falling into the trap of the confusion which may derive from the use by some international law scholars of the expression "consensus-result". We should reserve the term "consensus" to consensus as a procedure or method and use another term to convey the concept of "consensus-result".

The so-called "consensus-result" is the object and purpose of the various ways and means used in international relations to reach the general acquiescence or agreement necessary in the forming of rules of international law. It is not a target of the procedure of consensus only, but of other procedures as well. For example, the ILC codification method was conceived as a method for reaching the said "consensus-result", as much as the method followed within the Third United Nations Conference on the Law of the Sea.

In other words, I believe that the main task of the Sixth Commission would be, first, to identify and define "consensus" as a procedure and, then, to ascertain in the light of its features the merits of that procedure in the forming of rules of international law, taking duly into account the structure of the international community and prevailing conditions therein.

Regarding the present contents of Section 3, in which you raise several important questions, I think that some further systematization is needed bearing in mind the overall purpose of the Sixth Commission's work. In my opinion, Section 3 could be reorganized along the following lines : (a) to begin with general considerations relating to the alleged recent changes in the ways and means of forming international law or of ascertaining its established rules ; (b) this should be followed by the identification of some of those major changes or of its causes (for example, the impact of the work of organs of main international organizations or conferences, the conclusion of a considerable number of multipartite treaties, etc.) ; (c) lastly, the role and significance of the procedural device known as "consensus" should be analysed with respect to each of the identified sources contributing today to forming, directly or indirectly, general international law rules.

The fact that the procedure of consensus is followed in connection with the elaboration and adoption of rules cast in written form, namely of texts, does not mean at all that its role and significance stop there. It reaches also "international custom", and much so, as an element of proof or indication of the *opinio juris* of the States, as so rightly indicated at pages 10/11 of your Report. I will add, however, a note of caution. It is necessary to bear also very much in mind the object and purpose of the text (convention, declaration, resolution, etc.) adopted by consensus and the diplomatic frame of its elaboration and adoption, including the number of the participating States.

It is not of course the same thing a text included by consensus in a codification instrument adopted by a diplomatic conference convened by the General Assembly of the United Nations, or by the latter with a normative purposes in mind, than a text adopted by other means and

without normative law intentions (even if this latter text is part and parcel of a "multipartite treaty", to use language in your Report).

Moreover, all those circumstances do not preclude necessarily the need of some interpretation of the adopted text in order to determine whether the text expresses a general principle or rule of international law or an exception thereto (caution of the PCIJ in the *Lotus Case* referred to in page 4 of your Report). There is, therefore, some room for subjectivism with respect to this aspect of the matter, but much less reduced that at the time of the *Lotus Case* (1927) because of present generally accepted rules on interpretation of written instruments and the application of such rules by international courts and tribunals.

I found very interesting your reference and comments, in pages 5 to 7 of the Report, to other aspects of the jurisprudence of the *Lotus Case*, but I think the PCIJ and its Members (as the Romans of the Annex) were referring to "consensus-result" rather than to "consensus as a procedure of elaboration and adoption of rules". It is useful to keep it, but with the necessary distinctions (see observations above). You may find some additional interesting elements for this aspect of your Report in the Advisory Opinion of the Court of 8 July 1996 (*Legality of the threat or use of nuclear weapons*).

In any case, the proposition that "under international law everything which is not prohibited is permitted" referred by Loder in the *Lotus Case* (page 6 of the Report) appears to have been much present in the consideration by the ICJ of the said Advisory Opinion. It is a sign, among many others, that progress in the forming and development of international law rules is not a lineal phenomenon in terms of time. States cannot ignore or weaken the system of the United Nations Charter, revive the theories of the "vital interests" as a legal concept, etc., and, then, express surprise because of a given conclusion on a particular topic.

I consider, however, that for the purposes of the mandate of the Sixth Commission the only thing which matters in that respect would be to ascertain, eventually, whether or not the fact of the elaboration and adoption of a given set of international law rules through a "procedure of consensus" might be said to have some incidence in the evaluation at present, namely in 1996, of a proposition as the one mentioned above.

It may be also relevant for the work of our Commission to insert in the Report some considerations on a few additional points. First on the fact that "consensus" is a procedure frequently combined with others, for example with "voting". The Third United Nations Conference on the Law of the Sea was a good example of that. In such cases, "voting" appears to remain as a residuary procedure once "consensus" failed.

Secondly, some further consideration should be given to the delicate question of the operation of the concept of "unanimity" within a "consensus procedure". The absence of "formal objections" is not the same as the absence of "objections" *tout court*. It is a very important point for a comparison of the merits of "consensus" vis-à-vis other ways and means admitted and applied in the forming of rules of international law.

Lastly, it seems to me also very important to assess a procedure as "consensus" bearing in mind the nature of the normative undertaking in question. It is not the same thing to codify rules restating existing law than to formulate rules of progressive development of that law or, still less, to establish rules of international law entirely new. Moreover, a single diplomatic undertaking might have this three-fold dimension (for example, the Third United Nations Conference on the Law of the Sea).

I find much merit in your "temporary conclusions" (pages 13 to 15 of the Report). I will, however, refrain from making observations thereon before the completion of your final report announced in your letter of 10 July 1996.

Best regards,

Sincerely yours,

Santiago Torres Bernárdez

Réponse de M. C. W. Pinto[2]

10 September 1996

Dear Professor Sohn,

Thank you very much for your very useful Provisional Report on the "Role and Significance of Consensus in the forming of International Law", which suggests many important "Preliminary Conclusions". I would like to make a few comments on the subject for your consideration, and I apologize for being late in doing so.

As you know, I am a new member of the Commission to which you so ably provide guidance and was not in a position to address earlier the searching questionnaire offered by your predecessor Professor Suy. Had I been able to do so, I would have answered his very first question ("Should the Institute make an effort to develop its own definition of "consensus" ?) in the affirmative. While the meaning given to the term

2 Réponse reçue après la rédaction du Rapport définitif.

"consensus" by sub-paragraph 8(e) of article 161 of the UN Convention on the Law of the Sea might have been adequate in its context, I think a more elaborate "definition" would be required for the purpose of an analytical study of the concept and its significance. The definition should distinguish consensus as a conference mechanism from the meaning of that term in political science, and again from the *consensus ad idem* that is the basis of the binding force of contracts. Moreover, a definition must contain the *whole* thing and the *sole* thing, and the UNCLOS provision falls far short of that standard.

While I agree fully with your emphasis on institutionalized procedures for consultation as a means of narrowing areas of disagreement with a view to securing a "real consensus" at a gathering of State representatives, I am not sure that a decision reached through a conference consensus is necessarily more likely to be lasting than one determined by a vote. Much, it seems, may depend upon the persuasive political power of what we might call the "silent minority". Such a minority might well continue its negative stance on a proposal despite extensive consultations, and maintain covert opposition to it while allowing consensus to facilitate completion of a conference agenda. If that minority were to have substantial resources at its disposal and be sufficiently motivated, it may even end up converting the majority to its point of view — thus standing on its head what the majority had thought to be a hard-won consensus.

Some of these questions are explored in the enclosed note. To conclude : in my opinion, defining "consensus" for our purpose could give us a clearer idea of how the mechanism actually works ; and this, in turn could help us to determine its effective reach (conference procedure only, or beyond, to the substance of proposals) and thus its significance in the formation of international law.

Note on "Consensus"

"Consensus" was a concept well-known in political thought long before its reception into the vocabulary of international law. It seems originally to have meant the "converging of opinion upon a common judgement". Cicero maintained that *consensus juris* or agreement in judgement was a necessary condition for the existence and endurance of a republic. Such agreement in judgement is thought to arise automatically where there are common interests, a common understanding of those interests and of the fact that they are shared, and common agreement on the means to advance them. However, such a consensus might well arise even where differences of interest do exist, where for example, (1) agreement was due to failure to appreciate the nature or significance of

existing differences, or (2) an individual interest is not pursued in order to promote some common perception of the public good, as in time of war. It is perhaps to "consensus" in this sense, rather than to a conference consensus as conceived today, to which judges Loder and Weiss in the *Lotus case* (quoted at pages 6 and 7 of the Provisional Report) appear to have referred. If so understood, I think their views were unexceptionable.

In international law the term consensus has been used to describe a mechanism by which conference choices are made : pursuant to rules agreed in advance, a State's representative may, by deliberate forbearance from expressing "formal objection" to a proposal, permit the majority of the other State representatives at a conference to adopt that proposal by acclamation even though the forbearing State may not (or may not fully) agree with it. Such a device is not an exception to the well-known principle that silence does not mean assent, because it operates within and is governed by a prescribed legal context that has been put in place by express prior agreement on the appropriate procedural rules. A conference consensus thus achieves its effect, which is a limited one, because of that legal context and through the implied consent of the "forbearing" State arising through the application of those rules to a specific decision. But what could be said about the objective of that forbearance if the representative were not to express a reason for it ? It would seem difficult to assert that that consent to be implied from such forbearance had relevance to anything more than the working of the conference, enabling it to deal expeditiously with its agenda : *it is not necessarily indicative of the forbearing State's support for (or, for that matter, opposition to) the substantive rule adopted by acclamation as the result of the procedure.* At most, it might be said to create a rebuttable presumption in favour of the substantive rule. States, all of which traditionally insist on a number of national deliberative procedures before they would be prepared to recognize the creation of an international contractual obligation, are hardly likely to consider themselves legally or morally bound to acknowledge or adhere to the substantive rule merely through the procedural forbearance of their representative at a conference. Accordingly the significance of that "forbearance" in the building of a reliable "*opinio juris*" regarding the substantive rule would seem weak, if it should exist at all.

While the automatically arising "political consensus" might be the source of at least a moral obligation of compliance with the "common agreement in judgement", the effect of the consensus achieved by the application of conference rules, without more, would seem to have relevance only to the work of the conference itself : it does not bind the "forbearing" State in any substantive way to comply with, or to refrain from acting in a manner inconsistent with the rule adopted as the result of the

conference's consensus decision. The "forbearance" of the conference representative could not, because of the equivocal nature of such conduct, be the foundation for an estoppel operating in favour of the substantive rule ; nor, could it be the basis for a conclusive presumption binding upon the "forbearing" State in relation to the substantive rule adopted by consensus. There are too many possible motivations/causes (ranging from mere ignorance or misunderstanding of a proposal's implications, to an informed approval that is tempered by prudence) for a representative's conduct short of express objection (behaviour ranging from absence from a meeting or presence in silence, to outspoken criticism not, however, accompanied by a statement amounting to "express objection") for it to be thought of as other than equivocal.

M. C. W. Pinto

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Final Report

4 September 1996

A. Supplementary explanations

1. Introduction

This report of the Sixth Commission is supplementary to the Preliminary Exposé (19 June 1995), which dealt with the prior documents on, and discussions of, "consensus" by the Institute, and the Provisional Report (8 July 1996), which contained an analytical study of this topic. Both these reports, and the comments by members of the Institute on them, are reprinted in this preliminary volume for the Strasbourg session of the Institute. Consequently, the present report is limited to a discussion of a few general questions raised in the last series of comments. It contains also a revision of the proposed conclusions and a draft resolution.

2. Scope of the proposed conclusions

As a result of the current popularity of consensus, many decisions of international institutions and conferences are adopted by consensus or without vote. Most of them deal with administrative and housekeeping issues, and are adopted in a routine manner. Any small difficulties that might have arisen are quietly solved, without need for a debate, or a vote. Others do not raise any issue of international law and are of no special concern to the Institute.

The title of the task assigned to the Sixth Commission was properly limited to consensus decisions that are relevant to formation of rules of international law. Some such decisions recognize, reformulate or clarify an existing rule of international law, or provide the final imprimatur to a ripening rule and complete the rule's crystallization. Other decisions are *de lege ferenda* ; they in fact present a new rule that is considered necessary for the good of the international community, with the hope that the governments of the Member States of an international organization or of the States participating in an international conference will act accordingly, and by their practice contribute to the rules' crystallization.

In both instances, a consensus is significant to the formation of a rule of internatinal law. The States of the world can make the law for themselves any way they please. If all of them agree to do it this way, nobody can deny the capacity or the right to do it.

The proposed conclusions deal, therefore, primarily with the use of consensus for both crystallization and development of international law.

3. Definition of consensus

The Provisional Report borrowed from the United Nations Convention on the Law of the Sea the definition of consensus as meaning the "absence of any formal objections." It was thought that the latter formula might allow one objection, which would be inconsistent with the idea of "no formal opposition." One objection would be only a quasi-consensus which, though allowed by some international institutions (*e.g.*, the Organization on Security and Cooperation in Europe), would have different legal consequences. Only clear consensus can be formative of international law ; the less consensus there is, the weaker is the formative influence of quasi-consensus.

Two other definitions were also considered. According to Rule 69 of the original Rules of Procedure of the Conference (now "Organization") on Security and Cooperation in Europe, consensus is "the absence of any objection expressed by a representative and submitted by him as constituting an obstacle to the taking of the decision". Similarly, the 1994 Agreement establishing the Multilateral Trade Organization (MTO) defined the practice of decision-making by consensus as follows : "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting where the decision is taken, formally objects to the proposed decision."[1] These two complex formulations may be perhaps simplified to read : "A decision shall be considered as adopted by consensus, if no State present at the meeting where the decision is taken formally objects to the proposed decision" ; or more precisely : "The officer presiding over a meeting shall declare a decision adopted by consensus, if no Member State present at that meeting formally objects to the proposed decisions."

The United Nations Conference on the Law of the Sea developed also a special procedure to avoid a vote by making an extra-effort to reach consensus. Its Rules of Procedure (37-39) provided in particular, that when a substantive matter comes up for voting, the President may,

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1 Article IX and footnote thereto, 33 International Legal Materials 13, at 19 (1994).

and shall if requested by at least 15 representatives defer the taking of a vote by a period not exceeding 10 days. Alternatively, the Conference, on the President's proposal or on a motion by one representative, may decide to delay a decision on substantive vote for a specified period of time. During the period of deferment, the President shall make every effort, with the assistance, if necessary, of the members of the General Committee of the Conference, "to facilitate the achievement of general agreement, having regard to the overall progress made on all matters of substance which are closely related." If the consultations do not result in an agreement by the end of the deferment period, the Conference will have to decide that all efforts to reach an agreement had been exhausted. Such determination would require a two-thirds majority of representatives present and voting, and must include as well a majority of the States participating in that session of Conference. Unfortunately, the final vote on the convention as a whole was exempted by the Rules from this procedure, and this was the only instance at the Conference when such procedure might have helped.

There is some confusion between decisions approved by consensus, and those approved by "unanimity" or "without vote." Unanimity means that there was a vote and there were no negative votes ; it does not matter that there were some abstentions, or that some States were on purpose absent, or not participating in a vote.

Views differ whether unanimous decisions are acutally stronger, and more law-forming than decisions reached by consensus. There might be a genuine consensus and a genuine unanimity, and, on the other hand, there might be unanimity weakened by too many abstentions, and a consensus made weaker by too many conflicting interpretations.

When a decision is adopted "without vote", it is usually considered as equivalent to one adopted by consensus, and its value depends on the preparatory process. If it was the result of adequate, wide-ranging consultations, it can be considered as in fact adopted by consensus. If, however, it was approved quickly, without prior careful considerations, because there was strong pressure for an immediate decision, then it is not likely that this decision would contribute to the formation of a rule of international law.

4. Consensus building

Real consensus has to be worked for through careful consultations that often are spread over several years. These consultations have to be conducted by persons able to reconcile different points of view, to solve one problem after another either directly or by establishing various working groups for each decisive issue. They must satisfy both the major powers

and the smaller States intent on protecting their special interests. Every participant has to be able to ensure that his or her State's interests have been reasonably accommodated ; and the final result of the consultations has to appear equitable to all concerned. When this had been accomplished, every delegate would be able to find in the final project some conciliatory formulas which he or she helped to prepare. A wise presiding officer would ascertain this by calling together the representatives of all groups concerned, and would make sure that there are no outstanding unresolved issues ; and, if satisfied, would arrange for the approval of the proposed instrument by consensus at the final meeting of the negotiating body.

5. *Quasi-consensus*

Sometimes it is not possible to get a general agreement of all the participating States to all the provisions of the proposed document. The problem may be solved by allowing States to opt out of particular, not crucial, provisions, provided that they would not make any formal objection to the proposed general agreement. More often States may be allowed to make, prior to the final meeting, statements explaining their interpretation of a particular provision, or the presiding officer may announce that some States have informed him or her about their interpretation of a particular provision, but that he pointed to them that their interpretation was not necessarily the only possible interpretation thereof. Should this issue actually arise in a later dispute, it would have to be solved not by relying on such controverted interpretation but by resort to an international tribunal authorized to interpret the instrument, if one is available. Experience has shown that no provision of any agreement is so perfect that it does not later lead to varying interpretations. In a world of almost two hundred States an unexpected situation is likely to arise, and new consultations might be needed to provide a solution. The process never ends.

Returning now to the original consultation process, regardless of all the efforts, a situation may arise in which a State, or a few States, might insist on voting, and cast a negative vote. If there is only one objector, some meetings prefer to finalize the document nevertheless and still call it a consensus agreement. Others call it quasi-consensus, with a weaker international effect than a genuine consensus agreement. It still might be considered generally acceptable, with the hope that the recalcitrant State will someday change its mind.

6. *Effect of consensus*

It is necessary to distinguish between an international agreement that requires a ratification by a State before it becomes bound by it, and other instruments, such as resolutions, declarations, regulations, guidelines,

standards, or model rules, or a final act of a conference, which usually do not require ratification. Sometimes, even a treaty that officially requires ratification might become binding, as "customary international law", not only on States that ratify them but also on non-ratifying States and most non-ratifying States would in fact comply with it. Similarly, some treaties, such as the 1969 Vienna Convention on the Law of Treaties and the 1982 Convention on the Law of the Sea, have been applied by international and domestic courts as best evidence of international law on this subject even before they actually entered into force.

While some States have tried to pick and choose and to accept only some parts of a convention, others believe that a package deal cannot be split in such a way. It is possible that once a tribunal decides that a particular set of rules has been generally accepted, it may disregard an attempted dissent from it. For instance, in the case of the law of the sea, a tribunal may decide that the basic principles governing the exploitation of the sea-bed area (section 2 of Part XI of the International Convention on the Law of the Sea) have become customary international law applicable to all States, whether or not they are parties to the Convention, and any State violating these provisions would be considered as violating international law. Some non-ratifying States have in fact accepted the decisions of the Preparatory Commission under resolution II, accompanying the Convention, which relate to pioneer activities.

As was noted in the earlier reports, the preceding Commissions of the Institute were concerned first with all "non-contractual instruments having a normative function or objective", and later with a more limited topic, the "non-binding resolutions of the General Assembly". It seems proper, therefore, to interpret the objective of the Sixth Committee's report as focusing on instruments which do not require ratification, but nevertheless can have a significant effect on the forming of international law. The conclusions of this report may, however, have also a bearing on the formative value of provisions of draft treaties which have been approved by consensus, but have not yet been signed, or are not yet ratified by enough States to enter into force, or being applied by authorities of States that have not yet ratified a treaty that has finally entered into force.

This report is restricted primarily to the various non-treaty documents mentioned above which are being approved by not only the United Nations, but also other international organizations, global and regional. Some of these instruments become binding only on States members of these organizations or parties to a treaty, but often they may be invoked as models for mankind as a whole, especially if they are pioneering in such areas as human rights or environment. The dividing lines between the traditional treaty format and the new instruments such as declarations,

standards and guidelines, are rapidly disappearing, and the same consensus rules may be applied to them.

In the *North Sea Continental Shelf Cases*, the International Court of Justice discussed the emergence of international law through a multilateral treaty. It considered three possibilities : that a convention embodied a pre-existing rule of international law, or crystallized an emergent rule, or "constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention". The Court noted further that this process "constitutes indeed one of the recognized methods by which new rules of international law may be formed." (ICJ Reports, 1969, pp. 3, 41, paras. 69-70). The States can agree, at any time, and have in fact acted as if there were already such an agreement, that their norm-forming consensus decisions should have similar effects ; and can decide, thereafter, in each case, what effect a particular decision should have. The International Court of Justice already has recognized that both some decisions of the General Assembly and some decisions of international conferences, developed through a thorough consultation process, have had such effects.

Regardless of the form it takes, whether a decision or an instrument would be considered as contributing to the crystallization of a rule of international law, would depend on the will of the parties, surrounding circumstances, and the substantive content of the text being approved. As noted before, in the community of nations that has developed in the last years of the Twentieth Century, if either the United Nations Organization or a global conference in which all the States of the world participate, agrees on some rules, after careful consultations, in which everybody's needs were adequately considered and taken care of, there can be no better way of forming international law.

B. Conclusions

1. Consensus is increasingly being used in order to obtain a decision that is generally acceptable, as distinguished from a majority decision that is rejected by a large group of States, or by important States, and is likely to be overturned sooner or later.

2. Consensus differs from unanimity, as it is more flexible. It does not require a State to have to actually vote for a decision that is generally acceptable to it but contains some minor provisions that are not completely satisfactory to it.

3. The main core of all definitions of consensus is an express announcement by a presiding officer that "as no Member State present at the meeting approving the decision has requested that a vote be taken in order to enable that State to vote against it, the decision has been approved".

4. The corollary of this definition is that a presiding officer shall not announce the approval of a decision by consensus, if one of the participating States objects to using this procedure and asks to have its "no" vote inserted in the record of the meeting.

5. While many consensus decisions, especially those dealing with administrative and technical matters, are adopted "without vote", it is desirable, though not absolutely necessary, for a decision which approves some general principles or a set of rules that are intended to contribute to the formation of international law, to be adopted expressly by consensus.

6. The formation of such principles or rules requires also an adequate preparation by a consultation process rather than a decision quickly adopted in a moment of great excitement about an issue. It is not an instantaneous law.

7. In a multipartite context, many divergent interests need to be reconciled, satisfactory solutions have to be found for various groups, without affecting special interests of other groups, and many drafts must be prepared until the final consultations among all States, large and small, ascertain the existence of a consensus on all the crucial points.

8. Thus, in cases involving the formation of some general principles or basic rules of international law, the consultation process and consensus are closely linked. A genuine consensus can be reached usually only by a most thorough, a most persistent, and a most imaginative and inventive consultation process. A tremendous effort is required, but the result is rewarding.

9. The principles of international law or rules approved by consensus belong primarily to two categories. In some instances they help to crystallize, to present in a codificatory form, principles or rules that reflect growing practice of States which is being accepted as having created customary international law. In other cases, they reflect the need of developing international law in an area, the regulation of which has become important for the future of mankind, and of bringing it closer to crystallization. If State practice follows the approved principles or rules, the consensus would have expedited the process and opened up for the peoples of the world another area for peaceful, no longer contested, use.

10. The adoption by the Institute of the proposed resolution would significantly facilitate the approval by the international community by

consensus of this combination of thorough consultations with well-drafted, generally acceptable, principles and rules as a useful and significant way of forming international law.

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Draft Resolution

The Role and Significance of Consensus in the Forming of International Law

The Institute of International Law,

Considering that international consensus has become an important decision-making process in the international community ;

Noting that the success of consensus process depends on the careful preparation of the text to be approved through a thorough consultation process that takes into account the views of all States concerned, large and small ;

Recognizing that it is desirable to make clear how the combined consensus and consultation process can contribute successfully to the forming of international law ;

Having examined the reports and the conclusions of the Sixth Commission, which deserve to be carefully studies by all concerned,

Adopts the following Resolution :

Article 1 : Scope of the Resolution

The present Resolution is concerned exclusively with the role and significance of consensus in the forming of international law, and with the process by which such consensus should be reached.

Article 2 : Definition of Consensus

A decision is adopted by consensus when the officer presiding over a meeting declares that, as no Member State present at that meeting formally objects to the proposed decision or has asked for a vote, the decision should be considered as having been approved by consensus.

Article 3 : Consensus Building

Consensus is reached by a careful consultation process through which the problems that need to be solved are ascertained, all the States, large and small, interested in a particular problem are adequately consulted,

the necessary working groups are established for finding a generally acceptable solution for each problem, the results are combined in a composite text, which then is revised successively until a general acceptance is assured, allowing a plenary meeting to be called to approve the text by consensus.

Article 4 : Significance of Text approved by Consensus

The general principles or rules approved by consensus, depending on the decision of the body approving them, may be either declaratory of existing law, thus crystallizing the prior practice of States, or an important step toward the future crystallization of the approved principles or rules through their acceptance as law by subsequent practice of States.

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L'enseignement du droit international

The teaching of international law

*Dixième Commission**

Rapporteur : *Ronald St. J. Macdonald*

* La Dixième Commission est composée de : M. Ronald St. J. Macdonald, *Rapporteur*, MM. Adede, Bedjaoui, Dugard, Jayme, Sir Robert Jennings, MM. Pierre Lalive, Li, Makarczyk, Oda, Rudolf, Schermers, Schwind, Torres Bernárdez, Truyol y Serra, Vignes, Wang, Wildhaber.

I. Note introductive

A la suite de la création, en 1991, de la Dixième Commission, le Rapporteur a élaboré un premier questionnaire, et pris divers contacts. La Commission a tenu plusieurs réunions à Milan.

C'est dans ces circonstances que quelques observations et réponses ont été communiquées au Rapporteur. Elles sont reproduites ci-après.

Le principal questionnaire a été mis au point en décembre 1994, (ci-après III), suscitant observations et réponses (IV).

Le projet de résolution remis au membres de la Commission et à quelques personnalités extérieures en 1995 (V) a fait l'objet d'observations de leur part (VI), dont le Rapporteur a tenu compte pour présenter le projet de Résolution de 1997, soumis à l'attention de l'Institut à sa session de Strasbourg.

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II. Communications diverses

A) Des Membres et Associés de l'Institut

B) De personnes extérieures à l'Institut

A. *Des Membres et Associés de l'Institut*

Note written by Mr Shabtai Rosenne to the Secretary General, Mr Dominicé

27 November 1991

In connection with the Decade of International Law and the contribution which our Society could make to it, I would be grateful if you would bring the following to the attention of the Bureau when it meets in January :

In resolution 176 (II) of 21 November 1946, the General Assembly made some recommendations regarding the teaching of international law, and I would take that as a starting point. It should be repeated and strengthened.

In my meandering around the world, I have been struck by the vast differences of approach in different countries, and even in different Universities in the same country, to the question of what is international law, what should be included in a university course, and for what purpose. It is also quite clear that that resolution of the General Assembly is virtually unknown, and certainly not widely observed (except perhaps in some parts of Europe).

I think that one of the problems is the absence of any widely accepted and authoritative syllabus of what today — on the eve of the 21st century — should come within the scope of the topic. It has thus occurred to me that our Institute would perform a useful service if it could initiate studies and produce an appropriate syllabus (or more than one). There could be a syllabus for a whole academic year, or for only a single semester ; there could be different syllabi for different levels of instruction according to the general pattern of legal education in a given country ; and perhaps there could be a distinction between subjects considered as essential, the very core of modern international law, and others which could be left to the choice and inclinations of the individual teacher and even of the student.

I am thinking of a recommendation somewhat along the lines of the recommendations once made by the Council of Europe for the structure of a digest of current State practice in international law. I notice that those recommendations are widely followed in Europe, which makes for

a great deal of uniformity and, what is more important, makes consultation of the relevant publications much easier.

In my view, there should be a difference between what I would call the basic static side of the law — the "subject" of international law, treaties, diplomatic and consular relations, international responsibility and the basic elements of the law of international organizations on the one hand, and the more dynamic and unsettled side of the law, such as the use of force, the protection of the environment, the protection of human rights, and other evolving subjects on the other.

On the other hand, I doubt if the syllabus should become too involved in purely theoretical matters such as the "sources" of the law : it would be more important to teach the student where to find the law and how to read it after he or she has found it.

That is a rough outline of my thinking. I believe that co-operation between the academic side of our profession and the "consumers" of the educated product is necessary, and that our Institute is uniquely placed to undertake this.

Sincerely,

Shabtai Rosenne

Réponse de M. Boutros Boutros-Ghali

4 May 1993

Dear Professor Macdonald,

Thank you for your letter of 18 March to the Secretary-General concerning the Tenth Commission on the Teaching of International Law. Regrettably, owing to the Secretary-General's extensive overseas travels, and the current international situation, it will not be possible for him to contribute to or to attend the planned meetings.

The subject of your project is of great and long-standing interest to the Secretary-General. UNESCO published his book *The University Teaching of Social Sciences : International Law* in 1967. He therefore has asked me to pass on his very best wishes for the success of your Commission.

Yours sincerely,

Boutros Boutros-Ghali

Réponse de Sir Robert Jennings

15 July 1993

Dear Ron,

I have only just been able to turn for a brief while to the teaching problem posed in your letter dated 18 March 1993.

There is one point I should like to make. In my opinion the chief need is more elementary and comprehensive courses in public international law in general. The ideal situation is the one that, I am glad to say, still obtains in the University of Cambridge : that *every* law student taking his or her normal course in law will have to learn the elements of public international law in precisely the same way as they are required to become acquainted with the elements of the law of contract. The aim is that more practising lawyers, and Judges, should have a basic knowledge of international law, for then they will be prepared to see it applied as a routine matter in domestic as well as international tribunals. But if the system is entirely strange to them, they will resist the relevance of international law. Maitland's aphorism is still true : "taught law is tough law". Moreover, I would say that there might to be such a general course in the elements of the system in any faculty that purports to teach any *aspect* of international law. In many universities there are courses in trendy, or politically correct aspects of international law — such as, now,

the environment, or human rights ; though what those subjects will be in five years time one can only guess, for trendiness by definition changes rapidly. But nobody should be allowed to do such subjects unless they also take a course in general public international law. Otherwise one breeds utterly useless persons such as one with a "specialist" knowledge of, say human rights, though lacking any proven training in the law of treaties.

I realize that in asking for something that would have been an obvious experiment not needing a mention, say 50 years ago, I am now asking for something almost impossible of achievement. For faculties get funds for teaching what makes headlines in newspapers. But *unless* more *lawyers* are trained in the element of the subject *as a whole system*, the outlook for international law is bleak.

As ever,

Sir Robert Jennings

Réponse de M. A. A. Fatouros

September 1994

1. I am not sure (I do not mean that I am sure of the opposite) that there is a crisis in the teaching of international law, at least as far as its place in the law school curriculum is concerned. Every quarter of a century or so, the idea of a decline in the teaching of international law seems to recur, but what is happening may be nothing more than the usual rearrangements of emphasis on fields and courses in the curriculum. This is not unimportant in itself, of course, and no doubt there is a need to preserve a good position for international law in any reconstructed curriculum.

There may be, however, acute problems (a crisis) as to the teaching methods and the structure and contents of the courses ; I have an undocumented feeling that these have not been (radically) reconsidered (and changed) in recent years as they were in the first decade-and-a-half after the Second World War. But this is another topic and does not seem to be part of the questions in your letter.

The factors mentioned in the first question are all relevant, I believe. Let me embroider around them a bit. I realize that the points I am making are not fully consistent and are often inconclusive, but then it is in the nature of the beast ...(a) One problem with the general course is that its contents (the matters that have to be taught in it) have expanded

considerably. Compare, for instance, a textbook (or casebook) from the interwar years or the early fifties with a recent one. We continue to short-change some topics (the law of war, for instance), we reallocate time and matters a little, but we keep adding new sub-topics, without removing any old ones. This is a matter of necessity, not choice : the scope of international law has in fact expanded, new topics have become important and cannot be left out, while most of the old ones retain their significance. I had started to think, for instance, that recognition of States was not very "relevant" any more, and was giving less time to the subject in the course, and then, since 1989, pertinent State practice has blossomed forth, with all kinds of interesting problems (especially in the Balkans). The expansion of the course's contents creates problems of time as well as structure.

(b) It is true that in Europe there is now greater emphasis in the curriculum on European Community law and there is also increasing student interest in that topic. By and large, however, (and contrary to some initial tendencies) the Community Law courses have been kept separate from those in international law. In fact, the trend has helped increase, rather than decrease, the total international (non-national) component in the curriculum.

(c) It may be that the emphasis on international legal issues in the law school curriculum reflected in the past the aristocratic character of law schools (especially in the UK, the US and perhaps Canada, as contradistinguished to a degree from continental Western Europe). The relatively few persons studying law expected that they would be professionally involved in some kind of international practice (which in itself was regarded as h high-level-level type of practice). The increasing democratization of law school attendance in North American as well as Europe brings to the law schools people who do not expect to be political or social leaders and do not feel therefore that they must have an understanding of or an opinion on international matters, which they still consider to be issues of "high politics" and high social prestige (but see below, under 2).

(d) As to commercial and corporate law, here too (partly through the impact of European Community law) the topic has been "internationalized" (although probably not enough yet). The courses called "international business transactions" in the States and "international economic law" in Western Europe have become increasingly established in the curriculum, and they usually cover a lot of traditional public international law.

(e) The "Streamlining" of curricula, the addition of new courses, the emphasis on bringing the law school nearer to legal practice (still understood in domestic law terms), the increased margin of choice allowed

to students, all these and other developments have created a kind of crowding effect in the law school curriculum. This has affected all courses, except perhaps two or three hegemonic ones. I suspect that the fundamental problem is that international law has never been as "hegemonic" as contracts or real property.

2. In stressing the importance of international law for all students, not only law students, the fundamental point today is that the international dimension of things, in law as in commerce and the economy, and even in culture, has become so pervasive and so important that any university graduate (but also all citizens) must possess the elementary learning needed in order to address it, as part of the problems of everyday life. It is not primarily, I would say, a matter of ideals ("a just international order") but a question of being able to understand and cope with a life which is increasingly affected by international forces and factors. In Europe, this "raison of people's consciousness" proceeds apace with respect to the European Community dimension of things, which is not the same as the international one, but still retains some of the latter's characteristics and is still for most people "non-national". (On reflection, it may well be, contrary to what I said earlier, that the growing importance of European Community law in European law school curricula tends to push international law aside a bit. This is an excellent topic for empirical research ...).

At first glance, the point made in the preceding paragraph may seem to contradict point 1(c) above. But each relates to a different trend in today's world. It occurs to me, however, that there may be an interesting connection. Up to thirty-forty years ago, emphasis on international law issues was the hallmark of "top" law schools, whose aristocratic character was well-established (and the high-level prospects of their graduates, as well). Increasing democratization along with the spread of internationalization of business may be changing the situation.

3. The affirmations implied by your questions here are all quite reasonable and I would favour a curriculum along the lines you suggest — or that I infer. However, there are many variations in the structure of curricula — what is compulsory, what optional, etc. and it is very hard to generalize.

Let me give an example, from the practice in my own Faculty (of Political Science, as I mentioned). The first four semesters are common for all students (no options). Among the first year courses, there is a 50-60 hour (4 hours a week for a semester) "Introduction to the organization of the international society", which is a mixture of elementary international law and international relations courses. In the last two years of study (fifth to eighth semesters), students may choose one of three directions of special study (Political Science, International Studies, Public

Administration). Those who choose International and European Studies take compulsory courses in International Law I and II, International Economic Law, and European Community Law (as well as International Relations, other courses in European integration, etc.). About half the courses in the last four semesters are compulsory and the other half optional.

From this illustration one may retain, among other things, the possibility of a first-year introductory course. In a law school, this could include some elements of (international) conflict of laws as well as some indications on international relations theory and international organization. A tall order, no doubt ; much would depend on the overall structure and contents of the curriculum and in the US and Canada one would have to take into account the undergraduate courses taken before law school. By the way, I need not mention that the conflicts course in federal States differs quite a bit from the classical equivalent in unitary States (as in most of Europe).

It is possible to offer two (or more) equivalent international-law-oriented courses, one focusing on classical public international law, the other on international economic law, etc., with some common components, perhaps, (e.g. the law of treaties) and some non-common ones. Students would then have to take one of the two. Harvard had tried this line, a long time ago, when the "International Legal Transactions" courses was first introduced. I am not sure the experiment worked and I am not sure that I would favour it today.

Another possibility, theoretically very attractive but difficult to impossible in practice, is the inclusion of internationally-oriented components in several major courses (in addition to the one basic public international law one). This is happening slowly in Europe in the case of European Community law, which, as I have insisted throughout, is a different matter, although vaguely comparable.

4. I have problems with the comparability of curricula and courses of study in general across Europe and North America. The US (and now Canadian, too) model of three or four years of college prior to three years of law school allows for very different types of curriculum than the three or four year law school in Europe. The US/Canadian model allows for courses of higher level (and greater difficulty) ; a lot more may be demanded of students in a 3 or 4-hour one semester course than in Europe.

The increase in the flexibility of the curriculum (more choices available to students, as well as certain possibilities of mild specialization) raises a number of problems with respect to most of the questions, including this last one. Again, I am not sure I have a full picture of trends across the continents in this respect.

In conclusion, I come back to the question of structure, method and contents of international law courses. But that is an entire matter in itself ; it would need a separate discussion.

A. A. Fatouros

Réponse de M. Andronico O. Adede

4 October 1994

Dear Professor Macdonald,

Thank you very much for your letter of August 5, 1994 in which you raise extremely important issues on the teaching of public international law. No lawyer could be indifferent to such problems which are crucial for our legal profession and I do appreciate that you wish to know my opinion on the subject.

I believe that there is no excuse whatsoever for the decline in the teaching of public international law. There is a strong trend, recognised by many lawyers today, towards a widening of the area to be regulated by international law in various social relations, which used to be entirely left for action in the domestic jurisdiction of States. The new trend is caused by the processes of growing interdependence of nations ; further internationalization of the functioning of domestic social organisms ; and by the emergence of new global problems. Probably the most striking examples may be found in the field of human rights and environmental protection. The implementation of the emerging concept of "sustainable development" embraces virtually all the vital aspects of the functioning of a domestic society which can no longer ignore international standards and obligations. Just recently, on September 7, 1994, I participated in a very productive discussion with professor Thomas Buergental on the internationalization of domestic adjudication, organized by the United States Mission to the United Nations. There is, it was observed, evidence of cases when even the so-called "soft international law" becomes the source for the decisions of national courts. Various issues of international law are being almost daily discussed by the mass media, attracting the attention of the general public all over the world in the post-cold war era.

The above-mentioned massive "invasion" by international law of the every-day life of a modern domestic society makes it impossible to imagine a lawyer who would not wish to have at least the basic knowledge of public international law in addition to the knowledge of branches of specialization of relevance to a domestic lawyer. Such areas of specialization include environment and development, protection of human rights, and enactment of domestic legislation, accompanied by measures

of implementation and adjudication in accordance with international standards. That is why I believe that a compulsory full year course in public international law should be a minimal requirement as part of legal education throughout the world. A correlation between the general course and more specialised courses and seminars within this year should be established in each particular case on a flexible basis, depending upon the future interest and specialization of students. There is also the need for refresher courses for parliamentarians, government officials, practitioners and judges. The basic knowledge of international law is also necessary for students outside the area of legal eduction — in the high schools and in the colleges and universities. Students in other disciplines should grow up with the knowledge of, for example, what a "treaty" is that governs relations between States in the international arena, just as they grow up with the knowledge of what a "contract" is that governs relations between individuals in the domestic arena.

I hope that the above remarks may be of some use for the preparation of your report for the meeting in Lisbon in 1995.

Yours sincerely,

Andronico O. Adede

Réponse de M. Shabtai Rosenne

11 October 1994

Dear Ronald,

I was away when your letter of 16 August arrived, and have been terribly busy since, with four pending cases in the ICJ on my desk plus goodness knows what other matters. So please excuse the delay.

I think that you have put your finger on many essential points. Except perhaps in France and Italy, I am astounded at the absence of good modern textbooks in the English language to serve as a general introduction to the international law of today, not that of the 19th century. I think that the American case-book system is an outrageous way of teaching law in general, and international law in particular, and I have still not got over the trauma I experienced when I first went into an international law class in Harvard in 1951 (!) And saw how students were expected to analyse a debate in the Security Council, as reported in a case-book, from a legal point of view. I am also quite taken aback by the American system which accepts as teachers and practitioners of international law eminent personalities who do not possess even the lowest

law degree. I don't know if this is allowed in other countries. I would doubt it in Europe at all events.

I think that a full academic year general course in public international law, oriented to the 21st century, should be compulsory for the first law degree or for a professional qualification, and that all specialization should commence after that. You can call the kettle black, because as a student in London University before the War I couldn't fit in the general course in public international law as an undergraduate, but made up for it on a specialized post-graduate course, where I was compelled to make a general study for myself, based on Oppenheim, no small matter, even in those days.

Even in Europe, I do not see how it is really possible to get a proper grasp of European law without a grounding in general public international law. I should have thought that the same would go on the North American continent with regard to the free trade zones and the free trade agreements that are coming into existence all over the place. I think that there is room for something on the relation of public and private international law, especially given the growing complexity of modern commercial and personal relations, most of which in fact have some public international law underpinning. The *ELSI* case, in which I was involved on the American side, is a very good example of this.

I also think that somehow or other something should be done to bring the subject into high schools (not yet elementary schools). To a little extent this is being done here, as I see from questions which my grandchildren put to me from time to time. My own son was taught in high school about Grotius. This comes in a general knowledge session which here goes under the name of "Citizenship", I think normally one class a week. One of my grandchildren is now engaged in writing a term essay about the Peace Process (her choice), and I have simply given her the file put out by the Information Section of the Foreign Ministry for starters. And then ask me questions.

The important think, as I see it, is to bring in the notion that international law affects the everyday life of everyone. As examples I give the international treaties on the naming of wines, or cheeses, or the UNESCO arrangement about concert pitch A, or the European agreement about road signs or air carriers limitation of liability, or the UPU and ITU set-ups to ensure that mail and faxes are speedily delivered, and so on. I think a lot could be brought in along those lines, to remove the esotericism of the subject.

As a practical matter, is it conceivable that the Institute could prepare an outline of what it thinks a modern general elementary or preliminary textbook, not more than say 300 pages in length, should

cover ? Likewise, is it conceivable that the Institute could prepare an outline in a page or two that would serve Ministries of Education to bring the topic into the curriculum of high schools ? (Surely, the ICRC is working along such lines in its "dissemination" programme ?)

As a postscript, when I was about ten the headmaster of the English "prep" school which I was then attending told my parents that there was only one profession for me, public international law. Neither my parents nor I had the slightest idea — then — of what he was talking about. So you see that there can be sometimes and somewhere forward looking teachers who know about these things.

I hope the above is helpful to you. Please do not hesitate to write me again if needs be.

All best wishes,

Yours,

Shabtai Rosenne

B. Réponses de personnes extérieures à l'Institut

Réponse de M. Roy S. Lee[1]

25 August 1994

Dear Ronald,

Many thanks for your letter of 12 August on the interesting subject of teaching, research and dissemination of international law. Even though we are very busy during the dying days of summer, I am delighted to respond to your questions.

Question 1

This is a complex issue and each country may have different reasons for cutting down public international law courses. In the United States,

1 Mr Roy S. Lee belongs to the Office of the Legal Counsel of the United Nations.

the main reason for the decline seems to be the result of very limited prospect for jobs in public international law. The success of law schools is often judged by the percentage of students obtaining employment after graduation. If public international law offers little job opportunity, practical-minded students are less likely to take it. When the demand is low, public international law cannot compete with other courses and gets cut. In the East Coast of the United States, the decline of international law is therefore closely related to employment prospects.

A related issue is the mushrooming of other more job-rewarding law courses (taxation, patent law, negotiation, environment and entertainment, etc.) Making courses of public international law less competitive

Question 2

The reason is that public international law should not be regarded just as a "skill" to the profession, as it is so generally treated by most law schools. In today's world, international law should be treated as a field of "knowledge". For that reason, it should not be limited to law school and law students. We must reach the world beyond and plant the concept in youth. Students at the secondary and tertiary levels should acquire a basic concept of international law as part of the civics study.

Please note, I am not talking about teaching public international law as such to these students, just the concept and not elaborate courses. The idea is that this concept will stay with them as they grow up. If some of them become politicians or decision-makers, they will be able to ask the right questions and to take into account aspects of public international law. The goal therefore is not only to cultivate public opinion but also to influence the decision-makers.

At present, we disseminate the knowledge of international law essentially to those who already have an interest in the subject (the converted). We need to reach out beyond the converted. To reach the young is our objective.

Question 3

My answer is positive though we must be realistic. We must address the reasons of the decline. In this part of the world, no Dean is likely to make it compulsory as a Dean has to manage a law school according to demand and students' wishes. At present, there is no such demand and the students' interests is low. Moreover, international law teachers are loners in most law faculties. They do not see much support from other faculty members. We need to approach those who are dealing with higher education.

Similarly, it is desirable that public international law should be included as a subject for passing bar examinations. But again, few Bars will do so, because they do not consider international law as an essential skill for the legal profession.

Question 4

In my view, this is the most important question. Public international law must be made more competitive. To compete with other courses, we have to change. We need to reform our curriculum. Our present curriculum appears to be too heavy and too comprehensive to attract the interest of most students. They might be more interested in a short and simplified course. Since most students are market-oriented, we should have at least two types of courses : one short and simplified course to be offered in one or half a term, and the specialized courses. The objective for the former is to give law students a basic knowledge of international law. Then the specialized courses should be designed essentially for those students who intend to pursue a public international law career.

I am in favour of this two-pronged approach : one designed for professional purposes and one for law students in general ; the former being a comprehensive course and the latter a short and simplified general course.

Yours sincerely,

Roy S. Lee

Réponse du Professeur Christine Chinkin[2]

September 6, 1994

Dear Ronald,

Thank you for your letter. I apologise for the delay in replying but have been away.

The four questions :

1. I find this one difficult as in the institutions I have taught in international law has recently gained in popularity. For example enrolment in the optional general course has doubled here over this last year. Nevertheless, I share your perception of its overall decline. I think perhaps part of the problem is the overall increased complexity of a law degree.

2 Mrs Chinkin is Dean of the Faculty of Law of the University of Southampton, United Kingdom.

Another more specific reason is the continuation of the general course along very traditional lines. As teachers of international law we might be unwilling to adapt our courses to the changes that are occurring leading, perhaps, to a perception of irrelevance. Having said that I am a strong believer in the importance of sound instruction in basic principles (sources ; state responsibility ; dispute settlement ; treaty law, etc.). I think the greatest danger of specialisation is people claiming to be for example, human rights lawyers with little or no grasp of first principles. The general course has to be presented as a *genuine* pre-condition of such specialisation.

2. Other reasons seem to be expansions of those you have listed : the need for stability through the creation of legitimate expectations ; provision of an objective standard against which government behaviour can be judged ; the need for an orderly environment for the pursuit of international activities including trade, exchange of services, etc. I think also the impact of international law on domestic legal systems needs to be emphasised. The theoretical monist/dualist debate has now many practical domestic implications, especially in areas such as human rights and environmental law. Effective implementation at the domestic level requires a thorough understanding of the international legal principles which in turn are themselves reinforced.

3. At Sydney there was a compulsory international law course which combined public international law and conflicts, with emphasis upon those areas which have greatest impact upon the domestic (Australian) legal system ; *e.g.* Jurisdiction and immunity ; treaty implementation ; act of State, etc. I thought this worked well, but is probably a luxury that is only possible in a large law school like Sydney. It would be very difficult to argue that it should be compulsory in the UK where law schools are smaller creating greater staff constraints and the degree is completed within three years. Whether or not there is a compulsory general course, specialised courses should be available. It is often a good idea to change the topics of these according to teachers' research interests at the time.

4. It is difficult to answer questions about the length of the course because of differences in the structure of the academic year. I presume by a full year course you mean two semesters on the North American model. While this is ideal it is probably also a luxury. I think we have to make hard decisions about what are the essentials in a general course and our categorisations. It probably means *e.g.* That subjects such as the law of the sea and environmental law can only be dealt with as examples of delimitation, control and use of territory rather than as full topics. I would be against including conflicts in a general public international law course because of its very difficult concepts and assumptions but some areas are difficult to explore fully without at least some explanation, *e.g.* Jurisdiction, impact of recognition.

These questions have convinced me of the need for a small workshop with representatives from say North America, UK, Australia, Europe, South Africa to talk through these questions. Once one gets into questions of categorisation there are so many different approaches that could be taken. It would be invaluable to have a brainstorming/working session on some of these ideas. Do you think such a workshop could be feasible ?

For discussion of public international law in Australia I suggest Professor H. Charlesworth, University of Adelaide, who has taught public international law at Melbourne and now Adelaide, or Professor Don Greig who teaches at the Australia National University Canberra which has the most developed international law programme in Australia.

I hope some of this is useful. Very best wishes to you.

Yours sincerely,

Christine Chinkin

Réponse de M. A. H. A. Soons[3]

28 November 1994

Dear Ronald,

Your letter of November 9 arrived only a few days ago ; it has crossed with my fax of 10 November. So I hasten now to answer your questions.

1. It is my impression that in the Netherlands the teaching of the general course in public international law is not declining, certainly not at Utrecht University. There is some pressure because of the increasing attention for European law, but so far this has been accommodated by providing additional room for European law.

2. I subscribe to the "usual answers" you refer to. We have not been too successful so far, although this most probably varies according to the countries involved (I have the impression that the public at large in countries like the Netherlands and the Scandinavian countries is more convinced of the importance of public international law than in, *e.g.*, the U.S.).

3 Mr Soons belongs to the Faculty of Law of the University of Utrecht in the Netherlands.

We have to make a distinction here between "educating" the public at large (including the media and politicians) and law students. For the former category, apart from the more abstract reasons you already mention, much more emphasis must be put on informing them of the present reality and (relative) effectiveness of international law in many fields (including, *e.g.*, international trade, transport and communication).

As far as law students are concerned : perhaps in many countries the (general) courses on public international law should emphasize more the issues that practising lawyers may (and will increasingly) be confronted with. Such issues can be used as examples, to demonstrate how the general principles/rules of international law work.

3. Yes, I support the view that a general course should be compulsory for law students (this is now the situation in the Netherlands). If it is at all possible, there should be a range of more specialized courses, but this of course will depend on the size of the law school and other factors.

4. The general course need not necessarily be a full year course ; this also depends on the situation of the law school involved. I have no particular suggestions as to content (see Annex for the basic structure of our general course).

Basic elements of conflict of laws should be taught in another course ; however, some examples for the general course in the area of jurisdiction can be taken from conflict of laws.

5. Of particular importance is the promotion of the teaching of basic elements of international law (including the functioning of the UN) at secondary school level, and also informing the public at large through the media.

I hope these brief comments are of some help for your provisional report on this important issue.

With best wishes,

A. H. A. Soons

General Course in Public International Law at the University of Utrecht :

1. The nature of international law and its role in international relations.
2. The sources of international law.
3. The relationship between international law and national law ; international law in the Netherlands legal order.
4. Subjects ; territory.
5. The international law of the sea.

6. Jurisdiction and immunities ; nationality ; aliens ; refugees.
7. State responsibility ; the treatment of aliens and protection of foreign investments.
8. Protection of the environment.
9. Peaceful settlement of disputes ; countermeasures and sanctions.
10. International law and the use of force (prohibition of the use of force ; the collective security system of the UN ; individual and collective self-defence ; humanitarian intervention and basic principles of international humanitarian law).

III. Questionnaire

1st December 1994

1. The teaching of public international law, the general course in particular, seems to be declining in many, not all, but many countries. In some States the general course has virtually disappeared from the law school curriculum. Are we able to identify the reasons for this decline ?

Among others, the following explanations are sometimes offered : the rise of specializations ; the intense interest in commercial and corporate law ; the absorption of parts of the course by other courses, for example, criminal law and environmental law ; in Europe, the shift to the study of European law ; the appearance of a new interest in the study of conflict of laws ; changes in some countries, for example Germany, in the length of the teaching terms in the law schools ; a continuation of the belief in professional circles that public international law is not important or relevant ; absence of demand on the part of the students and law firms.

2. Why do we speak of the importance of public international law as a subject to be taught, at least at the secondary and tertiary levels, even at the primary levels of the educational system ?

The usual answers that are offered in response to this question have to do with the formation of public opinion outside as well as inside professional legal circles, and the need to strengthen the idea of the rule of law in national and in international affairs. Would you care to indicate other specific reasons which we should emphasize in persuading, first the institute itself, and then the wider legal and lay communities of the importance of public international law ?

3. Where should public international law fit in the law school curriculum ?

Would you support the view that a general course ought to be compulsory and that in the mid-1990s no law student should be allowed to leave recognized institutions of legal education without having had a course in public international law ? If the general course is to be compulsory, is it reasonable to recommend that students also have available a range of more specialized courses and seminars in the senior years of the law school ?

If the general course is to be optional, can you support the view that every recognized law school must ensure that such a course is in fact available to students ?

4. Assuming that every recognized law school must offer a general course on international law, either on a compulsory or optional basis, what should the duration of such a course be ?

The tendency in North America is to limit compulsory courses to half a term, that is to say, fifteen weeks, which may or may not be sufficient for a course in public international law. Is it realistic for the Institute to recommend a compulsory full year course, that is to say, a course that would be taught for a minimum of two hours a week over a period of thirty weeks ? Or is it more realistic to recommend a course that would be compulsory for half a term ? In Poland, where the law course runs over a period of four years, public international law is compulsory in second year and specialized seminars are offered in the third and fourth years.

5. A particularly vexing question concerns the content of the general course.

Having regard to the importance of teaching and developing the subject from a universalist perspective and at the same time meeting the perceived need in many States to teach something about the national attitude towards public international law (vide, the foreign relations law of the United States), is it desirable and realistic for the Institute to attempt to design a model curriculum that could be adopted in Asia, Africa, the Americas, and Europe ?

If the answer is "yes, we do need a more standard curriculum for the basic course throughout the world", can it indicate, very briefly, (without being into detail) what the content of the curriculum should be (for example, more or less the same content as Oppenheim-Lauterpacht, Rousseau, Brownlie, Dahm, Simma, Henkin) and how such a curriculum could be developed (for example, by the Institute alone, by the Institute in cooperation with various national societies of international law, by regional organizations and agencies of the United Nations ?

For example : that broad principles of the subject be taught even in the primary schools and in the high schools ; that more comprehensive courses be offered outside the law faculties in the colleges and universities ; that the subject be made mandatory in the law schools and that it also be made mandatory for admission to the practice of law and the assumption of judicial duties ; that refresher courses be offered on a regular, compulsory basis for government officials, practitioners, and judges ; that annual seminars be held for journalists and other professionals in the media in order to up-date them on issues of international law and

organization ; that national societies of international law be encouraged to improve the co-ordination of their activities.

7. Other aspects of the subject that should be addressed by our Commission ?

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IV. Réponses et observations de Membres et Associés de l'Institut

Réponse de Sir Robert Jennings

12 December 1994

My dear Ron,

Many thanks for your kind letter of 1 December, and for the enclosed questionnaire.

I have quickly written two somewhat unorthodox comments. I leave it entirely to you to decide whether to make these printable comments or not. You may well decide that these are things better not put down in black and white. Just as you decide.

But I have long felt that the Institute is a stuffy hot-house of mutual admiration and that it badly needs some fresh air. When I was on the Bureau for a short time, I supposed one might do something about it (not least about their losing a fortune at a time when anybody with money could hardly avoid making a great deal more !) ; but I soon discovered that, as soon as one had been on the Bureau long enough to discover what a closed body it really is (like all such, composed of very "nice" people), one is out on one's ear, whilst the "permanent members" somehow remain and rule.

I compare it in my mind with the Institute of Space Law where members include politicians, scientists and engineers. And one actually *learns* something at their conferences, accordingly.

Ron ; I know nothing is more absurd than a 81-year old 'rebel' — and I do leave it wholly to you, whether to adopt my screech or kindly suppress it !

Very best wishes.

Yours,

Sir Robert Jennings

Like you I am very concerned about the disappearance in many of our law schools of the general course on international law. Besides the reasons set out in your Question 1, I venture to suggest the following.

1. To teach a general course in international law requires many hours of dedicated preparation because it must be kept up-to-date in many departments, and the material is changing all the time. It is so much easier to teach a narrow but modish specialization. Of course this specialized knowledge is of little practical use without a general course — because, for example, one's first real case on "the environment" is likely to turn out to be largely about the law of treaties. But the "specialization" is what gets the approval of administrators, bureaucrats, politicians and other modern menaces to the idea of university.

There is, however, another compelling reason why the labours of a good, general course repel the younger university teachers. The young — poor things — have to publish or perish. They have to publish, whether they have anything to say or not, and whether they are ready to say it or not. They have to try to write more pages than their competitors for promotion. This pernicious and ludicrous disease, present in all western universities, leads straight to early specialization and kills the general course.

2. As to your second question about the reputation, or lack of reputation, of public international law in the profession and in the outside world generally, I think we ought first to look at the role played by the Institute itself. The Institute deals with matters of great interest and importance to the legal profession generally and to trade, commerce, finance and international economics. It pronounces on the subjects without any thought of involving interested experts other than its own "chosen" international lawyers. It pronounces upon extraterritorial jurisdiction without ever even contemplating seeking the guidance of those who can assess the social, economic, financial and trade aspects of the law. It pronounces upon maritime law without involving hydrographic experts, shipping experts, or insurers. In this way it produces in its resolutions, more and more 'lawyers' law ; keeping it as a mystery from those trying to deal with the problems as they arise in real life. Of course it is all very cosy and agreeable to the elect ; but how can we be surprised if the outside intellectual world does not speak to us, when we never speak to them ; or even ask their advice on matters t which they could bring the insights of a different expertise.

Sir Robert Jennings

Réponse de M. Luzius Wildhaber

12 December 1994

1. The teaching of public international law, the general course in particular, seems to be declining in many, not all, but many countries. In some States the general course has virtually disappeared from the law school curriculum. Are we able to identify the reasons for this decline ?

Among others, the following explanations are sometimes offered : the rise of specializations ; the intense interest in commercial and corporate law ; the absorption of parts of the course by other courses, for example, criminal law, **constitutional law** and environmental law ; in Europe, the shift to the study of European law ; the appearance of a new interest in the study of conflict of laws ; changes in some countries, for example Germany, in the length of the teaching terms in the law schools ; a continuation of the belief in professional circles that public international law is not important or relevant, **or even law** ; absence of demand on the part of the students and law firms.

2. Why do we speak of the importance of public international law as a subject to be taught, at least at the secondary and tertiary levels, even at the primary levels of the educational system ? **Primary level : No.**

The usual answers that are offered in response to this question have to do with the formation of public opinion outside as well as inside professional legal circles, and the need to strengthen the idea of the rule of law in national and in international affairs. Would you care to indicate other specific reasons which we should emphasize in persuading, first the *Institut* itself, and then the wider legal and lay communities of the importance of public international law ?

3. Where should public international law fit in the law school curriculum ?

Would you support the view that a general course ought to be compulsory and that in the mid-1990s no law student should be allowed to leave recognized institutions of legal education without having has a course in public international law ? **Yes.** If the general course is to be compulsory, is it reasonable to recommend that students also have available a range of more specialized courses and seminars in the senior years of the law school ? **Yes.**

If the general course is to be optional, can you support the view that every recognized law school must ensure that such a course is in fact available to students ? **Yes.**

4. Assuming that every recognized law school must offer a general course on international law, either on a compulsory or optional basis, what should the duration of such a course be ?

The tendency in North America is to limit compulsory courses to half a term, that is to say, fifteen weeks, which may or may not be sufficient for a course in public international law. Is it realistic for the *Institut* to recommend a compulsory full year course, that is to say, a course that would be taught for a minimum of two hours a week over a period of thirty weeks ? Or is it more realistic to recommend a course that would be compulsory for half a term ? In Poland, where the law course runs over s period of four years, public international law is compulsory in second year and specialized seminars are offered in the third and fourth years. **Yes, with the second half being offered on an optional basis.**

5. A particularly vexing question concerns the content of the general course.

Having regard to the importance of teaching and developing the subject from a universalist perspective and at the same time meeting the perceived need in many States to teach something about the national attitude towards public international law (vide, the foreign relations law of the United States), is it desirable and realistic for the *Institut* to attempt to design a model curriculum that could be adopted in Asia, Africa, the Americas, and Europe ?

If the answer is "yes, we do need a more standard curriculum for the basic course throughout the world", can you indicate, very briefly (without going into detail) what the content of the curriculum should be (for example, more or less the same content as Oppenheim-Lauterpacht, Rousseau, Brownlie, Dahm, Simma, Henkin) and how such a curriculum could be developed (for example, by the *Institut* alone, by the *Institut* in cooperation with various national societies of international law, by regional organizations and agencies of the United Nations ? **Only a minimum "standard" curriculum is needed.**

What specific steps should be recommended in our resolution on ways and means of strengthening the teaching and dissemination of international law during the decade ? **That depends : do we want to involve them ?**

For example : that broad principles of the subject be taught even in the primary schools and in the high schools ; **primary : no ; high : maybe ?** that more comprehensive course be offered outside the law faculties in the colleges and universities ; that the subject be made mandatory in the law schools and that it also be made mandatory for admission to the practice of law and the assumption of judicial duties ;

yes ; that refresher courses be offered on a regular, compulsory basis for government officials, practitioners, and judges ; **yes definitely yes** ; that annual seminars be held for journalists and other professionals in the media in order to up-date them on issues of international law and organization ; **very good** ; that national societies of international law be encouraged to improve the co-ordination of their activities. **This I doubt.**

7. Other aspects of the subject that should be addressed by our Commission ?

Luzius Wildhaber

Réponse de M. Santiago Torres Bernárdez

31 December 1994

Dear Professor and Confrère,

Many thanks for your kind letter of 1 December 1994 and the questionnaire on the subject referred by the Institute to the Commission. It will allow further progress in our study and facilitate discussion at the meeting in Portugal. My preliminary general answer to the various items of the questionnaire is as follows :

Question 1

The described declining in the teaching of public international law, including of the general course, cannot be but a matter of high concern to the Commission. It is not so, however, in all countries. In Spain, for example, such a decline is inexistent. In my country the general course has been preserved and an increasing number of international law treaties published. At the same time, the quality and quantity of courses, seminars and books concerning particular public international law subjects have been developed more and more in recent years. I would suggest, therefore, to be less categorical in the diagnostic of the present situation because the Commission cannot but approach the object of our concern on a world-wide basis.

As to the identification of the reasons for the described decline, to enquire why it takes place apparently in some countries and not in other countries could be, in my opinion, a useful method of gathering relevant information and reaching conclusions. Perhaps, there is a certain relationship between the subject of our preoccupation and the philosophic mood and political, economic and social conditions prevailing nowadays

within the societies conforming each of the various States. For example, if in a given national society the citizens perceive that beyond national borders relations are a matter of power exclusively, they would have difficulties to understand the need to continue to teach public international law ; if the world-market forces would provide the solution of international problems many norms of international law could be perceived as undesirable interfering regulations ; etc.

Governments are not immune to considerations as the preceding ones. There is a new reluctance on the part of certain States to participate in public international law undertakings, including in general multilateral treaties. This is even reflected in the codification and progressive development of international law. Previous pace appears to have been slowed down considerably during the last years and former regularity in convening codification conferences by the United Nations stopped.

As to the reasons of the declining enumerated in the questionnaire some are as old as public international law itself. Others, like a renewed interest in specialization in certain fields in detriment of the whole of public international law, are sometimes more recent. However, the phenomenon as such existed also in the past. It poses certainly the question of how the teaching time available should be divided and the need of some additional time cannot be altogether excluded. But practical solutions are always possible if matters of principle are not involved. In Spain, for example, the study of European law has been included in law teaching programmes without cutting the time allocated to the general courses on public and private international law.

It is difficult to understand how would it be possible to teach international criminal law or international environmental law of the students did not receive previously some general notions of what international law is about. Specialization without generalization would lead ultimately to the nationalization of public international law, namely to a break of the essential unity of public international law. If this would be the meaning of the claim for specialization it should be driven back by the Institut.

Among the reasons for the described decline I would list the way of financing and organizing university education in the various countries. For example, if business provides financing is normal that commercial and corporate law be listed high in the teaching programmes. Commercial and corporate law in such circumstances may even invade other branches of the law as reflected in the law periodicals of certain countries.

The teaching of international law is also highly educational. The notion of legal obligation or duty appears in international law still more clear and with less trappings than in other areas of the law.

Question 2

I assume that all members of the Commission will share the view that the teaching of public international law is important and particularly so when interdependence at the various levels of international intercourses is a fact generally recognized. The recognition of the fact of interdependence and the decline described under question 1 should also be a matter for reflexion. It could yield some conclusions of interest for the study of the subject by the Commission. How could it be that when confronted with a higher degree of international interdependence the teaching of public international law would seem to be declining in some States ? We are here confronted with a paradox to say the least.

Concerning the levels at which public international law should be taught I doubt that the primary and secondary levels of the educational system as a whole would be appropriated, beyond general considerations forming part of the civic and ethic education of children and teen-teenagers. In Spain public international law is taught at the university level only. Law in general and public international law in particular are too abstract and technical subject-matters for children and teen-teenagers. But, they understand certainly that the human family is divided in peoples and nations who should live together at peace with each other ; that human rights and the environment should be protected, etc.

Finally, the Institute should emphasize that public international law is important not only because of the formation of public opinion and the strengthening of the rule of law and the idea of justice, but also because of practical needs of contemporary life. It is more and more necessary to give international law answers to a series of international problems and this requires, in turn, the participation and contribution of experts in public international law at the level of both the elaboration of norms and the application and interpretation of existing norms. International institutions, governmental departments, courts of law, commercial firms and even individuals need increasingly the assistance of international law lawyers.

Question 3

(a) A general course in public international law ought to be compulsory for all law students.

(b) Every law faculty or school should ensure the teaching of such a general course.

(c) Specialized courses and seminars on public international law subjects should be organized, on an optional basis, in the senior years of the law faculties or schools.

Question 4

(a) The Institute should recommend that the general course on public international law should be compulsory during a given year of the law course and be taught in such a year for a minimum of hours to be considered by the Commission.

(b) In Spain according to the new legislation the law course (*licenciatura* degree) requires a minimum of 300 credits (3000 hours) and a minimum period of four years at the university (one credit means 10 hours of teaching). However, students may get, if they so wish, up to a maximum of 450 credits in the law faculties and this is noted in their curriculum. 180 credits out of the required 300 concern compulsory subject-matters (called in the Spanish legislation "*troncales*", namely part and parcel of the compulsory subject-matters. The general course on public international law is of about 90 hours and the general course on private international law of about 75 hours. This would mean, generally, that if a student passes the examination of the public international law general course he or she will get 9 credits and in the case of the private international law general course 7,5 credits. The public international law general course continues, as in the past, to be taught in many Spanish universities in the second year, but other universities do it now in the first year (the first and the second years are called in the Spanish legislation "*primer ciclo*"). The general course on private international law is taught in Spanish universities in the last year of the law course. It is a subject-matter of what the Spanish legislation called the "*segundo ciclo*" (the third and fourth years). The 120 credits to be added to the 180 on compulsory subjects to reach the required minimum of 300 relate to subjects which are optional for the students. Optional subject-matters may be, *inter alia*, courses on specialized topics of international law as offered by the university concerned. Teaching and seminars on specialized topics or subjects of international law are also done at the "*tercer ciclo*". This *ciclo* is required to get a *doctor* degree and comes after the minimum of the four years of the *licenciatura* degree.

Question 5

The idea of a general course model curriculum which would be elaborated by the Institute is indeed very attractive. It deserves to be explored further. If so, I would provide you with the content of the main present treaties or manuals written by Spanish international law professors. A model was prepared some years ago within the Council of Europe. We have also the book published by UNESCO in 1991. Cooperation with other United Nations or regional organizations as well as with international or national learned societies could help and it is highly advisable.

Question 6

It seems to me premature to give an answer to this question. As to the examples, I have already commented on some of them. Concerning other given examples, I have no objections of principle to specify them somewhat. Perhaps, the organization of moot court competitions and other examples could also be considered.

Question 7

In order to underline the relevance nowadays of the teaching of public international law, I think that such a teaching should be accompanied by some kind of practical training concerning, for example, matters such as the drafting of legal advise or comment or of a pleading or an oral argument, the structure that an international arbitral or judicial decision should have, the way in which treaties and other international undertakings are or may be elaborated, the relationship between objective law and consent in international law, the procedures by which international law norms are incorporated into the various domestic law systems, etc.

Thanking you again for the letter and the questionnaire, and with my good wishes for the New Year I remain,

Yours sincerely,

Santiago Torres Bernárdez

Réponse de M. Daniel Vignes

20 février 1995

1. Je partage votre constatation dans votre 1.1. Voilà à mon avis les raisons pouvant sinon justifier du moins expliquer ce déclin du cours général. Nous aimons tous toujours professer un cours plein de recherches et de précisions *nouvelles*, alors que le cours général peut être trouvé dans les manuels, de nous ou d'autres ; nous ne pouvons pas approfondir notre cours principal parce que la matière est énorme et qu'il faudrait plus d'heures que ce dont nous disposons. En outre, autrefois en D.I.P., tous les professeurs entendaient dans leur cours général faire x heures sur le fondement du caractère obligatoire du droit international ou quelque chose comme ça, pour montrer qu'ils étaient le disciple de Verdroos, de Scelle, celui de Guggenheim (ce qui était mon cas à l'époque alors que je suis de plus en plus l'élève de Scelle). Actuellement où on est de plus en plus positiviste, on ne s'interroge plus sur le pourquoi des choses et on peut donc descendre d'un ou deux degrés dans la généralité des

choses. Si je compare ce que je ferai si j'avais un cours général à faire à ce que je faisais, je ne ferai pas toute la substance de l'enseignement de Guggenheim (comme dans son manuel paru en 1954-54), mais seulement un des quatre ou cinq grands problèmes, en le rattachant peut-être à quelques développements plus généraux, par exemple sur l'acte illicite et la réparation. J'aurai ainsi de quoi meubler mes 36 heures en donnant aux étudiants des choses suffisamment générales mais en étant suffisamment précises.

Je déplore la constatation que vous faites en votre second alinéa. Le désir des utilisateurs de diplômés que ceux-ci soient familiarisés avec des choses pratiques et directement exploitables par eux est quelque chose à très courte vue. Les étudiants sont moins bien formés. Les meilleurs étudiants comprennent d'ailleurs les lacunes de ce que nous leur enseignons et souvent avant de nous quitter se mettent à l'étude des fondements !

2. Je comprends votre seconde question comme se rapportant au fait que notre matière est enseignée — d'une manière très sommaire —dès le secondaire, à 15-18 ans. Comment expliquer cela ?

Je pense que les étudiants sont dans la formation de leur esprit de plus en plus en retard. Je prend les termes français en disant qu'autrefois à 17 ans, un étudiant sur deux était prêt à entrer en faculté, qu'à 20 ans les retardataires rejoignaient le peloton ou ... abandonnaient. Dès lors, l'enseignement du droit international public se situait à 20-23 ans puis on allait à un métier.

Maintenant, il y a cinq ou six fois plus d'étudiants ; ils sont de deux ou trois ans en retard par rapport à autrefois et une grande partie se mettant éventuellement à travailler quitte l'université rapidement (soit en faisant sa scolarité sur plus longtemps, tout en travaillant, soit en abandonnant sans diplôme). Ils veulent donc quitter l'université peut-être pas beaucoup plus tard qu'autrefois mais en ayant des idées sur toutes les ex-matières du programme. Alors au lieu de faire les "institutions de la société internationale", à 20-22 ans, comme de mon temps où il y avait 3 ans de licence et où on enseignant le CIP en 3ème année, ils veulent "engranger" cette matière dès la première année (qu'ils font toutefois en moyenne à 19-20 ans et non plus 17-18). Cela a été la réforme de l'enseignement supérieur en France en 1952, cela a par ailleurs été la réforme de l'enseignement secondaire en France où on a tenté de donner dès le secondaire des connaissances sur la société, notamment la société internationale.

Dit d'une autre manière, il a fallu changer le déroulement des études pour que les étudiants puissent nous quitter au même âge, mais en ayant étudié beaucoup moins de choses. Tant pis pour les humanités classiques, tant pis pour la formation juridique générale. Le cycle "collège"

aux Etats-Unis est caractéristique de cette diminution du bagage intellectuel de la généralité des "graduates".

Mais après tout, ces "néo-graduates" peuvent faire illusion au niveau de la moyenne de l'opinion publique ; ils peuvent participer "àl'Etat de droit".

3. Vous voyez qu'avec les idées exposées aux deux paragraphes précédents, je peux facilement partager celles de votre 3.2.

Ajouterai-je compulsory oui, général ou semi-général dans le sens de mon 1.

4. Je voudrais d'abord rappeler que dans les universités françaises, classiquement l'enseignement était de deux fois un semestre par an, chacun comprenant quatre ou cinq cours ; ainsi chaque année il y avait 2 fois dix-sept semaines de cours plus sept semaines d'examen puis neuf à dix de vacances. Un enseignement semestriel était de 38 heures de cours magistraux plus 15 séances (une heure et demie) de travaux dirigés (dans tout cela, on devait suivre chaque année de l'ordre de 350 heures de cours plus les travaux dirigés. A cette époque où la licence se faisait en trois ans, il y avait un semestre de Droit international privé obligatoire, un semestre de Droit international public à option (entre sept possibilités dont le droit fiscal, le droit maritime et aérien, les voies d'exécution, le droit du travail ... on devait choisir deux cours à option). Plus tard, en 1952, on fit la licence en quatre ans avec deux semestres de droit international obligatoires, l'un de privé, l'autre de public, plus un à option. A partir de 1968, on diversifia plus encore.

Les expériences que vous décrivez dans votre 4.2. ne diffèrent finalement que peu du régime de 1952 et de ses modalités ultérieures.

Je voudrais encore évoquer le système belge auquel j'ai participé et qui en droit international comporte quelques semestres obligatoires de droit international (public et privé) plus quelques semestres plus spécialisés à option, j'ai ainsi enseigné le droit de la mer en 30 heures et le droit du développement en autant. A l'examen, j'avais des étudiants soit de quatrième année de licence générale, soit de la licence spéciale de droit international, soit de celle de droit maritime (voir d'une licence spéciale de relations internationales).

5. Je suis tout à fait d'accord sur le caractère "vexing" de ce que vous rapportez en 5.2. Il est déplorable que certains enseignements (voire certains manuels ou précis ou mémentos) n'aient un contenu que de droit constitutionnel (français/national) appliqué aux relations extérieures, où on apprend comment on ratifie un traité ou pourquoi celui-ci est obligatoire et s'il est obligatoire face à une loi contraire antérieure ou postérieure ?

C'est très insuffisant et pas assez formateur car on reste dans le monde national.

La lecture de votre 5.3. a commencé pour moi par plusieurs évocations, celle du manuel collectif qu'en 1968 feu notre Confrère Soerensen et une dizaine de ses amis publia ; par ailleurs l'excellence de la plupart des cours généraux de l'Académie de La Haye, j'ai aimé le Jimenez de Arechaga, le Truyol y Serra, le Jennings ; dans la doctrine française actuellement, il y a — ce sont les mieux — le Combacau et Sur, la P.M. Pupuy, le Daillier et Pellet ; et puis il y remontant à 32 ans l'admirable sixième édition de *The Law of Nations* de Brierly. L'Institut pourrait-il faire quelque chose, je vois encore mal, mais l'idée est à creuser.

Je ne sais pas si c'est ici — vous, vous en parlez dans 1.2. à propos du droit européen — que j'évoquerai la nécessité que parmi les 10 à 12 grands chapitres de tout enseignement de droit international général, il y en ait un de droit international économique avec une grosse section de droit de l'intégration régionale et une petite de droit de développement.

6. J'approuve ce que vous dites dans votre 6. Comment pourrait-on attirer l'attention sur la question.

7. Il y a un double problème qui m'intéresse et qui est celui de l'équivalence des diplômes, d'une part, des scolarités, d'autre part. Comment peut-on faire pour qu'un licencié en droit suédois puisse en un an devenir licencié en droit français ? Assurément, vous me direz que ce n'est pas du droit international mais une question qui intéresse la Communauté européenne. Ne faut-il pas plutôt prévoir que le licencié en droit suédois puisse acquérir en deux ans une licence spéciale en droit international comme à l'Université de Bruxelles qui s'ajoutera à son diplôme suédois. Je continue, n'y aurait-il pas un inventaire à faire des diplômes supérieurs (*post-graduate*) en droit international des différents pays ? Feu notre Confrère Tunkin l'avait entrepris. Je reviens sur l'équivalence des scolarités avec des idées comme : un étudiant qui se veut spécialiste en droit international ne devrait-il pas obligatoirement avoir fait un semestre dans un pays autre que le sien ?

Daniel Vignes

Réponse de M. Andrés Aguilar-Mawdsley

24 February 1995

Dear Ronald,

I have read with great interest the questionnaire you sent to me with your letter of 1 December 1994. May I express first of all my congratulations on t his excellent piece of work. Your questionnaire covers indeed all the issues that I could think of in connection with the teaching of public international law. I can therefore be very brief in my comments to the different issues raised in it.

1. I agree with the proposition made in the first paragraph of this point and with the explanations you offer in the second paragraph. I would, however, emphasize that one of the main reasons for this situation is that opportunities of work in the field of public international law are rather limited and that the income one can expect from the practice of it does not compare with the income one may get from the practice of other branches of law.

2. In connection with this point I would only offer the suggestion that due to the over closer relations of nations and the accelerated integration in the economic and political fields, there is more than ever a need to give at least a general view of public international law.

3. I support your view that a general course on public international law ought to be compulsory and that in the mid-1990s no law student should be allowed to leave recognized institutions of legal education without having had a course on this subject. I would also support the idea that if this is to be so, it is reasonable to recommend that the students also have available a range of more specialized courses and seminars in the senior years of the law school. I also support the idea referred to in the last paragraph of this point.

4. In my view, the Institute should recommend a compulsory full-year course. That was, in fact, already the case in my years as a law student in the *Universidad Central de Venezuela*. Half a term, that is to say, fifteen weeks, is not sufficient for a course in public international law.

5. I do not think it is desirable and realistic for the Institute to attempt to design a model *curriculum* that could be adopted in Asia, Africa, the Americas and Europe. Of course, some subjects are of such a universal importance and interest that they should be included in the *curriculum* of any public international law course. Perhaps the Institute, in co-operation with various national societies of international law, regional organizations, agencies of the United Nations and leading universities, could develop such a *curriculum*.

6. I agree with all the suggestions you make in the second paragraph of this point. Indeed, already today human rights and other basic concepts of international relations are taught in primary schools and high schools of some countries. I would also emphasize the importance of organizing courses on the principles and purposes of the United Nations, even at such levels of education. Of course, more comprehensive courses should be offered outside the law faculties in the colleges and universities.

7. In view of the thoroughness of your questionnaire I have no suggestions at this point in time as to other aspects of the subject that could be addressed by our Commission.

Perhaps I could make a further contribution once I get the bibliographical and other supplementary materials that you very kindly offer to send to me in the near future. Be assured that your correspondence is not a burden at all. Indeed it is a pleasure to be working with you on this project.

I take this opportunity to thank you for your always kind words of friendship and cordial good wishes to my wife and me. May I, although belatedly, reciprocate in wishing you the very best for 1995.

Andrés Aguilar-Mawdsley

Réponse de M. Mohammed Bedjaoui

27 février 1995

Cher Confrère,

Je vous remercie pour votre lettre du 1er décembre 1994 et regrette de n'y avoir pas répondu avec toute la promptitude souhaitée. C'est néanmoins avec beaucoup d'intérêt que j'ai pris connaissance de votre questionnaire et des diverses suggestions émises par nos Confrères membres de la Dixième Commission. Vous trouverez ci-dessous quelques unes de mes remarques à ce propos.

Point 1 du questionnaire

J'ai quelques doutes quant à la réalité du *déclin* de l'enseignement du droit international public et du cours général en particulier. Plutôt que de déclin, je parlerais d'*évolution* de l'enseignement du droit international. Cette évolution n'est d'ailleurs que le reflet fidèle de celle du droit international lui-même. Celle-ci se caractérise par les faits suivants :

(a) L'émergence de préoccupations nouvelles telles que la protection des droits de l'homme ou celle de l'environnement n'a en effet pas manqué de façonner la physionomie de cet enseignement.

(b) Les avancées notables dans le domaine de l'intégration politique et économique européenne ont également contribué à la diversification de la matière.

(c) La fin de la confrontation Est-Ouest et la promesse d'un nouvel ordre juridique international auraient pu être l'occasion d'une stimulation renouvelée de l'intérêt porté à son enseignement et à une dynamisation du cours général. On assiste au contraire au renforcement de la tendance — déjà amorcée — à la spécialisation, avec la création d'enseignements répondant à l'orientation actuelle du droit international, celui-ci devenant de plus en plus un droit de la coopération Est-Ouest et Ouest-Ouest et un droit de juxtaposition Nord-Sud, comme en témoignent la disparition de l'enseignement du droit du développement du *curriculum* de nombreuses facultés de droit et la création d'enseignements sur un sujet aussi spécifique que le droit des réfugiés, traditionnellement intégré à l'enseignement des droits de l'homme.

(d) Cette tendance à la spécialisation de l'enseignement ne menace pas réellement *le devenir du cours général* ; elle n'est que la conséquence du développement du droit international et du rétrécissement du domaine réservé des Etats. Des sujets qui autrefois faisaient l'objet de quelques développements dans le cadre du cours général alourdiraient sensiblement ce dernier aujourd'hui du fait de leur expansion et de leur complexité croissante (protection des droits de l'homme, droit humanitaire, droit de l'environnement, droit des espaces). Le cours général conserve ainsi sa vocation de *cours d'introduction* au droit international.

(e) L'universalisation des échanges, la généralisation de l'économie de marché et la plus grande perméabilité des marchés nationaux, ont pour leur part certainement provoqué, de la part des acteurs économiques, une demande accrue en spécialistes dans divers domaines et conduit à la floraison ou au renforcement d'enseignements spécifiques (droit du commerce international, fiscalité, droit de la concurrence, droit de la propriété intellectuelle, etc.), favorisant ainsi le glissement d'intérêt du droit international public vers le droit international privé.

(f) Il conviendrait encore d'ajouter que les tendances mentionnées ci-dessus ne sont peut-être pas observables dans tous les pays. La spécialisation de l'enseignement est en effet tributaire non seulement d'une demande spécifique dans une certaine matière mais également de la richesse en ressources matérielles et humaines des pays concernés.

Point 2

La sensibilisation précoce au droit international public permettrait de remédier au "déclin" (je prends le terme avec précaution) observé de son enseignement par une plus grande demande future des étudiants pour cette discipline.

Il faudrait donner au droit international le caractère d'un thème d'intérêt commun en sensibilisant par exemple l'opinion publique à la grande pénétration du droit international dans la vie quotidienne, à l'idée que l'accomplissement de certains actes simples tels que poster une lettre ou faire un voyage en avion met chacun de nous en contact avec le droit international public.

Point 3

Je me rangerais sans grande hésitation du côté de ceux qui voudraient donner un caractère obligatoire à l'enseignement du droit international public dans les programmes des facultés de droit. Nous vivons en effet une époque

- d'universalisation des flux de personnes, de biens et de capitaux,
- de croissante interdépendance,
- d'interpénétration culturelle.

Il me paraît donc inconcevable qu'un étudiant de droit ne dispose pas des instruments d'analyse lui permettant de comprendre si ce n'est d'appréhender juridiquement ces relations multiples et parfois complexes, autrement que par le seul biais du droit international privé.

La plus grande perméabilité des ordres juridiques nationaux au droit international et aux décisions juridictionnelles internationales, par exemple, rend souhaitable, si ce n'est indispensable, que le praticien du droit soit instruit de la spécificité des sources du droit international et des moyens de règlement pacifique des différends internationaux.

Par ailleurs, un enseignement relatif à la protection internationale des droits de l'homme paraît désormais constituer le complément indispensable du traditionnel cours sur les libertés publiques.

Enfin, la spécialisation est souhaitable justement en raison de la complexité croissante de certains sujets dont il était jusqu'à récemment possible d'intégrer l'enseignement dans le cours général.

Point 4

La durée de l'enseignement du droit international ne saurait être alignée sur celle des enseignements de base tels que le droit constitutionnel ou le droit civil par exemple. L'enseignement devrait néanmoins être

dispensé sur une base annuelle et à raison de deux heures hebdomadaires. L'expérience montre en effet qu'un enseignement semestriel ne suffit pas à couvrir le programme de base. Certaines facultés de droit ont pour cette raison décidé que l'enseignement de droit international public serait dispensé sur une base annuelle.

Point 5

Oui, il est à mon sens souhaitable d'établir un standard dans l'enseignement du droit international public, une sorte de programme minimum qui comprendrait : les sujets du droit international, les sources du droit international, la responsabilité internationale des Etats et le règlement pacifique des différends internationaux. La prolifération des organisations internationales — universelles et régionales — ne doit pas non plus être perdue de vue. L'Organisation des Nations Unies et ses résolutions devraient ainsi faire l'objet d'une étude à travers aussi bien celle des "sujets" que celle des "sources" du droit international. Seul un enseignement d'une telle consistance peut en effet offrir les instruments de base nécessaires à la compréhension du fonctionnement juridique de la société internationale contemporaine. Il appartient ensuite aux Etats d'enrichir cet enseignement par des compléments en fonction de ce qui leur paraît nécessaire à une compréhension et acceptation meilleures du droit international.

Je me demande si l'on ne devrait pas chercher à réaliser davantage une *uniformisation* de l'enseignement du droit international à travers le monde, notamment par une uniformisation des manuels mis à la disposition des étudiants. L'avantage en est évident pour une diffusion universelle d'une culture de la paix par le droit et du développement par l'équité. A cet égard, on devrait s'inspirer de l'idée, lancée il y a dix ans par l'UNESCO à mon initiative, d'un Manuel de droit international auquel ont collaboré une soixantaine de spécialistes du Nord, du Sud, de l'Est et de l'Ouest. Cette "polyphonie" sans frontières a permis d'offrir aux étudiants du monde une vision globale et sans oeillères du droit international.

Les manuels habituels partent souvent en effet d'une approche nationale du droit international. Le manuel de l'UNESCO, pour sa part, repose sur un parti pris internationaliste : promouvoir une rencontre des esprits sur les notions de base, les concepts clés, les principes directeurs du droit international, par delà les frontières, les idéologies et les doctrines. Lieu de rencontre très largement ouvert sur la diversité du monde juridique, creuset de toutes les sensibilités juridiques de notre temps, ce manuel capte et focalise ainsi les "grandes formes de civilisation" et les "principaux systèmes juridiques du monde", pour reprendre la terminologie de l'article 9 du Statut de la Cour internationale de Justice.

Les sociétés savantes — "nationales" telle l'*American Society of International Law* ou la Société française pour le Droit international, ou "internationales" telle l'Association Africaine de Droit International — ont un grand rôle à jouer dans le développement et la promotion d'un standard d'enseignement. Dans ce contexte, il revient bien entendu une place particulière à l'Institut de Droit international qui pourrait proposer les grandes lignes de ce programme d'enseignement minimum. Il appartiendrait ensuite aux diverses autres sociétés savantes de donner forme à celui-ci. L'exigence de représentation de tous les systèmes juridiques commanderait toutefois l'établissement d'une commission aux travaux de laquelle seraient également associés des internationalistes de pays ne disposant pas de société savante. Certaines agences spécialisées des Nations Unies (l'UNESCO par exemple) pourraient prendre l'initiative d'établir une telle commission dont les propositions seront ensuite canalisées vers les institutions nationales concernées.

Point 6

Pour renforcer l'enseignement et la dissémination du droit international public durant la décennie actuelle, l'Institut devrait recommander :

1. l'intégration obligatoire dudit enseignement dans le *curriculum* des facultés de droit ;
2. l'introduction de l'enseignement des principes généraux de fonctionnement de la société internationale dans le *curriculum* des collèges (secondary schools) et lycées (high schools) ;
3. l'organisation de séminaires d'initiation au droit international à l'intention de certains corps de métiers (magistrature, presse, corps enseignant, etc.) ;
4. l'aide à la création de sociétés nationales de droit international et de comités nationaux pour les Nations Unies ;
5. des moyens destinés à favoriser une plus grande participation des internationalistes des pays économiquement défavorisés aux rencontres des sociétés savantes existantes ou à créer ;
6. la facilitation de l'accès aux "CDroms" ou de l'accès direct ("on-line access") aux banques de données informatisées existant dans le domaine du droit international ;
7. l'aide à un meilleur accès à la littérature juridique internationale (ouvrages et périodiques) ;
8. ou encore la mise à disposition et la distribution *effective* de kits de droit international public comprenant par exemple la Charte des Nations Unies, les principales résolutions du Conseil de Sécurité et

de l'Assemblée Générale, des extraits pertinents (*dictum, orbiter dictum*) d'arrêts des deux Cours et de sentences arbitrales, certaines résolutions de l'Institut de Droit international, les textes ou extraits de quelques traités importants, ou encore un aide-mémoire sur le mode de saisine de certains organes internationaux.

Point 7

J'aimerais ici attirer l'attention de notre Commission sur un aspect important de la question de l'enseignement du droit international public apparemment occulté par ce questionnaire et sur lequel j'ai pourtant déjà eu l'occasion de débattre longuement avec vous. Il s'agit d'un problème qui apparaît en filigrane de mes réponses aux points 1 et 6 du questionnaire mais sur lequel je ne saurais trop insister.

Notre Commission devrait en effet accorder une attention toute particulière à la question de l'enseignement du droit international public dans les pays en voie de développement. Ces pays ont dans la mesure de leurs faibles moyens déjà consenti de gros efforts en matière de formation de spécialistes en droit international tant pour les besoins de leurs universités que pour ceux de leurs services diplomatiques. Ces efforts doivent être poursuivis et méritent d'être soutenus par des moyens à définir.

Un des problèmes chroniques qui caractérisent ces pays est leur extrême pauvreté en documentation relative au droit international. Ce problème affecte bien entendu l'enseignement de cette matière dans la mesure ou son efficacité est largement tributaire de la disponibilité des outils pédagogiques indispensables que sont une littérature juridique de base et certains documents fondamentaux tels que la Charte des Nations Unies ou d'autres instruments juridiques conventionnels ou non.

Or, force est de constater qu'un grand nombre de pays sont dans l'incapacité matérielle de doter leurs universités d'une documentation de base en droit international, sans parler de l'actualisation périodique de celle-ci. Le problème affecte d'ailleurs non seulement l'enseignement du droit international mais également sa pratique dans la mesure où un grand nombre de ministères des affaires étrangères ne disposent pas non plus de cette documentation minimale. Notre Commission devrait par conséquent réfléchir aux moyens propres à renforcer le potentiel pédagogique de ces pays et àassurer l'information continue — voire la formation continue — de leurs praticiens du droit international.

Les observations et suggestions ci-dessus mentionnées ne sont bien entendu pas définitives ; il ne s'agit là que d'idées générales dont je vous laisse juge de l'intérêt pour la rédaction de votre rapport préliminaire.

Mohammed Bedjaoui

Réponse de M. Henry Schermers

4 August 1995

Dear Colleague,

Thank you for your letter of 21 July with reactions to the questionnaire for Commission N° 10 of the *Institut de Droit international*. To widen the discussion I would like to add the following item.

Over the last decades mobility of students has enormously increased. We may expect that during the next century this increase will continue. Generally speaking mobility of students is good for their education and for mutual understanding. This leads to the question whether it is necessary to teach international law in detail at every university. Can we limit ourselves to a general introduction for all students which can remain rather basic and concentrate more thorough teaching in the larger universities who are able and willing to do so ?

Under all sorts of exchange agreements Leiden University takes in about 200 foreign law students a year. The vast majority of them is not really interested in Dutch law. They take the more general subjects such as European Community law, Human Rights, private international law, and public international law. In order to be accessible for foreign students most Dutch universities teach their international law classes in English. Would it be advisable to educate those students who want to specialize in public international law in only a few universities ?

One advantage of such concentration would be that the large student body would make it possible to teach specialized seminars on specific international legal issues. Furthermore, the mutual contacts between students from different countries interested in the same field of law would benefit education.

I hope that it will be possible to devote some time to this possibility during our discussion in Lisbon. I am looking forward to meeting you there.

With my best wishes,

Yours sincerely,

Henry G. Schermers

Text on the subject published by Mr Tieya Wang

Teaching and Research of International Law in Present Day China

Law and legal education in China were completely disrupted during the chaotic years of the "Cultural Revolution" (1966-1976). International law was by no means immune from this general upheaval. Courses on international law in universities and colleges were cancelled and faculty members were summarily dismissed and, in many instances, sent to the countryside to perform manual labour. During the entire decade of the Cultural Revolution, there was no study of international law to speak of. It was not until the fall of the Gang of Four in 1976 that legal education began to be revived.

In the field of international law, 1979 stands out as a landmark year. In that year, instruction and research in international law were restored in universities and colleges ; preparations to found a national association devoted to the study of international law were finalized ; plans were made for the publication of a journal of international law ; and work was begun on the compilation of a new textbook of international law.

After the smashing of the reactionary rule of the Gang of Four, departments of law reappeared one by one at universities and colleges across the country. There are now twenty-two law departments and four law colleges in operation and others are being established. Each of these departments and colleges has its own international law faculty and curriculum. There is a plan to establish a new law university, with an international law department, to train teachers and high level personnel. The most significant development is the establishment for the first time of an international law section in the Department of Law at Beijing University.

In Chinese universities, departments or faculties are administrative, while sections or specialities are pedagogical. Each section has its own particular curriculum and students. At Beijing University, there are three sections in the Department of Law. The largest is the section of general law, which enrolls about 150 students each year. Next largest is the economic law section with a quota of fifty to eighty students. The smallest section is that of international law, which accepts between twenty and thirty students. All students are required to study for four years before graduating.

The purpose of the international law section is to provide teachers and research workers for the law departments and colleges and to train international law personnel for the governmental units involved in the application of international law. These governmental units include the

Ministry of Foreign Affairs, the Ministry of Foreign Economic Relations and Trade, and the Ministry of Justice.

Students in the international law section are required to take certain core courses in their discipline as well as foreign language (primarily English) instruction. In our opinion, international law is a branch both of law and of international relations. Therefore, students are required to study not only law but also international relations and economics. This broadly interdisciplinary program is designed to insure that students will satisfactorily meet the needs of the governmental units or university faculties that employ them after graduation.

Since 1979, the international law section of the Department of Law at Beijing University has enrolled three classes that total ninety students. The first class graduated in the summer of 1983. Wuhan University and Jilin University have recently established international law sections in their law departments, but each has its own specialization. The former will emphasize international trade law, while the latter will emphasize private international law.

The Department of Law at Beijing University also offers graduate level programs in international law. Before the Cultural Revolution, there were graduate students specializing in this field, but they were very few in number. In 1978, an experimental graduate program in international law was instituted, and in the following year it was established on a permanent basis. To date, there have been more than twenty post-graduate students ; an average of five students enroll each year. After studying for three years and submitting a dissertation, these students receive a masters degree. They will then become teachers or researchers in universities or colleges, or work for the government. In 1981, for example, one graduate was assigned to the Ministry of Foreign Affairs ; another holds a college teaching post, working under the direction of the Ministry of Justice. Several graduate students have been sent abroad for further study. Four students are currently enrolled in a graduate program at the Dalhousie University Law School in Canada ; of these, two have been awarded LL.M. degrees. Three others are studying in the United States. One has been awarded the LL.M. degree at the Columbia University School of Law and is now working toward the JSD degree at the Yale Law School. Graduate students have also been sent to Belgium, Japan and other countries. The Department of Law at Beijing University is planning to institute a doctoral program in international law in 1983.

The establishment of the Chinese Society of International Law (the "Society") is one of the most significant events in the development of international law in China. It is the first such organization ever established in China. Its guiding purpose is to unite all international lawyers in the

country to further the study of international law. Its membership already exceeds 250, and includes professors, researchers in international law, governmental officials and practitioners concerned with both public and private international law.

During the last three years, the Society has been very active. Several distinguished foreign international lawyers have spoken to the members of the Society in both formal and informal settings. The Society has been host to Professor Macdonald of Canada, Professor Yokota and Judge Oda of Japan, Professors Henkin and Schachter of Columbia University and Mr. Cohen, formerly of the Harvard Law School, Professor Bin Cheng of London, Dr. Scott of the United Nations Secretariat, and the Honorable Mark MacGuigan, then the Minister of External Affairs of Canada.

At its inaugural meeting, the Society decided to publish an academic journal of international law to be co-edited by Professors Chen Tiqiang and Wang Tieya. With the encouragement and support of both Chinese and foreign colleagues, the Society has successfully begun publication of the *Chinese Yearbook of International Law*. This journal is also the first of its kind in the history of international law in China. In the *Yearbook*, we try to make known the achievements of both old and young Chinese scholars in the field of international law. The *Yearbook* includes articles, comments and notes, special features, reports on major international events or activities, book reviews and documentary materials. Contributors are free to express their views and opinions, which do not necessarily represent the point of view of either the Society or the Chinese government. Currently, the *Yearbook* also has an English table of contents. For the convenience of foreign readers, an English edition will be prepared in 1983.

To date, the Society has convened three discussion meetings in which a wide range of Chinese university professors and international specialists have participated. The first two conferences, convened in Beijing, emphasized the concern within the Chinese legal community for the issues surrounding the use of the oceans. At the first meeting, discussion focussed on recent Chinese legislative developments in the area of maritime law, while the second meeting concentrated on the Draft Convention of the Law of the Sea adopted by the Third United Nations Conference on the Law of the Sea (the "UNCLOS III"). The third meeting, held in Shanghai, focussed on various legal problems involved in international economic relations. China has opened her doors to the outside world and her economic relations with other countries will certainly become more frequent in the future. The internationalization of the Chinese economy poses many legal questions that require study and that arouse much interest and attention within the Chinese international legal community. Specifically,

there has been a lively debate among Chinese legal scholars on the nature, scope and practical function of international economic law.

During the Cultural Revolution, the Chinese international legal community was almost completely isolated from relations with other countries. Chinese international lawyers had no chance to communicate with their colleagues abroad. Now, conditions are changing. In the last few years, the opportunity for mutual exchange with foreign lawyers has grown. In addition to the efforts of the Society described above, invitations have also been extended to foreign international lawyers by academic institutions, such as the Law Department of Beijing University, and the Institute of Law of the Chinese Academy of Social Sciences. Chinese international lawyers have had the opportunity to visit foreign countries. For instance, Professors Chan Tiqiang, Rui Mu and Wang Tieya of Beijing University, Han Depei of Wuhan University, and Madame Shen Yu of the Institute of Law of the Chinese Academy of Social Sciences have visited the United States, Canada, England, France and Switzerland.

The departments of law at Chinese universities, at one time closed to foreigners, have now been opened. For example, several American lawyers have recently given courses to law students at different Chinese universities, and some foreign law students have been permitted to attend courses, including courses on international law.

Progress is also being made in increasing the availability of Chinese publications on international law. A new printing of the late Professor Zhou Gengsheng's monumental work, *International Law*, has just been completed. Following the promulgation of the new Chinese Nationality Law, a number of studies were published, including one entitled *A Comparative Study of Nationality Laws* by Professor Li Haopei. A new treatise by Yao Zhuang *et al.*, *Principles of International Private Laws* has also been published. Several other works are currently at press. Special mention should be made of a new Chinese textbook on international law, accompanied by a source materials book. This is the first of its kind in new China. It is the product of a collective effort and is in the form of a collection of essays. In terms of content, it is compiled as a text-book and is intended to be a primary reference source for international law students at the university level. Naturally, we do not claim that this textbook is a fully mature work. The authors of various chapters have their own opinions and the textbook as a whole is not representative of any particular point of view. It should be specifically emphasized that nothing in the book necessarily represents the views, attitudes or positions of the Chinese government. Rather, the purpose of the work is both to stimulate open discussion of international legal issues and to encourage publication of more works in this field. There is also a Chinese encyclopaedia being compiled and law will be the topic of one of its

volumes. Professors Chen Tiqiang and Wang Tieya are the editors of a chapter on international law that will appear in this volume. The encyclopaedia should be completed this year.

International law papers and articles are appearing with more frequency in Chinese academic journals. They can be found both in professional legal journals and in those published by universities and colleges. Three professional journals often contain articles on international law : *Legal Studies*, published by the Institute of Law of the Chinese Academy of Social Sciences ; the *Law Journal*, published by the Beijing Bar Association ; and *Democracy and Law*, published by the Institute of Law of Shanghai.

For the most part, papers and articles written by Chinese international lawyers have to do with issues that particularly affect China. However, Chinese scholars are now turning their attention increasingly to problems of a more general nature. At the inaugural meeting of the Chinese Society of International Law in 1980, the author submitted a report outlining current trends in international law, indicating how recent developments in international relations reflect parallel advances in international law. The main topics discussed in that report are as follows :

1. The establishment of the People's Republic of China and the emergence of the Third World ;
2. The expansion of international organizations, both global and regional ;
3. The impact of science and technology on the development of international law ; and
4. Changes in the international economic order.

It may be expected that the study of international law in China will develop along the lines set forth above.

From the foregoing, it can be seen that the study of international law has undergone a rebirth in present day China, and many new things are astir. We consider, however, that we are just beginning. We are faced with many problems and difficulties. There is a lack of qualified Chinese international lawyers and university and college teachers. Research on many important topics has yet to be undertaken. There has always been a serious shortage of books and reference materials. The reactionary cultural policy of the Gang of Four made things even worse. Publication of books and materials was halted for almost ten years, as was the import of foreign books and materials. While it is true that conditions have improved in the last decade, formidable difficulties still remain. Chinese international lawyers must make strenuous efforts before these problems can be solved.

Under the present open door policy, significant progress has been made in developing and internationalizing the study of international law in China. Barring external political disruptions, this progress will certainly continue. To be sure, this discipline needs international cooperation and exchange. There must be active intercourse between scholars of different countries and extensive exchange of books and materials. In recent years, international lawyers in some countries have given assistance to the Chinese international legal community. It is hoped that cooperation and friendship between Chinese international lawyers and their colleagues abroad will be not only strengthened but also expanded.

Tieya Wang

V. Draft Resolution of 1995

The Institute of International Law,

I

Taking into account :

1. General Assembly Resolution 176 (II) of 21 November 1946 on the teaching of international law :

2. General Assembly Resolution A/36/633 of 12 November 1981 on the "United Nations Program of Assistance in the Teaching, Study, Dissemination and Wide Appreciation of International Law" ;

3. General Assembly Resolution 44/23 of 17 November 1989 designating the 1990s as the Decade of International law ;

4. UNESCO Resolution A/CONF. 157 (PC/42/Add. 6, 1993 on *The World Plan of action on Education for Human Rights and Democracy ;*

5. General Assembly Resolution 49/184 of 23 December 1994 proclaiming the ten year period beginning 1 January 1995 to be the United Nations Decade for Human Rights Education and the Report of the Secretary General, Document A/491, annex ;

6. The Doha Declaration on Priorities for Progressive Development of International Law in the United Nations Decade of International Law to meet the Challenges of the 21st Century, 1994 ; and,

7. *The United Nations Congress on Public International Law*, 1995.

II

1. *Noting* that the international community is moving to a more dynamic, more open and complex system in which non-state actors are increasing in importance and that international and national laws are becoming inextricably linked ;

2. *Observing* that the new model of international relations reflects a complex network at States, intergovernmental organizations, international non-governmental organizations, transnational corporations and industry associations, national and sub-national nongovernmental organizations,

transnational expert communities, and *ad hoc* associations that are intricately connected and that the development of this network has important implications for traditional doctrines of State sovereignty and international public order ;

3. *Aware* of the expanding role of international organizations and structures, including the trends to integration, and the importance of institutional processes in facilitating cooperation between States and the development of effective means of international administration ;

4. *Welcoming* the activity that has taken place in the field of international law during the first seven years of the United Nations Decade on International Law in pursuance of the goals set out in General Assembly Resolution 44/23 ;

5. *Welcoming* the important contributions of the Asian African Legal Consultative Committee and the symposium hosted by the Government of China on Developing Countries and International Law in 1992 ;

6. *Emphasizing* in particular that international law has become more specialized and varied ; that it increasingly affects the content of municipal law, even those areas of municipal law traditionally regarded as domestic, and that a knowledge of international law is now necessary for the effective discharge of a wide range of professional responsibilities ;

7. *Reaffirming* its Resolution of 12 September 1979 on the teaching of international law ;

8. *Desiring* to contribute to global efforts to strengthen the teaching, study, dissemination and wider appreciation of international law within the framework of the United Nations Decade on International Law.

III

Recommends that :

1. Every recognized school and faculty of law offer a General (foundation) Course on international law. The purpose of the General Course is to familiarize students with the fundamental concepts of international law and to provide a foundation on which more specialized information can be acquired at later stages of the educational process.

2. No student be allowed to graduate from recognized institutions of legal education or enter the practice of law without having had a General Course on international law. In particular, successful completion of the General Course should be a requirement for the assumption of judicial duties in courts, prosecutors' offices, foreign offices, ministries of justice, and departments of government dealing with external affairs.

3. The General Course include the following topics :

(i) The nature and function of international law.
(ii) The sources of international law.
(iii) The general principles of private international law.
(iv) The relationship between international law and national law.
(v) The law of unification, integration, and harmonization.
(vi) Subjects of international law.
(vii) The regulation of land, sea, air, and space.
(viii) Jurisdiction and immunities ; nationality ; aliens ; refugees.
(ix) The international law of human rights.
(x) State responsibility.
(xi) The peaceful settlement of disputes.
(xii) International law and the use of force. The United Nations system of collective security.

4. The General Course be offered for a minimum of two hours per week throughout the regular Academic Session ; alternatively however, the General Course may be offered for two hours per week throughout half the regular Academic Session.

5. In addition to the General Course, recognized institutions of legal education should offer a range of specialized courses and seminars aimed at supplementing the General Course. Generally speaking, specialized courses should not be available until the student or students concerned have successfully completed the General Course. A correlation between the General Course and more specialized courses should be established on a flexible basis.

6. The following subjects be accorded special attention for study and research at advanced levels of instruction :
(i) The law and practice of the United Nations, its principles, purposes and practices.
(ii) The international law of development
(iii) International environmental law
(iv) International economic law (international business transactions)
(v) The use and regulation of natural resources
(vi) The international law of disarmament.

7. Broad principles of international law be taught in secondary schools, high schools, colleges and universities outside as well as inside the traditional faculties of law with a view to raising public consciousness of the importance of international law and public awareness of its overarching principles.

8. The Institute cooperate with non-governmental organizations, regional and local authorities, teachers' associations, and official responsible for education with a view to preparing audio-visual materials for high schools,

colleges, universities and post-secondary institutions, training programmes for the legal profession, media, professionals, journalists, and the military.

IV.

Recommends in particular that :

1. Members and Associates increase their efforts to explain the nature and value of international law to as wide an audience as possible.

2. Members and Associates assist in promoting the professional needs of teachers of international law, especially younger teachers, with a view of ensuring continued improvement in the standard of teaching as well as the quality of research in recognized institutions of learning.

3. Special emphasis be given to the establishment of academic and professional institutions devoted to international law in countries where such institutions do not exist and where there is need for greater public education and understanding of international law.

4. Relevant materials on the sources of international law be made more readily available to officials, students, teachers, researchers, judges, and practitioners.

5. In view of the vast quantities of information available to international lawyers and the variety of electronic methods of seeking information, international lawyers, especially in developing countries, continue to assess the possibilities created by the new information age.

6. The United Nations family of organizations, regional organizations, and States continue their efforts to organize seminars, symposia, training programmes, lectures and meetings, and undertake studies on various aspects of international law.

7. Students of international law, professors, judges, lawyers, and personnel from Ministries of Foreign Affairs, Ministries of Justice, and other Ministries, dealing with external affairs, should be given scholarships, short-term as well as longer term in order to attend programmes in international law in various universities. Refresher courses be offered on a regular compulsory basis.

V

Action plan

1. *Emphasizing* the need for intensive efforts to develop more effective strategies for strengthening the teaching, research, and dissemination of information about international law, the Institute calls for a Plan of action by international, regional, national, and local authorities in the field of

international law for the invigoration and expansion of their capacities and programmes.

2. *Calls on* national associations of international law to draw up plans of action to strengthen teaching, research, and dissemination of information about the role and content of international law with a view to enabling the Institute to develop a world-wide profile of the place of international law in the educational processes of national societies. Each national plan should contain an assessment of needs, strategies and programmes for the enhancement of education in international law at the level of secondary schools, colleges and universities, professional schools, and institutions for the training of public officials. National associations of international law should periodically review and revise the implementation of their action plans.

3. *Decides*, to initiate studies and produce model syllabi which will suggest acceptable divisions between topics considered to be essential, the very core of modern international law, and topics which may be left open as specialized courses on an optional basis ; and to produce model syllabi for secondary as well as post-secondary institutions.

4. *Invites* the United Nations Institute of Training and Research to cooperate with the Institute in promoting and exchanging information on the development of national plans of action to strengthen the development of international law on a world-wide basis.

5. *Decides* to create a technical unit within the framework of the Institute to work with international organizations and national societies of international law to realize the goals of this Resolution.

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VI. Comments on the Draft Resolution of 1995

A. Comments by Membres and Associate Members of the Institute

B. Comments by persons not part of the Institute

A. Replies by Members and Associate Members of the Institute

Comments by Sir Robert Jennings

18 October 1996

Dear Ron,

I am grateful for the early copy of the draft resolution. I think it is admirable and congratulate you, having some idea of the enormous amount of work you have devoted to this very important subject. I am especially delighted that we put so much emphasis on the importance of providing a general, and preferably compulsory, course in international law. It is ludicrous to produce people with a specialized 'knowledge' of modish topics like human rights or the environment, who have nevertheless never mastered the law of treaties, or state responsibility.

My only doubt about the actual draft concerns the phrase 'fundamental concepts' in III, 1. There are some of the 'general courses' of the Hague Academy which have reduced the entire system of international law to 4 or 5 'fundamental concepts' set at a high level of abstraction, and themselves controversial. This may be fine for graduates. It is, I think, not what we want to suggest for our General Course. For this reason I would prefer to speak of the 'basic elements'. But I do not press this because there is also the unfortunate common misunderstanding of 'elements' as meaning something easy ! And your list of subjects makes all clear, I think.

I would like, however, to comment on III 8 ; the paragraph asking the Institute to "cooperate with non-governmental organizations, regional and local authorities, teachers' associations, ... etc". Of course I applaud the sentiment whole-heartedly. But can we realistically imagine the Institute as such cooperating with anybody who is not a Member of at least an Associate ? There is absolutely no machinery for doing so ; and I doubt whether our venerable Bureau would have the will to bring about any such dialogue.

As section II of the draft Report points out, there have in the last decade or so, been quite fundamental changes in the international scene ;

changes which put into question many of the basic assumptions of a State-centric international law. To use the language of the Report, "non-State actors" are increasing in importance. The communications revolution has created great power in many non-State actors ; these include pressure groups, the media generally, and other more or less benign organizations ; but they also include international terrorists, international actors in economic crimes, many of a novel kind, the drug trade, the laundering of hot money and the rest.

These new international problems of the greatest possible importance are being discussed constantly in the media, in the universities and academies, by economists, by diplomats, by sociologists, by philosophers, by historians and by students of international relations and of politics. The significance of these changes has not gone un-remarked by our Confrères (see for example Professor Georges Abi-Saab his essay on "The changing world order and the international legal order : the structural evolution of international law beyond the State-centric model" ; and Ambassador Owada in his remarkable address to the United Nations conference on international law in New York in the summer of 1994). The sad fact is, however, that in all the intense discussion of these developments, whether in the media or in the faculties other than law faculties in the universities, international law will most likely hardly be mentioned, if indeed it be mentioned at all. Most of the intellectuals and leaders in ideas in most countries are not even conscious that there is an actual working system of international law.

For this general and most damaging ignorance I believe that international lawyers have largely only themselves to blame. We do not involve these other kinds of scholars in our problems. We have by and large also failed to notice that our own subject of international law has become an interdisciplinary subject. How can one study the legal problems — and they are very great — of the control of the new means of instant communication, of the use and abuse of Internet, of hacking into computer systems and the rest, without help and advice from electronic engineers ? It is, one might think, astonishing that there is no commission of the Institute created to study the legal problems of the electronic revolution in instant communication. But what use would be a commission of lawyers unless they were required to work along with technicians ? And how could we sensibly discuss the eventual report unless the technicians were present and permitted to take part ?

The reason why I raise these problems in connection with the teaching of international law is that intellectual cooperation between different disciplines is a two-way traffic. If we could find more ways of using scholars from other disciplines in our own work, these scholars would probably at the same time themselves become interested and involved

in international law, would get some idea of its nature, and would probably acquire a respect for it. We might indeed begin by trying to talk more often to members of the other branches of the legal profession. The Institute is rightly proud of its history, in its maintenance of standards, and in what it has accomplished in the past. But it is the fact that even most lawyers today have never heard of it. Small wonder when, even though it is mainly concerned with proposals for changes in, and development of, existing international law, the Institute invariably sets about this task on the assumption that a commission composed only of international lawyers can do this, without resort to other disciplines intimately concerned with the law-making policies involved.

If only the Institute of International Law could take steps —even quite modest steps — to involve other disciplines in our exercises, this would not only provide an often essential ingredient of what we are trying to do, but would greatly spread the knowledge of international law and respect for it and interest in it, amongst important groups of decision makers and of intellectual leaders in general. That would greatly strengthen our attempts to get the nature and elements of the international legal system taught more generally. It seems apposite to recall again a favourite aphorism of mine taken from Frederick William Maitland, one of the very greatest of legal historians that 'taught law is tough law'. But international law that generally speaking tends to be discussed seriously only by international lawyers amongst themselves is *not* "taught" law.

Sir Robert Jennings

Comments by Mr E. Jayme

28 October 1996

Dear Professor Macdonald,

I thank you very much for your letter of October 12, 1996 and your draft resolution which reflects perfectly our discussion at Lisbon and before.

Since it might seem unusual to a reader that public and private international law should be taught together in a General Course, I would like to add some short considerations as to this point of the draft.

First of all, I would like to recall that, at present, the main source, in large parts of the world, for conflicts rules (including jurisdiction and choice of law) are international conventions. This development is enhanced

by the necessities of integration within common markets (European Union, Mercosur, Nafta). In addition, the former socialist countries and its successors have concluded bilateral treaties on conflicts law. Private international law conventions follow, with regard to their conclusion, interpretation and application, the general principles which have been elaborated in the field of public international law.

Furthermore we may note a certain erosion of the formerly clear cut distinction between the two branches of international law. Matters of "private" concern are, within the sphere of human rights, of vital importance for public international law. On the other hand, conventions on human rights have become, in private international law, a part of public policy, and have, thus, had an impact on the choice of connecting factors as well as for the revival of party autonomy in conflict of laws.

To teach both subjects in one course — as it is already done in some countries such as Italy — has the advantage of maintaining an international standpoint for studying private international law.

Sincerely yours,

Prof. Dr. Dr.h.c. Erik Jayme

Comments of Mr Henry G. Schermers

28 October 1996

Dear Professor Macdonald,

Thank you for the Draft Resolution on the teaching of international law. On the whole, I think that the Resolution offers an acceptable point of departure. I have only a few suggestions :

Would it not be appropriate to add to the considerations on page 2 that we are aware of the universalisation of the issues which law must cover (trade, environment, industry, communication, etc.). I think that the most important reason for urging a stronger position of international law is that the world no longer is divided in independent States. Virtually all important issues are trans-frontier. Somehow, this should be reflected in our considerations.

I have some doubt whether the list under 3 on page 4 should not stop at (x). Peaceful settlement of disputes is not special for international law. All disputes should be settled peacefully. If there are any specific rules to be taught to law students, they should be the principles applicable to all dispute settlements. The specific rules for settlement of international

legal problems are not of practical importance for the vast majority of lawyers.

The same goes for (xii). The use of force under international law is an issue which only very few lawyers will ever meet in their practice. I would rather shift that to the optional field. We have to take account of the fact that university *curricula* are usually quite full. By asking too much we risk that we will get nothing at all.

The list under 6 on page 5 should be extended. In my opinion international humanitarian law, international institutional law and regional integration should at least be added.

Item 7 on page 5 sounds interesting, but I find it difficult to prescribe that secondary schools should teach a course on international law if they do not have any other law in their *curriculum*. Many schools on the European continent do not teach any law courses. It may then be advisable to teach principles of law, including international law but it may go too far to limit the law teaching to international law.

At the end of 7, on page 7, I would rather delete the word 'compulsory'. Again, asking too much may alienate the reader.

On page 8, under 3 we suggest to initiate studies and to produce model syllabi. Would it not belong to the task of Commission 10 to add some model syllabus to the resolution ?

I am looking forward to the comment of the other members of the Commission and I wish you success in the further preparation.

Yours sincerely,

Henry G. Schermers

Comments of Mr Luzius Wildhaber

29 October 1996

Dear Ronald,

Since we did not find time to discuss your draft which you sent to me on October 16, 1996, I am sending you a letter with a few remarks. I might take up your suggestion to formulate one or two pages which could then be published in the *Annuaire*, but at present I feel it is more important that you should have my views.

At page 2, II. 2, I find the wording at the end of paragraph 2 a little bit unfortunate. I do not think that it is possible to speak of a

traditional "doctrine" of "international public order". Why not say "notions" ?

At page 6, IV. 1 and 2, I wonder whether we should not actually set up some sort of an institute instrumentality of "good offices", which would offer the help of members and associates, if asked or approached in any way.

At page 8, V. 5, I do not quite understand what is meant with the term of a "technical unit". Would that be the Secretariat ? Would it be our Commission N° 10 ? Would it be something else, requiring special staff and financing ? I believe we should here be clearer as to what we mean.

For the moment this is all. With all best wishes and warmest regards, as ever,

Luzius Wildhaber

Comments of Mr John Dugard

29 October 1996

Dear Ronald,

Thank you for your copy of the Draft Resolutions for the Strasbourg meeting. I attach a short comment on the subject from the perspective of Africa. I have two comments on your draft.

First, I think that the General Course (page 4) should include specific mention of international criminal law. Alternatively, it should be included in the list of subjects to be accorded special attention (page 5). I know that aspects of the subject are covered in jurisdiction and human rights. However, it is taught as a special topic on its own in many universities today (including Cambridge, where I teach it in the LLM programme). My preference is for the alternative, i.e., special attention at advanced level.

Second, on page 6 you refer to the need to make materials on international law available. Obviously this is a reference to library resources. However, I wonder whether it would not be wise to refer specifically to the need for university and professional law libraries to pay greater attention to their international law holdings.

I hope these suggestions are of some assistance.

Yours sincerely,

John Dugard

The Promotion of International Law in Africa by John Dugard

International law has played an important role in the decolonization of Africa and the maintenance of peace and stability in the continent. In most instances, however, the lawyers who have shaped the international order of Africa have been educated in Europe or North America.

In the years following the liberation of Africa international lawyers continued to receive their education abroad. The erstwhile colonial powers and other industrialised nations made this possible by generous study grants which made it possible for African international lawyers to study in the best universities in Europe and North America. This practice continues today but at a much lower level. The reduction in the number of scholarships for foreign study, the increase in university fees for foreign students in many Western countries, the depreciation of African currencies and deteriorating economic conditions have all contributed to this. At the same time it seems that some Western nations have withdrawn their interest in African education and now expect African universities to cater for their own needs.

Universities have mushroomed throughout Africa to provide the youth with the necessary skills for the development of the continent. The proliferation of universities, which has served to take education to the communities, has made it financially impossible for most countries to fund universities to the same extent that universities in the major industrialised nations are funded. This has had serious implications for the teaching of international law as a well equipped international law library is an enormous financial undertaking, which has been aggravated in recent years by the deterioration of the rates of exchange in many African countries. The failure of African universities to offer proper facilities for international law has in turn resulted in the emigration of many international lawyers to Europe and North America.

International lawyers play an important role in the settlement of disputes and the maintenance of peace. Africa cannot therefore afford to be without properly trained international lawyers. Yet, for the reasons outlined above, there is a serious shortage of international lawyers in Africa.

The needs of Africa in the field of the teaching of international law require urgent attention. First, there is a need for international law teachers who will be able to offer general and specialist courses not only on an elective basis to a few students but on a broader basis as a compulsory component of the legal curriculum. Secondly, there is a need for greatly improved library facilities to enable students to obtain a proper education and to enable the teaching staff to pursue research. In this respect it is essential that more research be conducted into the practice

of international law in Africa, both to highlight regional practice and to make it clear to students that international law is not a First World legal order. For this purpose universities should assume responsibility for the preparation of law reports, both of municipal courts and of international bodies, such as the African Commission of Human and Peoples Rights. Thirdly, opportunities should be created for more African students to study and attend conferences abroad, to overcome the problem of intellectual isolation. Fourthly, it is essential that the African Society of International and Comparative Law, which seeks to promote the study of international law, be expanded to play a more comprehensive role in Africa.

Many of the problems facing the teaching of international law in Africa can only be solved by the injection of substantial funds into advanced legal educational institutions. In the absence of such funds, there is still much that can be done by foreign governments, universities and associations. Scholarships for the study of international law in Europe and North America, staff and student exchanges, invitations to attend short study courses and conferences are obvious remedies. Generally, bodies like the Institute itself, the International Law Association and the American Society of International Law need to become more involved in the development of international law in Africa, possibly together with the African Society of International and Comparative Law. If this is not done there is a serious danger that Africa will become marginalized. This has serious implication for the future of the continent and, indeed the world.

Comments by Mr Shigeru Oda

8 November 1996

Dear Ronald,

First of all I must apologise to you for not having made any contribution to the Commission of which you are serving as Rapporteur. This failing on my part is for two reasons : firstly, I was last year hospitalized in Japan during the summer and therefore missed the Lisbon Session and, secondly, the Court spent nearly a whole year on the question of the nuclear weapons, leaving little time for anything else.

1. You have now drawn up the Draft Resolution, which you kindly set to me, and I congratulate you most sincerely on its completion.

2. I have some doubts. As the Institute itself has already made a resolution on the same subject nearly 20 years ago (1979) in Athens (where I was present), for what reasons is the Institute adopting the same title ? I am certainly aware of the recent quick developments in international law, and the increasing importance of the dissemination and

teaching of that subject ; I believe, therefore, that a new resolution, made twenty years after a previous one on the same subject, must incorporate a more practical Action Plan or more practical ideas than those presented in 1979 in the Oslo resolution.

3. As a minor point, I would like to mention that the international lawyers in Asia had gathered already in Singapore in 1962 (with the sponsorship of the Asia Foundation) to discuss the same matter — that is, the dissemination and teaching of international law in Asia when L. C. Green was Vice-Dean of the Law School of Singapore University. Since that time, I served once as Chairman of the Committee of that Asian group and published the following survey in Volume 9 (1965) of the *Japanese Annual of International Law*, "Research and Teaching of International Law in Japan".

4. Re the formalities or style of the Resolution :

(I) Part I of your Draft does not need to be itemized and could be condensed into one paragraph.

(i) General Assembly Resolution 176(II), GA resolution 36/633 and GA resolution 44/23 can be put in one sentence but, with regard to resolution 44/23, some explanation must be given to reflect the idea of the UN Decade of International Law, namely, that the encouragement of the teaching, study, dissemination and the wide appreciation of international law constituted one of the purposes of the UN Decade of International Law. Otherwise the meaning of the reference to this particular resolution is not clear. As regards the teaching of human rights, in particular, the UNESCO resolution and the GA resolution 49/184 may be placed together in one sentence.

(ii) I do not quite understand the reference to the Doha Declaration of 1994 because, if this Declaration of non-governmental organizations is to be mentioned, there must be other similar resolutions made by other *ad hoc* conferences.

(iii) I have difficulties in understanding why the UN Congress of Public International Law is mentioned, as there may be similar conferences, such as the ICJ's own 50th Anniversary Celebration Conference

(iv) All the items mentioned above could follow the introductory words "taking into account" without indicating any paragraph number.

(II) (a) Part II of the Draft may be combined with Part I, reading as follows : "Taking into account ... ; noting that ... ; observing that ... ; being aware of ... ;" etc. This Part may also be re-drafed

in such a way so as to combine paragraphs 1 and 2. I do not see much difference, as what is stated in paragraph 2 is, in principle, covered by paragraph 1 as the increasing importance of the role of non-state actors is at issue.

(b) Paragraph 3 of the Draft starting with the words "Aware of", should be amended to read "Being aware of".

(c) The reference to the AALCC in paragraph 5 seems to be a little irrelevant in this context, or is the AALCC mentioned here for having organized a symposium in China ? If that is the case, it should be mentioned clearly. If those activities are to be mentioned then we should not omit the work of the Hague Academy of International Law.

(d) In paragraph 4, the activity in the first seven years of the UN Decade of International Law should be specified in a more concrete manner ; was the UN Congress of Public International Law (1995), as mentioned in Part I, one of those activities ?

(e) Paragraphs 6, 7 and 8 do they contain anything different from the IDI's 1979 resolution ?

5. Re the substance of the Resolution

1. Part III, dealing with the substance of the resolution, should follow after the Preambular Part combining, as I suggested, Parts I and II. Part III (Recommends that), Part IV (Recommends, in particular, that) and Part V (Action Plan) could be rearranged.

2. In principle I agree with what you mention as the recommendation and decisions or as the action plan. However, I feel that this substantial part may well be divided depending on what category the intended recipient falls into :

(i) The decisions to be taken by the Institute itself are contained in Part III, paragraph 8, and Part V, paragraph 5.

(ii) The advice given to the Members and Associates of the Institute is contained in Part IV, paragraphs 1 and 2.

(iii) Appeals to the various associations or authorities in the field of international law are contained in Part V, paragraphs 1 and 2.

3. The obligatory teaching of international law is suggested in Part III, paragraphs 1-7, and I wonder if the specification, in paragraphs 3 and 6, of the content of the courses to be given is too detailed. The content should be left to the discretion of each school or institution teaching international law, otherwise the Institute may be accused of dictating the systematic structure of the courses of international law as it deems appropriate. The facilities to be

provided for the teaching of international law, as mentioned in Part IV, paragraphs 4, 5 and 7, are certainly to be highly recommended.

4. Part IV, paragraph 3, concerning the establishment of academic and professional institutions in the developing countries is very pertinent but it is not clear to whom this recommendation is addressed.

In conclusion, I should say that I am rather afraid that I may have misunderstood your request in that my answer possibly does not really meet your wishes. I feel that I have made some rather radical and outspoken comments, and I sincerely hope that you do not find me too critical when there is, in fact, much to admire in the draft resolution.

Yours sincerely,

Shigeru Oda

Reply of Mr R. P. Anand

22 November 1996

Thank you very much for your nice letter of November 4, 1996 and for sending me a copy of the draft resolution as approved in Lisbon in 1995.

I mostly agree with it. As regards your proposal on the content of the General Course, I feel that you should add the following :

i) International law in historical perspective ;

ii) Contribution of the Asian and African countries in the development of international law ; and

iii) International law in a multicultural world.

With these amendments I would be glad to accept your proposal to be included in the General Course.

I am requesting my colleague and good friend, Professor Rahmatullah Khan, to send you a brief note on the teaching of international law in India for publication in the *Annuaire*. Professor Khan has been writing on the subject quite frequently in recent times.

With kind personal regards,

Yours sincerely,

R. P. Anand

Comments by Mr J. Makarczyk

29 November 1996

Many modern Constitutions, especially but not exclusively in Europe, including constitutive acts of the new democracies, give international law primacy over the domestic legal system. This results from the well understood interests of States ; if one recalls the not so distant in time negation of international law or at least the opinions of its subsidiary character, the progress is indeed significant.

Still, the very countries which recognize the primacy of international law tolerate situations where one can become a law graduate and subsequently become a judge, a barrister or a government's legal adviser without any notion of international law. A situation may easily be conceived when lawyers responsible for drafting projects of national laws, including those closely connected with international obligations of States, would have no knowledge even of sources of such obligations. This is so because in many States international law is not a compulsory subject in the programs of legal training in universities.

It may be explained that this state of affairs, detrimental in the first instance to the State concerned, but also to its partners in international relations and the whole international community, results on the one hand from the traditionalism of those responsible for framing the higher education programs, on the other from the lack of coordination among various governmental agencies. National departments of justice, which should be instrumental in reaching appropriate decisions, have frequently only a very vague understanding of the importance of international law, and cannot be relied upon to redress the situation in the departments of education, which understand even less of it.

Be it as it may, the situation must be spedily changed, and the role of the Institute, as suggested in the Report prepared by Professor Macdonald, should be to exercise pressure on Governments to make the necessary changes in their teaching programs without further delay.

It may be useful at this point to make a reference to the Polish system of teaching international law, which for various reasons, some of them historical, may be considered as exemplary. One of these reasons was the importance of international law in the re-emergence of Poland as an independent State after the First World War, and in its difficult situation among the two mighty neighbours. It may be recalled that Poland was one of the main clients of the Permaanent Court of International Justice, had to conduct difficult negotiations with Germany and other countries, in short needed skilled and qualified internationalists during the whole of the inter-war period. This situation did not really change after

the Second World War, even if the country could not conduct independent foreign policy. Many international law professors survived the war — to mention but Ehrlich, Hubert and Berezowski, and created centers of teaching our discipline at three main universities — Warsaw, Cracow and Wroclaw. It should be recalled that the Polish school of international law was independent to an extent unthinkable in other communist States, and always rejected the so-called socialist international law as opposed to the general one. All this was the result of teaching and research conducted in the inter-war period, of a certain tradition and *esprit d'indépendance* known to those who, via teaching and framing the minds of the young were perhaps less prone to loose the values injected into them by their own teachers.

In short, in Polish universities the teaching of international law is compulsory for all law students. The training starts with the general course in the second year accompanied by weekly proseminars. In the third year those who select international law as subject of their masters thesis are obliged to follow a weekly seminar as well as a monographic course. It may be added that our discipline is also compulsory for students in some institutions of higher education other than universities, as for instance economic schools.

I am of the opinion that the anachronistic opposition in some countries to compulsory education of lawyers in international law must be met with energetic counteraction and that no other institution is better qualified to do so than ours.

Jerzy Makarczyk

Reply by Mr Santiago Torres Bernárdez

14 December 1996

...

Congratulations for your draft resolution. I have no problems with the text, including on the main points of substance singled out in your letter of 18 November. So far as the content of the compulsory course listed in paragraph 3, I have two suggestions only for your consideration.

First, perhaps it would be advisable to make a reference to "humanitarian law" by drafting point ix as follows : "The international law of human rights, including protection of victims of armed conflicts".

Second, it is not clear for me if you intend to cover the field of "State succession". Alternatively, the law of State succession could be

listed among the subjects to be accorded special attention of paragraph 6. The proposed Action Program seems to me well balanced.

Finally, I think that in part II between points 4 and 5 a paragraph should welcome the contribution of the International Law Commission and *ad hoc* bodies and conferences, including regional, to the codification and progressive development of international law since the forties. Also in the same part, paragraph 8 could be completed by adding, for example, something like : "including the study and dissemination of international law codification instruments and drafts as well as of judgements of the International Court of Justice and decisions of other international courts and tribunals".

Yours faithfully,

Santiago Torres Bernárdez

B. Comments by persons not affiliated to the Institute

Comments of Mr Donald Buckingham[4]

October 31, 1996

Dear Ronald,

I have read your proposal to the Institute of International Law with great interest. You have put forward a convincing case and one in which I strongly believe. I offer two types of comments. The first is of a general nature. The second, specific to paragraphs in the text you have prepared, are set out in the attached Appendix.

The document reads well and I offer only a few general comments. First, I strongly believe that the wider teaching of international law is essential for everyone in the twenty-first century to be an informal global citizen. Not only is it important for a wide range of professional responsibilities as you set out in point 6 in page 3, an understanding of international law has become of importance to the ordinary citizen. As telecommunication, commerce and environmental concerns, not to mention peace and security and human rights, take on a global dimension, which we see through CNN and other global mass media, citizens need an understanding of the international legal system. Such an understanding will, in my opinion, enhance compliance with international norms, because an informed citizenry will put added pressure on governments to compile with international obligations. All this is to say that you might consider a broader rationale for why the teaching of international to be a broader audience is essential.

My second comment is that you might consider an appendix of what materials are available now (there aren't many) to show that the project really is new and innovative. You might also stress that your project requires international lawyers from different countries to embark on a similar exercise of taking stock of what exists in their country and how those resources could be expanded. I would be delighted to provide you with the fruits of my research as to what materials are available in North America for high school instruction.

Yours sincerely,

Donald Buckingham

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4 Mr Buckingham belongs to the College of Law of the University of Saskatchewan, Canada.

Appendix

1. Section II, Para 2.

Should one mention that "individuals" too are increasing subject to the direct effects (rights and obligations) of international law ? Add "individuals" after "*ad hoc* associations".

2. Section II, Para 6.

Add (pursuant to the rationale stated in my letter to you on 31 October 1996) at the end after "responsibilities" the paras "and the role of being an informed global citizen".

3. Section III, Para 4.

Add "or more" in third line after "two".

4. Section III, Para 7.

In line two, delete first "o" in "outside" and delete "as well as inside the" because in my opinion the prior paragraphs cover the law school environment.

5. Section III, Para 8.

In line five, delete "medical professional, journalists" and replace simply with "the media". I think this is expressing the same idea more succinctly

6. Section IV, Para 4.

In line one, after the word "be" add "further developed and be". This addition acknowledges that at least some materials exist. Such a list could, as I suggest in my letter, be appended to your proposal.

7. Section IV, Para 5.

Delete end of sentence starting from "continue ..." and replace with "make that information available in electronic form delivered by [CD-Rom or via the Internet]. OR [electronic means]". This formulation better reflects current technology.

8. Section V, Para 2.

Add at the end of line six after "and" add the following "an inventory of existing materials and". This addition reflects the comment I raise concerning the need to list existing resources for teaching international law to a broader audience.

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Réponse de M. Pierre-Henri Imbert[5]

19 novembre 1996

Monsieur le Professeur,

D'emblée je puis dire que j'approuve l'esprit et la structure d'ensemble du document. Les points essentiels sont bien mis en valeur et les demandes particulières (chapitres IV et V) me paraissent raisonnables. Je suis donc conduit à ne faire que quelques remarques sur des aspects spécifiques.

1. Dès le chapitre II, vous indiquez à juste titre qu'il y a une imbrication de plus en plus étroite entre le droit international et le droit national (§ 1, p. 2) et que rares sont les matières "internes" qui échappent à une influence du droit international (§ 6, p. 3). Peut-être faudrait-il alors mieux souligner le paradoxe qui apparaît de plus en plus nettement entre cette internationalisation croissante et la diminution constante de la part accordée à l'enseignement du droit international. Si l'Institut insiste sur la nécessité d'un tel enseignement, ce n'est pas uniquement parce que le monde devient de plus en plus "international" mais parce que cet enseignement connaît depuis quelques années une véritable dégradation.

2. En ce qui concerne l'enseignement lui-même, je pense qu'il faudrait dès le début dire qu'il devrait s'adresser au public le plus large possible : le paragraphe 7, p. 5 pourrait être placé en tête du chapitre III. Des professions non strictement juridiques sont aussi mentionnées comme devant bénéficier d'un tel enseignement (professionnels des médias, journalistes, militaires). Mais cette indication n'apparaît qu'à la fin du chapitre III, dans un paragraphe relatif à la coopération entre l'Institut et d'autres institutions, ce qui est très insuffisant. Une autre catégorie de personnes est totalement absente de ce chapitre et n'est mentionnée, presque incidemment, que dans le paragraphe 2 du plan d'action. Je veux parler des fonctionnaires. Etant presque quotidiennement en contact avec des fonctionnaires nationaux, je puis dire qu'une formation internationale est pour eux une absolue nécessité. Ils peuvent, un jour, être appelés à participer à une réunion internationale et il sera alors trop tard pour découvrir ce qu'est une négociation internationale ou une organisation internationale. Même en restant dans leur pays ils seront nécessairement amenés à prendre des décisions ou à donner des avis qui auront des répercussions dans une enceinte internationale.

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5 M. Pierre-Henri Imbert est Directeur des Droits de l'Homme au Conseil de l'Europe, Strasbourg.

3. En ce qui concerne les facultés de droit, je suis fermement partisan d'un enseignement obligatoire du droit international, avec même une préférence pour une durée annuelle. Quant au contenu suggéré pour le cours général (chapitre III, para. 3), je me permettrai les remarques suivantes : la contenu du (v) ne paraît pas très clair ; le (ix) devrait suivre immédiatement le (vi) ; les questions de nationalité, étrangers et surtout réfugiés (viii) devraient être traitées à part. Je pense que les organisations internationales seront présentées dans le (vi) relatif aux sujets de droit international, ce qui est très insuffisant, d'autant plus qu'il n'est pas prévu de leur consacrer un cours spécialisé (para. 6, p. 5).

Cet enseignement spécifique du droit international est absolument indispensable. Toutefois je pense qu'il faudrait aussi souligner — comme l'a fait récemment la Société française pour le droit international — que le droit international ne devrait pas être isolé par les clivages habituels entre disciplines ou matières, mais bien au contraire "imbriqué" dans toute formation juridique.

4. Pour le plan d'action (chapitre V), l'Institut devrait au moins mentioner qu'il est bien conscient des difficultés particulières auxquelles se heurtent lesl pays du Sud et de l'ancien Est : pour les autorités de ces pays, l'enseignement du droit est rarement une priorité ... et le droit international vient généralement à la fin.

5. Enfin, sans pouvoir engager l'Organisation à laquelle j'appartiens, je crois pouvoir dire que le Conseil de l'Europe serait disposé à contribuer, dans la mesure de ses moyens, aux différentes formes de coopération qui sont envisagées.

En espérant que ces quelques remarques pourront vous être d'une quelconque utilité, je vous prie de recevoir, Monsieur le Professeur, l'expression de mes sentiments très respectueux.

Pierre-Henri Imbert

Comments from Mr E. K.M. Yakpo[6]

15 November 1996

The need to teach international law as a basic subject has never been more important than at present. In the last thirty years or so, there has been a tremendous growth of mechanisms that make States mutually

6 Mr E. K. M. Yakpo is General Secretary of the African Society of International and Comparative Law.

dependent on each other. The need to be clearer-sighted beyond seeing only one's own interests has therefore become even more urgent. Unfortunately however, the interdependence of States is only in material things and even though that may be important, there is the need to teach international law as a means of achieving an international social consciousness. The recommendations to the Institute of International Law on the teaching of international law are therefore welcome.

It is often said that there is only one international law for the international community. However, as the recommendations correctly point out, " ... the international community is moving to a more dynamic, more open and complex system ..." in which non-State actors are beginning to plan a more active role. This necessarily means that the various cultures of the international community would be expected to influence international law. Nevertheless, international law at present, has come to be dominated by Euro-American materials and ideas to the point where the subject is in danger of ceasing to be truly international.

The active contribution of Africa and Asia in the 1960 and 1970s to the development of international law have long stopped. In the case of Africa, economic difficulties are the major cause. So that legal materials are more scarce now than they have ever been. Law reports are behind by ten years, in some cases, many law libraries have teaching materials which have not been updated since the 1970s, and very little material on international law comes out of Africa itself. And yet, as pointed out in the document, international law has come to affect the content of municipal law to an extent where knowledge of international law is essential. Making international law a compulsory subject for all law students is an excellent way of disseminating international law. However, the United Nations and some of its agents have passed several resolutions on the teaching of international law and yet, as the Decade of International Law comes to an end, the aims of these resolutions have still not been fully realised.

For the compulsory teaching of international law to succeed, it would be necessary to take a practical look at the resources of law schools, especially in Africa, and to consider how these law schools might be assisted in teaching the subject. First, there must be an exchange of teaching materials, or rather a supply of materials from Europe and America to African law schools. Publishing companies must be persuaded to donate the previous editions of their law books to African law schools. Second, law teachers in Europe and America should be encouraged to take short-term teaching posts in Africa, paid for by their own universities. Third, international lawyers in Europe and America should show more willingness to participate in law seminars and conferences held in Africa. This would not only be a show of solidarity but would also enhance the "international" nature of the subject. Fourth, African international law teachers should be

given more opportunities to spend short periods at better endowed universities in order to collect teaching materials that they are unable to obtain in their own countries.

Modest efforts are being made in Africa to enhance the teaching of international law. The African Society of International and Comparative Law periodically distributes law textbooks to all African law schools. The Society also publishes the *African Journal of International and Comparative Law*, copies of which are distributed free of charge to two hundred African universities and law court libraries. The Society also holds the only law annual conference in Africa and has just held the eighth annual conference in Cairo. Recently, the Society and the University of Pretoria have joined to organise a continent-wide moot court competition in international law. The second moot court competition took place in Morocco in September this year, attracting fifty-two African universities. To that end the Society has donated the Judge Elias Trophy to be awarded each year to the best team.

It is encouraging to note that the recommendations have recognised the need of members and associates of the Institute of International Law, to become more active in promoting international law in their own countries. One would like to hope that these promotional activities would also be on the international level. The short-cimings of international law are clear to us all. The institutions which exist for the making of international law are rudimentary in character and there is no executive power to enforce the law. While the Security Council has become more active in enforcing international law, its powers to enforce the law are limited. Although the International Court of Justice is becoming more important, there is still no compulsory resort to it.

One of the important results of the teaching of international law is that it is likely to help to annex to its own sphere, important matters which continue to be reserved for "municipal jurisdiction" of the State. In a continent such as Africa, where civil strife is still common, an increase in the influence of international law would be welcome.

E.K.M. Yakpo

Reply by Mr Ramón Escovar-Salom[7]

10 December 1996

Dear Professor Macdonald,

Thank you for your letter of 6 November in which you attach a draft resolution concerning the Institute of International Law to be presented in Strasbourg in August 1997.

Now that the Sixth Committee has completed its work for the 51st session of the General Assembly, I would like to make the following suggestions to complete your draft resolution. First, in part I you might add the new resolutions (1996) on the UN Decade on International Law. Secondly, in part III, number 3 (General Course topics), you could include the following :

xiii) The establishment of the International Criminal Court.

xiv) The progressive development and codification of international law. The work of the ILC.

I commend your effort to promote a better understanding of International Law among students of this important subject.

Sincerely,

Ramón Escova-Salom

7 Mr Escovar-Salom is Embassador of Venezuela and Chairman of the Sixth Committee.

VII. Draft Resolution of 1997

I

Taking into account :

1. General Assembly Resolution 176 (II) of 21 November 1946 on the teaching of international law ; and General Assembly Resolution A/36/633 of 12 November 1981 on the "United Nations Program of Assistance in the Teaching, Study, Dissemination and Wide Appreciation of International Law" ;

2. General Assembly Resolution 44/23 of 17 November 1989 designating the 1990s as the Decade of International Law ;

3. UNESCO Resolution A/CONF. 157 (PC/42/Add. 6, 1993 on *The World Plan of action on Education for Human Rights and Democracy* ; and General Assembly Resolution 49/184 of 23 December 1994 proclaiming the ten year period beginning 1 January 1995 the United Nations Decade for Human Rights Education, and the Report of the Secretary General, Document A/49/261/Add 1, annex ;

4. The Doha Declaration on Priorities for Progressive Development of International Law in the United Nations Decade of International Law to meet the Challenges of the 21st Century, 1994 ; and,

5. *The United Nations Congress on Public International Law*, 1995.

II

1. *Noting* that the international community is moving to a more dynamic, more open and complex system in which non-State actors are increasing in importance and that international and national laws are becoming inextricably linked ;

2. *Observing* that the new model of international relations reflects a complex network of States, intergovernmental organizations, international non-governmental organizations, transnational corporations and industry associations, national and subnational non-governmental organizations, transnational expert communities, and *ad hoc* associations that are intricately connected and that the development of this network has important

implications for traditional notions of State sovereignty and international public order ;

3. *Being aware* of the expanding role of international organizations and structures, including the trends to integration, and the importance of institutional processes in facilitating cooperation between States and the development of effective means of international administration ;

4. *Welcoming* the activity that has taken place in the field of international law during the first seven years of the United Nations Decade on International Law in pursuance of the goals set out in General Assembly Resolution 44/23 ;

5. *Welcoming* the important contributions of the Hague Academy of International Law, the Asian African Legal Consultative Committee and the symposium hosted by the Government of China on Developing Countries and International Law in 1992 ;

6. *Emphasizing* in particular that international law has become more specialized and varied ; that it increasingly affects the content of municipal law, even those areas of municipal law traditionally regarded as domestic, and that a knowledge of international law is now necessary to discharge a wide range of professional responsibilities in particular and the responsibilities of informed global citizenship in general ;

7. *Reaffirming* its Resolution of 12 September 1979 on the teaching of international law ;

8. *Desiring* to contribute to global efforts to strengthen the teaching, study, dissemination, and wider appreciation of international law within the framework of the United Nations Decade on International Law.

III

Recommends that

1. Every recognized school and faculty of law offer a General (foundation) Course on international law. The purpose of the General Course is to familiarize students with the basic elements of international law and to provide a foundation on which more specialized information can be acquired at later stages of the educational process.

2. No student be allowed to graduate from recognized institutions of legal education or enter the practice of law without having had a General Course on international law. In particular, successful completion of the General Course should be a requirement for the assumption of judicial duties in courts, prosecutors' offices, foreign offices, ministries of justice, and departments of government dealing with external affairs.

3. The General Course include the following topics :

(i) The nature and function of international law.
(ii) The sources of international law.
(iii) The general principles of private international law.
(iv) The relationship between international law and national law
(v) The law of unification, integration, and harmonization.
(vi) Subjects of international law.
(vii) The regulation of land, sea, air, and space.
(viii) Jurisdiction and immunities ; nationality ; aliens ; refugees.
(ix) The international law of human rights.
(x) State responsibility.
(xi) The peaceful settlement of disputes.
(xii) International law and the use of force. The United Nations system of collective security.

4. The General Course be offered for a minimum of two hours per week throughout the regular Academic Session ; alternatively however, the General Course may be offered for two or more hours per week throughout half the regular Academic Session.

5. In addition to the General Course, recognized institutions of legal education should offer a range of specialized courses and seminars aimed at supplementing the General Course. Generally speaking, specialized courses should not be available until the student or students concerned have successfully completed the General Course. A correlation between the General Course and more specialized courses should be established on a flexible basis.

6. The following subjects be accorded special attention for study and research at advanced levels of instruction :

(i) The law and practice of the United Nations, its principles, purposes and practices.
(ii) International law of development.
(iii) International environmental law.
(iv) International economic law (international business transactions).
(v) International criminal law.
(vi) International humanitarian law.
(vii) The use and regulation of natural resources.
(viii) The international law of disarmament.
(ix) International institutional law.
(x) The international law of regional integration.

7. Broad principles of international law be taught in secondary schools, high schools, colleges and unviersities outside traditional faculties of law with a view to raising public consciousness of the importance of international law and public awareness of its overarching principles.

8. The Institute cooperate with non-governmental organizations, regional and local authorities, teachers' associations, and officials responsible for education with a view to preparing audio-visual materials for high schools, colleges, universities and post-secondary institutions, and for training programmes for the legal profession, the media, and the military.

IV

Recommends in particular that

1. Members and Associates increase their efforts to explain the nature and value of international law to as wide an audience as possible.

2. Members and Associates assist in promoting the professional needs of teachers of international law, especially younger teachers, with a view to ensuring continued improvement in the standard of teaching as well as the quality of research in recognized institutions of learning.

3. Special emphasis be given to the establishment of academic and professional institutions devoted to international law in countries where such institutions do not exist and where there is need for greater public education and understanding of international law.

4. Relevant materials on the sources of international law be further developed and made more readily available to officials, students, teachers, researchers, judges, and practitioners.

5. In view of the vast quantities of information available to international lawyers and the variety of electronic methods of seeking information, international lawyers and teachers of international law cooperate to make that information immediately available in electronic form delivered by CD-ROM or via the Internet.

6. The United Nations family of organizations, regional organizations, States, and national associations continue their efforts to organize seminars, symposia, training programmes, lectures and meetings, and undertake studies on various aspects of international law.

7. Refresher courses be offered on a regular compulsory basis for judges, lawyers, and personnel from Ministries of Foreign Affairs, Ministries of Justice, and other Ministries dealing with external affairs.

V

Action Plan

1. *Emphasizing* the need for intensive efforts to develop more effective strategies for strengthening the teaching, research, and dissemination of information about international law, the Institute calls for a Plan of Action

by international, regional, national, and local authorities in the field of international law for the invigoration and expansion of their capacities and programmes.

2. *Calls on* national associations of international law to draw up plans of action to strengthen teaching, research, and dissemination of information about the content and role of international law with a view to enabling the Institute to develop a world-wide profile of the place of international law in educational institutions at the national level. Each national plan should contain an assessment of needs, an inventory of existing materials, and an outline of strategies and programmes for the enhancement of education in international law at the level of secondary schools, colleges and universities, professional schools, and institutions for the training of public officials. National associations of international law should periodically review and revise the implementation of their action plans.

3. *Decides*, to initiate studies and produce model syllabi that will suggest acceptable divisions between topics considered to be essential, the very core of modern international law, and topics which may be left open as specialized courses on an optional basis ; and to produce model syllabi for secondary as well as post-secondary institutions.

4. *Invites* the United Nations Institute of Training and Research to cooperate with the Institute in promoting and exchanging information on, and conducting programmes for the development of national plans of action to strengthen the development of international law on a world-wide basis. This would include public and private law, as well as new fields such as international financial law, environmental law, and peaceful resolution of conflict.

5. *Decides* to create a permanent Commission within the framework of the Institute to work with international organizations and national societies of international law to realize the goals of this Resolution.

*

VIII. Annexes

1. **Resolution of the Institute of International Law of 1979**

2. **Select Bibliography**

Résolution adoptée par l'Institut de Droit international le 12 septembre 1979

L'Institut de Droit international,

Rappelant le Voeu qu'il a adopté à Rome le 14 septembre 1973, lors de son centenaire, concernant l'enseignement du droit international,

Soulignant l'importance primordiale du droit international pour le maintien de la paix et de la sécurité internationales, ainsi que pour le développement du commerce et des relations entre individus sur le plan international,

Conscient de l'internationalisation croissante des rapports sociaux ainsi que de l'influence grandissante des facteurs internationaux dans les domaines les plus divers de la vie des individus, des peuples et des Etats,

Considérant que les exigences de la société internationale appellent la formation de nouvelles générations ouvertes aux réalités et aux problèmes de la vie internationale,

Souhaitant que, dans tous les pays, l'enseignement en général, primaire, secondaire ou supérieur, soit adapté aux besoins d'une meilleure compréhension de la société internationale,

Constatant que l'enseignement du droit, dans bien des pays, demeure essentiellement voire exclusivement national, dans ses préoccupations et ses méthodes, et que l'enseignement du droit international, public et privé, répond souvent de manière insuffisante, du point de vue quantitatif et qualitatif, aux nécessités de notre époque et n'est pas donné dans une optique assez internationale,

Qu'il en résulte de multiples conséquences défavorables, souvent méconnues ou sous-estimées et, en particulier, une insuffisante préparation aux besoins de la vie internationale contemporaine, aussi bien interindividuelle qu'interétatique,

Considérant au surplus que le rôle essentiel du droit international dans la prévention et la solution des difficultés qui peuvent surgir dans les relations internationales a été mis en lumière par de nombreuses Résolutions de l'Assemblée générale des Nations Unies,

Tenant compte notamment des Résolutions 137 (II) en date du 17 novembre 1947 et 176 (II) en date du 21 novembre 1947, par lesquelles l'Assemblée générale des Nations Unies a invité les Etats membres à encourager l'enseignement du droit international,

Prenant en considération les obligations en matière de diffusion du droit humanitaire stipulées dans les Conventions de Genève de 1949 et leurs Protocoles additionnels de 1977, ainsi que la Résolution adoptée à ce sujet, le 7 juin 1977, par la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés,

Considérant enfin que le droit international privé est aujourd'hui un instrument essentiel pour la sécurité et le développement du commerce et des relations entre individus sur le plan international,

Adopte la présente Résolution :

I

(1) Il est essentiel que, à l'intérieur des universités, facultés ou instituts analogues — de droit, de sciences économiques ou politiques, de relations internationales — soient prises des mesures concrètes tendant à favoriser le développement et la cohésion de l'ensemble des matières d'étude ayant une portée internationale.

(2) Il faut comprendre dans ces matières, outre le droit international public (y compris le droit humanitaire) et le droit international privé au sens le plus large, l'étude de la coopération internationale, notamment économique.

(3) Il y a lieu de ne pas négliger, dans l'étude de ces matières, l'apport de la méthode comparative et la contribution qu'elle est susceptible d'apporter à une meilleure compréhension internationale.

II

(1) Une connaissance du droit international public est devenue indispensable à la formation des spécialistes, toujours plus nombreux, dont ont besoin les Etats ainsi que les organisations internationales, et très désirable pour celle non seulement des juristes en général, mais aussi des titulaires de nombreuses fonctions civiles et militaires.

(2) Il est nécessaire de généraliser, dans les universités, facultés, écoles de droit et institutions analogues, un enseignement de base obligatoire portant sur le droit international public et les organisations internationales, ainsi qu'un enseignement spécialisé facultatif.

III

(1) Une connaissance du droit international privé, au sens large, est devenue indispensable à la formation, non seulement des spécialistes

toujours plus nombreux qu'exige l'internationalisation croissante des rapports sociaux, mais aussi à celle des praticiens en général (avocats, juges, juristes d'entreprise, etc. ...) et de toute personne appelée à traiter de questions juridiques ou économiques internationales.

(2) Il est nécessaire de généraliser, dans les universités, facultés, écoles de droit ou de sciences commerciales et institutions analogues, un enseignement de base obligatoire portant sur le droit international privé, ainsi qu'un enseignement spécialisé facultatif. Compte tenu des méthodes et techniques particulières de cette discipline et du rapprochement souhaitable des solutions nationales en la matière, il est désirable que ces enseignements, qu'ils soient de base ou spécialisés, soient donnés dans un esprit comparatiste et international.

IV

L'évolution contemporaine appelle l'étude et l'enseignement, soit du droit international public, soit du droit international privé, dans une optique qui souligne les contacts entre ces deux disciplines, notamment dans le domaine des relations économiques, et s'écarte des conceptions fondées sur un cloisonnement entre droit public et droit privé.

V

En considération de ce qui précède, l'Institut de Droit international,

Demande à tous ses Membres et Associés de concourir par tout moyen approprié, notamment par leurs publications, à la diffusion de la présente Résolution et à la réalisation des voeux et recommandations énoncés ci-dessus,

Adresse un appel pressant aux autorités politiques, aux universités et autres instituts d'enseignement pour que, à la lumière des considérants et déclarations qui précèdent et des exigences actuelles et prévisibles d'un monde toujours plus international, ils examinent la place réservée dans leurs programmes aux disciplines juridiques internationales et les méthodes d'enseignement de ces disciplines, ceci sans préjudice de mesures plus générales propres à disséminer et populariser une connaissance de base du droit international.

Souligne le rôle capital joué en faveur du progrès du droit international par les institutions nationales et internationales, actives en matière d'enseignement, qu'elles soient scientifiques ou professionnelles.

Attire particulièrement l'attention sur la contribution décisive fournie, depuis sa création en 1923, par l'Académie de Droit International de La

Haye, dont il déplore que les travaux soient aujourd'hui menacés par des problèmes de financement.

Décide de créer une commission permanente de l'Institut chargée de suivre le développement de l'enseignement du droit international, dans l'esprit de la présente Résolution.

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L'environnement

The environment

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Deuxième groupe : Processus d'adoption et de mise en oeuvre des règles dans le domaine de l'environnement

Rapporteur : Felipe Paolillo

* La Huitième Commission, à laquelle ont été adjoints deux groupes de travail, a pour rapporteur M. Luigi Ferrari-Bravo. Les Membres sont : MM. Adede, Bernhardt, Brownlie, Caminos, Diez de Velasco y Vallejo, Dupuy, Fatouros, do Nascimento e Silva, Rosenne, Salmon, Seyersted, Shihata, Sohn, Sucharitkul, Yankov. Le premier groupe est formé de MM. Adede, Gaja, North et Ress. Le deuxième groupe est constitué par MM. Bedjaoui, Seyersted, Vukas, Yankov et Wildhaber.

I. Introduction et présentation des travaux

La Huitième Commission, créée en 1991, à suivi un parcours original. Il est retracé par le Rapporteur général, M. Ferrari-Bravo, dans son rapport final, auquel il y a lieu de se reporter (ci-après, p.). Les étapes successives des travaux y sont rappelées. Elles apparaissent également dans l'*Annuaire*, vol. 64-II, p. 408 et vol. 65-II, pp. 88 ss.

Compte tenu de la décision prise lors de la session de Milan de désigner deux autres Rapporteurs, l'accent a été porté sur les deux questions spécifiques dont l'étude leur a été confiée, le Rapporteur général assurant la coordination des travaux, pour présenter ensuite un rapport de synthèse.

Il n'a pas été possible, et ce n'eût pas été utile, de publier tous les documents de travail qui ont été utilisés. Il a fallu faire un choix. C'est ainsi que l'on trouvera ci-après les travaux dirigés par M. Orrego Vicuña, puis ceux que M. Paolillo a conduits. Ils sont suivis de la synthèse du Rapporteur général. Chacun des Rapporteurs présente un projet de Résolution.

II. Travaux de M. Orrego Vicuña

Sous-commission sur : Responsabilité et environnement

Note introductive

Dès le début de ses travaux, le Rapporteur a présenté un Rapport, qui a connu par la suite des versions successives, inspirées par les diverses réactions des membres de la Commission. Il a trouvé sa forme finale dans le Rapport définitif, qui seul est publié.

Le Questionnaire publié ci-après donne le reflet du premier rapport, ce qui explique que M. Orrego Vicuña ait reçu des commentaires avant d'avoir diffusé son Questionnaire.

Questionnaire

26 December 1995

1. *Conceptual framework*

- Do you agree with the dual function of liability as to prevention of harm and restoration/compensation ?
- Is the concept of punitive damages favored under international law ?
- Are the new links of international environmental law with intergenerational equity, sustainable development, environmental security and human rights indicative of changing perspectives on the question of responsibility and liability ?

2. *Legal distinctions*

- Is the dictinction between State responsibility and liability more generally conducive to a broader scope of measures as to prevention and reparation ?
- Is damage the essential element so as to trigger reparation ?
- Should primary and secondary rules become fully integrated under liability regimes so as to ensure their effectiveness ?
- Is the expansion of the geographical scope of the law relevant in terms of the nature and extent of liability regimes ?
- Are the conflicts of interest relating to sovereignty, culture or economic development in terms of environmental issues likely to affect the prospect of negotiated liability regimes ?

3. *The evolving role of State responsibility*

- While fault-based responsibility has thus far been the preferred approach under international law, can it be considered that the "due diligence" test is becoming a more objective and less subjective test ?
- Do internationally agreed standards contribute to diminish the ambit of discretionality and subjectivity in the matter ?
- Are the concepts of extra-hazardous operations and risk likely to influence the evolution of State responsibility ?

- Is the concept of an international crime in connection with environmental obligations a useful tool for a more demanding system of State responsibility ?
- Given the difficulties of fault-based liability for the proof of environmental damage, can more demanding standards be expected ?
- Do concurrent obligations binding the State under present international law contribute to enlarge the likelihood of engaging State responsibility for failure to comply ?
- Should the systems of State responsibility and civil liability normally operate simultaneously and in a complementary manner ?
- Is it to be expected that States will increasingly share the burden of liability with private operators by means of residual State liability, contribution to international funds or other participation in compensation schemes ?

4. *Strict liability and new interlinkages*

- Is the evolution from fault-based liability to strict liability more marked in the case of civil liability under international regimes ?
- Can strict liability be considered the normal standard under international principles and regimes while fault-based and absolute liability more exceptional expressions ?
- Is it appropriate to assign primary liability to operators and apply the strict liability standard in conjunction thereto, while States' liability would be engaged subsidiarily as a consequence of State responsibility under the due diligence standard ?
- Should subsidiary liability be limited to the portion of liability not covered under the primary system ?
- Should the State back-up system of liability operate in conjunction with other mechanisms, such as insurance and international funds ?
- What implications would a two-track approach have in terms of jurisdiction over multinational operators ?

5. *Strict liability and the need for legal certainty : limits, insurance and collective reparation*

- Would an open-ended system of strict liability result in excessive financial burdens, costs, discouragement of investments and economic inefficiency ?
- Is the establishment of a ceiling to liability an adequate solution bearing also in mind the objective of paying full compensation ?

- Is it pertinent to consider unlimited liability schemes provided the contribution of operators, insurance, State subsidiary liability and special funds might be limited to a given ceiling for each such segment ?
- Would an unlimited overall liability scheme take care of the argument that limited liability entails a subsidy to the beneficiary of the limitation and distorts competition ?
- Is it appropriate to provide for limits in relation to some kinds of damage and not for other within a given regime ?
- Is a limit to liability an essential condition for obtaining insurance ?
- Can it be considered that unlimited liability amounts to a mechanism of automatic compensation not likely to be insured ?
- Should insurance and financial security be mandatory in liability regimes ?
- Could States require such obligation from operators if domestic law does not provide for compulsory insurance ?
- Since insurance only intervenes in case of unforeseeable damage of a non-intentional nature, can it be reconciled with fault-based liability and its intentional nature ?
- Is the channeling and apportionment of liability to a greater number of entities required to participate in the payment of compensation an appropriate solution to fully ensure the reparation of damage ?
- When the source of pollution cannot be identified or compensation might not otherwise be available from the liable entity, is it appropriate to provide for a mechanism of collective reparation or whould the damage remain uncompensated ?
- Is a mechanism of collective reparation an adequate means to engage the contribution of potential polluters in advance of the damage ?
- Can funds providing collective reparation be adequately financed ?
- Are government contributions to funds, taxes and fees likely to provide a realistic financial backing to collective reparation ?
- Do these financial restrictions enhance the role of liability as a preventive mechanism as opposed to a compensatory function ?
- Does environmental impact assessment, notification and consultation an other new approaches contribute effectively to this preventive role ?
- What impacts on liability regimes are likely to emerge from new principles such as the Precautionary Principle, the Polluter-Pays Principle and the principle of common but differentiated responsibility ?

- Is international assistance to avoid environmental damage an adequate alternative to liability regimes ?

6. *New issues associated with liability and response action*

- Can a separate obligation of operators be conceived in order to undertake timely and effective response action, including restoration measures when appropriate ?
- Would a failure to comply with response action entail additional liability ?
- Would compliance with the obligation reduce or eliminate the liability for damage ?
- In addition to the role of States in providing for response action, should private entities and individuals be required to intervene, particularly in cases of emergency ?
- Would contingency plans, early warning and notification, and environmental impact assessment constitute the necessary tools for the adequate discharge of response action obligations ?
- Should the failure of a State to prepare a contingency plan engage its subsidiary liability and State responsibility ?
- Is it reasonable to expect compensation for the cost of response action ?
- Should the costs of response action be claimed separately or as a part of compensation for damage ?

7. *Defining activities which may engage strict liability*

- Is it necessary to identify activities considered environmentally dangerous as a starting point of a liability regime ?
- Should the nature of the risk involved and the financial implications of such identification be also taken into account ?
- Should whole sectors of dangerous activities be identified because of their hazardous or ultra hazardous nature, or is it preferable to include dangerous activities in general, providing criteria for the listing of dangerous substances ?
- Should all activities relating to a given sensitive geographical area be considered dangerous, such as the case of Antarctica ?
- In case that more than one liability convention would apply to a given activity, what criteria should be followed to establish an order of priority ?

- Could multiple criteria for such priority, such as the strictest standard in force, the option more favorable to the claimant, the choice of the claimant or the precedence of the most specialized convention, be considered in a liability regime ?
- Should the compensation paid under one arrangement be offset against the amount of payments under other arrangements ?

8. *Identifying damage in the context of liability regimes*

- Should damage to the environment as such be considered for the purpose of liability irrespectively of the question of death, personál injury or loss of property ?
- Should a regime concerned with liability for environmental damage also cover other values such as personal injury or property, or should the latter be left to other rules of international or domestic law ?
- Is it an adequate alternative for a regime to provide for environmental damage and for other types of damage if arising directly from such environmental damage ?
- Should all types of damage included be related to the very purpose of the regime and the nature of the activities undertaken ?
- Should a regime provide for different approaches to the different types of damage and to the different degree of harm required to engage liability ?

9. *Issues related to the degree of damage*

- Should all damage be included in a liability regime or only that above a given threshold representing a certain gravity or seriousness ?
- Is the distinction between tolerated and serious impact, or between minor or transitory impact and that exceeding this level, an appropriate approach ?
- Do these distinctions require a certain foreseeability of damage ?
- Does the utilization of Environmental impact assessment facilitate the distinction between different degrees of damage and generally make damage foreseeable ?
- Is it appropriate to exclude minor damage ?
- Should, on the other hand, all impacts above the degree of minor be regarded as damage ?
- If an activity has been assessed, should its impact not exceeding the accepted level not engage liability ?

- Should damage as such also be assessed in addition to the proposed activity ?
- If an impact is foreseen and accepted in the framework of an environmental impact assessment, would it become as a consequence exempted from liability to the extent of the assessment ?
- Would this mean that only accidental and unforeseen damage should be covered by liability ?
- Could this lead to environmental impact assessment being turned into a certificate of liability free activity that would deviate from the preventive function of this mechanism ?
- Could State responsibility be engaged for not undertaking environmental assessment with due diligence ?

10. Liability and responsibility for illegal activities

- Should activities undertaken in violation of binding international rules and standards engage liability in case of damage ?
- Is State responsibility engaged because of a failure to carry out obligations under a treaty and this results in an adverse impact by the activity of the State or that of private entities under its control ?
- If an operator fully complies with applicable rules and standards and government controls but anyhow its activity results in environmental damage, should it be exempted from liability but State responsibility engaged for failure to enact appropriate rules under treaty obligations ?
- Should responsibility and liability for wrongful enforcement measures also be established ?
- Is there a need to prove significant impact or injury when the environmental damage is caused by highly dangerous substances ?
- Is the presumption of causality and adequate mechanism to deal with issues of accumulative effects of pollution or unidentified specific sources of damage ?
- Is the shift in the burden of proof so as to only authorize a given activity if it is established that it will not have an adverse impact an adequate tool for the purpose of environmental protection ?

11. The debate about exemptions from liability

- Should exemptions from liability be allowed under an international regime ?

- Should armed conflict, terrorism or a natural disaster of exceptional, inevitable and irresistible character be generally accepted as exemptions ?
- Should intentional or grossly negligent acts or omissions of a third party be accepted as exemptions ?
- Is compliance with a specific order or compulsory measure enacted by a public authority admissible as exemption for the operator ?
- Would the latter situation anyhow engage the liability of the public authority concerned ?
- Should damage caused by a dangerous activity undertaken lawfully in the interest of the person suffering the damage be admissible as an exemption ?
- If the latter person contributed to the damage by his own fault, should compensation be disallowed or reduced ?
- Should exemption in the case of armed conflict be admissible only for the victim of such conflict ?
- Is damage resulting from environmental warfare admissible as an armed conflict exemption ?
- Should exemptions from liability also apply to response action or should the latter obligation subsist in any event ?
- Should damage resulting from humanitarian activities be exempted from liability ?
- If exemptions are not approached in a restrictive manner, can this deprive liability regimes of their significance ?
- Should the proof of a direct causal nexus between the event justifying the exemption and the damage be also required ?
- Should the mere unforeseen character of an impact accepted as an exemption ?
- Should liability regimes provide incentives for States to become parties and avoid the use of flags of environmental convenience ?
- Would the incentive to accede to important markets for entities accepting international obligations on liability be an adequate mechanism to this effect ?
- Could the extraterritorial application of domestic environmental laws provide an answer to avoid potential loopholes of international regimes ?
- If exemptions are not accepted, would this turn strict liability into absolute liability ?

- Could the absence of willfulness constitute an exemption in strict liability regimes ?

12. A broader framework for the reparation of damage

- Should compensation be limited to the payment for an economic loss or could it be broadened so as to include cleanup and restoration costs ?

- Is the cost of rehabilitation of an area to its preexisting condition without grossly disproportionate expenditures an adequate standard of compensation beyond economic loss ?

- If rehabilitation is not possible, would the reasonable cost of acquiring biological resources to offset the loss be an adequate alternative standard in case of damage to living resources ?

- Is the equitable assessment of compensation a better approach ?

- Should contingency plans provide the criteria as to what is to be expected as reasonable restoration action ?

- Would the establishment of baseline conditions be a prior requirement for restoration criteria ?

- Where restoration is not possible, would impairment of use, a esthetic or wilderness values provide a reasonable compensation standard ?

- Would domestic or international guidelines be useful to this effect ?

- Do diplomatic means constitute an alternative to establish a measure of compensation ?

- If damage is irreparable, could voluntary contributions, diplomatic consultations and arbitration or adjudication be appropriate alternatives ?

- Is it acceptable that damage may end up uncompensated because of its irreparable nature ?

- Would the latter situation mean that the liable entity might end up being better off than other entities causing lesser damage which is subject to economic assessment ?

- Would punitive compensation be justified in this context ?

13. Expanding the access to effective remedies

- Should a direct legal interest be required for a State or an individual to make an environmental claim or demand the termination of an activity causing environmental damage, or should the traditional rules of international law be made more flexible in this context ?
- Is it always possible to identify a precise legal interest in environmental matters, particularly when the action refers to the environment *per se* ?
- Are the limited precedents of international law or federal common law to broaden the standing of claimants relevant in the matter ?
- How can the entity entitled to receive compensation be identified in the absence of a direct legal interest ?
- Would trustees be an appropriate solution ?
- Should international institutions be empowered to proceed on behalf of the community and participating States ?
- Could this provide for the consolidation of individual claims or handle concurrent claims ?
- Is the role of international claims commissions a useful procedent ?
- Is the establishment of a World Environmental Court a possible solution ?
- Might it be useful to revert the criteria of the *Barcelona Traction* so as to allow partners of a legal entity not entitled to claim because of its nationality to make a claim in proportion to their interests if individually they are not affected by the nationality requirement ?
- Might it be useful to allow a given number of parties to a regime to jointly make a claim on behalf of the collective interest or of an International Fund ?

14. Securing access to remedies by the individual

- Is the access by States to dispute settlement mechanisms satisfactory at present for environmental purposes and liability ?
- Will the establishment of a standing chamber for environmental disputes facilitate the access to the International Court of Justice ?
- Should foreign States be allowed to participate in the domestic-planning process of major projects of another State ?

- Should domestic environmental impact assessments be required for activities that might have transboundary effects or affect the global commons ?
- Should there be a mechanism for the inter-State apportionment of liability ?
- Is the representation of the individual by a given State an adequate mechanism to access dispute settlement mechanisms ?
- Should individuals be granted direct access under international regimes ?
- Is the access by foreign individuals or States to domestic courts and remedies adequate at present ?
- Should recovery by a foreign claimant be made subject to reciprocity ?
- Are decisions by courts from different legal systems expected to be consistent ?
- Are foreign courts generally impartial when deciding claims against individuals of their nationality or the State itself ?
- Should the exhaustion of local remedies be eliminated as a requirement for international civil liability claims ?
- Should such requirement be kept in the case of State responsibility ?
- Is it always possible to separate in practice international responsibility from civil liability so as to establish different requirements ?
- Should State immunity from legal process be kept in environmental matters ?
- Should there be a rule on equal access to remedies and courts by nationals and foreigners alike on a non-discriminatory basis ?
- Should dispute prevention by means of consultation and negotiation be privileged as an alternative to judicial mechanisms ?

15. Private international law issues and solutions

- Is there a preferred criteria to establish personal jurisdiction in cases involving a variety of multinational aspects ?
- In the absence of agreement, should an international tribunal decide which court is more closely related to the case ?
- Should international liability regimes provide the rules for the determination of the pertinent court ?
- Should such regimes provide the rules for the identification of the governing law ?

- How can the enforcement of judgments be secured so as to ensure the effectiveness of remedies ?
- Should financial resources be made available for claimants who cannot afford the costs of transnational litigation ?
- Is it to be expected that international cooperation between courts and that aiming at the adoption of uniform principles in matters of jurisdiction and applicable law will be importantly developed as regards the environment ?
- Do the 1968 Brussels Convention and the 1988 Lugano Convention on Jurisdiction and Enforcement of Judgments offer an adequate answer for environmental liability questions ?
- Should exchange of information, on-site inspection and government consultations be further expanded in this matter ?

16. Advancing international regimes

- Is it appropriate to negotiate comprehensive liability regimes for environmental damage ?
- Would this facilitate the uniform application of substantive and procedural rules by domestic courts ?
- Should private associations and foundations concerned with the environment have a legal standing in the context of such regimes ?
- Would comprehensive conventions facilitate the harmonization of national legislations and the coordination with other conventions ?
- Should liability be addressed at under one single and comprehensive international regime covering a variety of activities or by means of separate specific regimes ?
- Does effective liability require different levels of stringency, limits, exceptions and other characteristics relating to the specific nature of the activity ?
- Should groups of closely interrelated countries adopt broad and comprehensive liability regimes following the model of advanced national legislations ?
- Is it possible to identify issues, principles and solutions common to comprehensive and sectoral approaches which governments and other entities might apply *mutatis mutandis* to different types of regimes ?

Note de M. Gaja

(antérieure à l'envoi du Questionnaire)

23 December 1995

First of all let me congratulate you again on your revised report on "Responsibility and Liability for Environmental Damage under International Law". It is a well-balanced paper which appears to cover all the main issues. At this stage of our Committee's work I have only a few comments to make. As unfortunately our Committee could not discuss your report at Lisbon, I am sending you this written note.

I. I should hesitate in describing State responsibility, if any, as a form of subsidiary liability in relation to the operator's civil liability (for instance, at p. 10). I certainly agree that insofar as compensation is given under the system of civil liability, the same sums cannot be claimed a second time from a State under international law. However, State responsibility may be invoked independently of the operator's civil liability — subject to the requirement of exhaustion of local remedies when applicable. It is doubtful whether local remedies should be exhausted also in case of transboundary damage.

II. As both the Stockholm and Rio declarations (Principle 22 and Principle 13, respectively) shelved the issue of State responsibility for environmental damage and State practice offers only few examples of claims for reparation for environmental damage under international law, it may be useful for our Committee to explore the reasons why States are reluctant to apply the general rules on State responsibility in the area of environmental law. I do not believe that State attitude in this matter depends mainly on the difficulty of providing evidence of fault or insufficient diligence. The Chernobyl case is a prominent example of States' reluctance to claim compensation even when fault or insufficient diligence could be proven. One of the factors explaining State attitude in this case was the perception of the need to provide assistance to the Soviet Union in view of the extensive damage suffered on Soviet territory. Moreover, some States were clearly concerned that a precedent could be used against them in the future.

III. Some questions relating to State responsibility for environmental damage are arguably not covered by general rules on State responsibility. One of the questions is referred to at p. 18 of your report (and also at p. 12 and 31 with regard to civil liability). This is the issue of reimbursement of costs which State authorities incur when responding to pollution caused by another State. Which costs —administrative and others

— should be borne by the State which is affected by transboundary pollution ?

IV. Another question is that of environmental damage caused to common areas such as the high seas or to the global environment. Is the polluting State liable to pay costs incurred by other States for responding to pollution ? If restoration is impossible, who is entitled to compensation ? Moreover, who can bring a claim ? In the case of the existence of institutions such as those to which you refer at p. 34, are they entitled to receive compensation and may they bring a claim ?

V. With regard to civil liability, it would be hard on the operator if he could be sued in all the States for the damage that occurred in the respective territory — a solution implied in Article IX of the 1969 International Convention on Civil Pollution for Oil Pollution Damage and stated in Article 19 of the 1993 European Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. A great variety of decisions would also be likely to be given then. On the other hand, the rule that only the State where the damaging conduct occurred has jurisdiction is too restrictive. A limited plurality of fora at the claimant's choice — such as the State of the damaging conduct and that where the main damage occurred — is a more desirable solution.

With best wishes, yours sincerely,

Giorgio Gaja

Note de M. Shihata

(antérieure à l'envoi du Questionnaire)

December 26, 1995

Thank you very much for your revised report which offers a very interesting and stimulating analysis on the issues of liability and responsibility in international environmental law. It clearly outlines trends which are taking place in this area, even though some appear to still be in a nascent state. As you mentioned, it is important they be addressed so as to allow the *Institut de Droit international* to contribute to the development of basic principles of international law.

The report gives a broad survey of the practice and the literature, showing that the topic is complex. In this respect, a few aspects might deserve closer attention. With regard to the due diligence test, you view State responsibility as operating as a subsidiary means within a civil liability scheme. No doubt this is an emerging trend, as is the establishment of compensatory funds. In our attempt to develop rules *de lege ferenda*, we may give some thought to the idea that due diligence could also

require States to require the setting up of civil liability mechanisms including such components as insurance schemes and compensatory funds and ensure that they are effectively implemented. State responsibility would derive from the non-fulfillment of this obligation. Such an approach would reinforce the preventive function of State responsibility.

The issue of the responsibility of the State as regards multinational operators activities may also deserve closer attention. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration offer some guidance when saying that States have "the responsibility to ensure that activities within their jurisdiction or *control* do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" (emphasis added). Even though raising complex problems of jurisdiction, it may be worthwhile to address more extensively the issue of the control of activities of multinational corporations.

In addressing the topic of responsibility and liability for environmental damage under international law, the report deals with the issues of State responsibility and civil liability of the operators. In this broad survey, the issue of criminal responsibility of the operators has not been touched upon. You may want to consider addressing this issue. In this regard, special attention could be given to the protection of the areas beyond the limits of national jurisdiction, as they are still very much unregulated when it comes to preventing and restoring environmental degradation. Parallels could be drawn from the 1982 Convention on the Law of the Sea which sets some grounds for the application of the principle of universality of jurisdiction, as regards for example the jurisdiction of port States or coastal States.

Hoping that these comments will be of some use in your report.

Ibrahim F. I. Shihata

Réponse de M. Hugo Caminos

25 January 1996

1. Conceptual framework

Emphasis on preventive measures is essential. Liability in itself operates as a deterrent and a restoration/compensation mechanism. However, as the Report states, other incentives for the prevention of environmental harm are necessary.

Punitive damages against States, as Jimenez de Arechaga said, "inspired by disapproval of the unlawful act and as a measure of deterrence

of reform of the offender, are incompatible with the basic idea underlying the duty of reparation. 'The fundamental concept of damage is reparation for a loss suffered ; a judicially ascertained compensation for wrong. The remedy shall be commensurate with the loss so that the injured party may be made whole'. For these reason arbitral awards have rejected 'the superimposing of a penalty in addition to full compensation, and naming it damages' (Lusitania cases, 1923)". (In Max Sorensen's manual of Public International Law, p. 571).

The links of international environmental law with the concepts of intergenerational equity, sustainable development, environmental security and human rights are indicative of changing perspectives in the nature and extent of responsibility and liability in this field.

2. *Legal distinctions*

I agree that the distinction between responsibility and international liability allow for a broader reach of liability. Without entering into the controversy generated on this issue, the current work of the ILC and the actual application of the distinction "in circumstances which have been previously and clearly defined by international agreement" (Sorensen, p. 539) would seem to indicate the direction of the development of the law on this matter. Under this regime, a lawful activity, though dangerous, which causes environmental damage would trigger reparation. As an author says, "international liability is simply another tool States can use to support their claims in the international fora, and it could be useful for that purpose so long as State responsibility remains linked to wrongful activity. As a theoretical matter, however, the concept itself, and its relationship with State responsibility, should be further clarified" (Elli Louka, "The Transnational Management of Hazardous and Radioactive Wastes", Orville H. Schell, Jr. Center for International Human Rights at Yale Law School. Occasional Paper N° 1 1992, p. 28). This author finds "it would be more practical to broaden the concept of State responsibility so that a State's act would be explicitly included if it had damaging effects in the territory of another State, even if lawful. The continued use of different terms one of which does not have an equivalent in other legal system would create confusion and increased uncertainty rather than facilitating the process of dispute resolution" (*id.* at p. 29).

Primary and secondary rules should become integrated to ensure that liability will provide maximum protection under the applicable regime.

The expansion of the geographical scope of the law is relevant in terms of the nature and extent of liability regimes. Conflicts of interest, particularly in establishing values and priorities in environment and economic development, are likely to affect negotiations of liability regimes but this is precisely the challenge that the international community faces

in the process toward globalization of environmental law. In essence, this calls for the integration of the different views and interests of developed and developing countries.

3. The evolving role of State Responsibility

There is no doubt, as explained in the Report, that "due diligence" is becoming a more effective and less subjective test. The articles in UNCLOS in "International Rules and National Legislation to Prevent, Reduce and Control Pollution in the Marine Environment" contained in section 5 of Part Xll, making intemational standards an "obligatory minimum", are a good example of this evolution. Internationally agreed standards contribute to reduce State discretion and subjectivity.

The concepts of extra hazardous operations and risk are influencing the evolution of State responsibility. The work of the ILC, illustrates this trend, although, as has been said, it represents more a development of international law than codification of existing law (Birnie and Boyle, p. 149). However, according to these authors, "strict liability is not necessarily advantageous if it involves either set limits on reparation or an equitable balance which spreads the loss across polluter and victim State, alike", as the ILC Draft does. In their opinion, "the concept of objective responsibility for breach of obligation builds on a clearly established principle of international law and can accommodate a standard of responsibility approaching that of strict liability where necessary".

The idea of treating certain environmental violations as international crimes, incorporated to the ILC Draft Code of Offences Against the Peace and Security of Mankind, is not a norm of international law. It will be not easy for States to accept that concept. I agree with Birnie and Boyle when they say that this concept "may prove a significant development if adopted in practice", however, because of its potential utility in protecting the global commons. Due to the difficulties of fault-based liability for the proof of environmental damage more demanding standards can be expected. Again, acceptance of these standards will require difficult negotiations between industrialized and developing countries.

I agree, as expressed in the Report, that concurrent obligations binding the State under international law can contribute to enlarge the likelihood of State responsibility for failure to comply. The conflict between trade liberalization and environmental regulation is a typical example. However, although complementarities between both are being undertaken, the adoption of environmental measures as an excuse to justify protectionist policies create further difficulties.

The simultaneous operations of State responsibility and civil liability is advisable. The increasing share of States in the burden of liability with

private operators by means of residual liability, contribution to international funds or participation in compensation schemes is a positive consequence of the interrelationship between the two systems

4. Strict liability and new interlinkages

As stated in the Report, the evolution from fault-based liability to strict liability has been much more noticeable in the case of civil liability. Under current international practice the trend in terms of civil liability is oriented toward strict liability (see 3 *supra*).

The two-track approach suggested in the Report seems appropriate. Subsidiary liability should be normally limited to that portion of liability not covered under the primary system. The State back-up system of liability should operate in conjunction with other mechanisms, such as insurance and international funds. The system will not be exempted from problems of jurisdiction in connection with the determination of which State would engage its subsidiary liability over multinational operators.

5. Strict liability and the need for legal certainty : limits, insurance and collective reparation

It has been said that even though strict liability would grant redress automatically after the occurrence of significant injury and that it gamers the legitimizing cachet of objectivity, the "disjunction between strict liability and State's interests precludes and international consensus for strict liability" (Harvard Law Review, Developments in the Law. International Environmental Law, 1991, vol. 104 : 1484 at p. 1510). This study points out that many industrial States mistrust the system and that it is anathema to developing countries as well. The causes of a number of difficulties are to be found in the excessive financial burdens, costs, discouragement of investments and economic inefficiency.

Establishing a ceiling to liability would not appear to be an appropriate solution bearing in mind the objective of full compensation and the implementation of the polluter-pays principle. The suggestion to consider unlimited liability schemes provided the contribution of operators, insurance, State subsidiary liability and special funds might be limited to a given ceiling for each such segment is pertinent. Such a scheme would take care of the argument that limited liability entails a subsidy to the beneficiary of the limitation and distorts competition. True, absolute liability would hardly be acceptable to States. As expressed in the Report, it is still possible to provide for limits with respect to some kinds of damage and not for others within a given regime.

A limit to liability is an essential condition for obtaining insurance. The report rightly states that absolute liability not allowing for limitations

or exemptions, is a mechanism virtually impossible to insure. Insurance and financial security should be mandatory in liability regimes. However, there is a problem in those countries where domestic legislation does not provide for compulsory insurance.

Since insurance only intervenes in case of unforeseeable damage due to non-intentional nature, it will be difficult to reconcile with fault-based liability and its intentional nature.

The channeling and apportionment of liability to a greater number of entities required to participate in the payment of compensation is an appropriate solution to insure payment of compensation and reparation of damage.

In cases where the source of pollution cannot be identified or compensation might not be available from the liable entity, it would be proper to engage the contribution of potential polluters in advance of the damages as stipulated in some environmental regimes. Funds providing collective reparation cannot be adequately financed. These financial difficulties enhance the role of liability and international cooperation as preventive mechanisms.

Environmental Impact Assessment (EIA), notification and consultation can effectively contribute to the preventive role of liability under international law. Some new principles, as the Precautionary Principle, the Polluter-Pays Principle and the Principle of common but differentiated responsibility can also contribute to the implementation of preventive measures. The recent Agreement for the implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, for example, establishes special rules for the application of the Precautionary principle (Articie 6). Under this provision, "States shall be more cautious when information is uncertain, unreliable or inadequate" and "(T)he absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures". This same idea appears in Principle 15 of the Rio Declaration in a somewhat less strong formulation.

International assistance to avoid environmental damage is an adequate altemative which, as the Report expresses, provides a wider scope that goes beyond the avoidance of damage.

6. New issues associated with liability and response action

A separate obligation of operators in order to undertake timely and effective response action, including restoration measures when appropriate, would entail additional liability. Compliance with this obligation, as stated

in the Report, should not forestall liability for damage, but in many cases it will reduce or eliminate such damage.

Private entities and individuals should be required to intervene, particularly in emergencies. In this regard, preventive measures will provide essential tools for the fulfilment of this obligation. Among these, contingency plans, early warning and EIA and specially collaboration between scientists of different States, are essential procedures.

Failure of a State to comply with obligations under contingency plans might engage its subsidiary responsibility and liability.

It is reasonable to expect compensation for the cost of response action. Probably the costs involved will be claimed as a part for compensation.

7. Defining activities which may enable strict liability

Identification of these activities posing a risk of environmental harm seems to be a necessary starting point of a liability regime. The nature of the risk involved and the financial implications should also be taken into account. As regards the approach to be followed, consent to a treaty including dangerous activities in general and establishing basic criteria for the listing of dangerous substances may be easier to negotiate. The approach consisting in considering all activities in specially sensitive areas, such as Antarctica, would seem appropriate. However, as indicated in the Report, this approach can encounter difficulties.

Various criteria have been suggested to establish an order of priority in case that more than one liability convention is applicable. Multiple criteria could be considered in a liability regime. Compensation paid under one arrangement should be offset against payments under other arrangements.

8. Identifying damage in the control of liability regimes

For the purpose of liability, damage to the environment is a value to be protected in its own merit. The current trend to provide comprehensive definitions of damage as illustrated in the Report is appropriate provided that the other types of damage to be covered are directly caused by such environmental damage. All types of damage included should be related to the purpose of the regime and the nature of activities undertaken. Since all activities, as the Report expresses, will not necessarily be treated alike, different approaches to the various types of damage and the different degree of harm required to engage liability seem appropriate.

9. Issues related to the degree of damage

States have accepted treaties and declarations stating the obligation to prevent significant transboundary harm. The requirement of a certain seriousness, as the Report indicates, has been generally adopted. Thus, it is probable that this approach will continue to prevail.

The distinction between tolerated and serious impact requires a certain foreseeability of damage. Identification of harmful result in advance facilitates prevention and the operation of liability, but insurance for environmental harm will only be available for unforeseeable damage.

EIA, now incorporated to the Rio Declaration as a national instrument (Principle 17), can facilitate the distinction between different degrees of damage and allow exclusion of minor or transitory damage. All impacts above the degree of minor should be regarded as damage.

I agree, as the Report states, that damage as such should be subject to assessment and not only the proposed activity. EIA should not become a certificate of liability for free activity.

The concept of EIA needs to be clearly defined. "Although designed to nip extraterritorial damage in the bud, the duty to assess imposes no obligation upon States to forego environmentally harmful activities. Assessment requires the determination of costs and benefits of a proposed project, it does not specify how they should be weighed. States may have a duty to consider the transboundary harm of a proposed activity, but no international consensus indicates the weight that national decision-making must accord to the "costs" of environmental harm abroad. The dearth of precise criteria precludes the imposition of liability, prior to the damage, for a State's decision to adopt a harmful course of action. Thus, the duty to assess remains a purely procedural obligation that creates no opportunity for judicial review of either the substantive merits of the consequent decision to act or even the procedural adequacy of a State assessment of extraterritorial effects. Some commentators have asserted that environmental impact assessments at least have the salutary effect of mobilizing political opposition to the environmentally hazardous projects. Indeed, the emergence of the international duty to assess heralds a misguided doctrinal emphasis on placing procedural obligation on States, because States may effectively ratify environmentally behaviour through formal compliance with the duty to assess extraterritorial environmental effects. Without any enforcement mechanism, the environmental assessment program remains a procedural formality bereft of any substantive impact on national decision making" (Harvard Law Review study, p. 1515 ss. footnotes omitted).

10. Liability and Responsibility for illegal activities

The first four questions on this subject should be answered affirmatively. The question for establishing a casual nexus between the activity undertaken and the damage is a quite important one and could be expanded.

As to the innovative approach of reversing the burden of proof, it is necessary to establish how far it should be taken so as to assure the protection from pollution consequences.

11. The debate about exemptions from liability

"Exemptions are a particular useful tool in securing States assent to treaties", but it is also true that "every exception undermines environmental protection" (Harvard Law Review, p. 1557-58).

Exceptions based on armed conflict, terrorism and national disasters, as stated in the Report, have been often accepted in current practice, as well as grossly negligent acts or omissions of a third party. "Violations on the UN Charter will, however, entail responsibility under international law to make reparation, and Security Council Resolution 687 (1991) holds Iraq liable on this ground for 'direct loss, damage, including environmental damage and depletion of natural resources' arising out of its conflicts with Kuwait". A step in the right direction would be ratification by developed countries of the 1977 Additional Protocols I and II of the Geneva Conventions.

Compliance with specific orders enacted by a public authority, although admissible as an exception, should not exclude liability of the public authority concerned. Other exemptions contained in the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Council of Europe) can be acceptable.

Two questions regarding damage caused by a dangerous activity undertaken lawfully in the interest of the person suffering the damage should be answered in the affirmative.

The exception in the case of armed conflict should be admissible only for the victim. Damage resulting from environmental warfare should not be admissible as an armed conflict exemption.

Obligation to compensate for response action should subsist separately from compensation originating in liability.

Damage resulting from humanitarian activities should be exempted provided that these activities do not constitute illegal intervention.

Exemptions should be approached in a restrictive manner to avoid depriving liability regimes of a real significance. Proof of a direct casual

nexus should be required. The mere unforeseeing character of an impact should not be accepted as an exemption.

Liability regimes should provide incentives for States to become parties and avoid the use of flags of convenience. To this effect, access to important markets for entities accepting international obligations on liability would be a proper incentive.

The question of extraterritorial application of domestic environmental laws is a complex one. After a thorough analysis, the Harvard Law Review study reaches the following conclusion which I can subscribe :

> "Because the public international legal system is of only limited effectiveness in encouraging sovereign States to improve their environmental regimes, extraterritorial regulation by States with strong environmental regimes may seem intuitively useful. Nations such as the United States, however, may find it difficult to regulate extraterritorially in a manner that is sensitive to the costs and benefits faced by foreign countries. Even if environmental preservation were the only interest at stake, extraterritorial regulation by the United States would not always be desirable. Not only may unilateral action be undermined by substitution effects, but such action may also discourage foreign countries from further developing their own regulatory regimes. To the extent that extraterritorial environmental regulations supplements the contribution of public international law to environmental protection, it would be a welcome interim development. The ultimate goal, however, must remain the development and strengthening of each State's own regulatory regime" (pp. 1638-39, footnotes omitted).

If no exemptions can be accepted strict liability becomes absolute liability. In strict liability regimes absence of wilfulness could not be accepted as an exemption.

12. A broader framework for the reparation of damage

Compensation should cover cleanup and restoration costs. The cost of rehabilitation of an area to its pre-existing condition without grossly disproportionate expenditures is an adequate standard of compensation beyond economic loss. In case of damage of living resources, an alternative measure would be the reasonable cost of acquiring biological resources to offset the loss. Equitable assessment may be a fair alternative approach but not necessarily a better one.

Contingency plans will provide the criteria as to what is to be expected as reasonable restoration action. The establishing of baseline condition should be a prior requirement for restoration criteria.

When damage is irreparable, impairment of use, aesthetic or wilderness values can provide a reasonable compensation standard. Domestic or international guidelines should be useful to this effect. Diplomatic means

could constitute an alternative to establish a measure of compensation. Voluntary contributions, diplomatic consultations and arbitration or adjudication can be viable alternatives. Damage should not end up uncompensated. If that would be the case, the liable entity may finally be better off than other entities causing lesser damage subject to economic assessment.

As stated above, punitive damages are not accepted under international law.

13. Expanding the access to effective measures

Traditional rules of international law for a State or and individual to make an environmental claim or demand termination of an activity causing damage should be made more flexible in this context. When an action refers to the environment *per se* it is not always possible to identify a precise legal interest as required by the international law. As the report states, referring to a document from the Italian Government, international law is gradually moving in the direction of finding a solution in this question. Precedents in federal common law also indicate that a state can present an independent claim for injury to its environment. However, even if violations erga omnes could provide a legal standing to all States to react, the fact is that these are reluctant to sue each other.

As suggested in the report, procedures to confront the issues of legal access to jurisdictional remedies under domestic law or international regimes can serve as a basis for their solution. In this respect, one of the recommendations of the Harvard Law Review study could be useful : "Instead of multiplying statements of vague international legal principles and obligations, publicists need to engage in the much more empirical work of identifying common interests and construct a regime based on them." (p. 1571).

14. Securing access to remedies by the individual

Some committee members expressed the view that more important than dispute settlement is dispute prevention. In this regard, it seems that the existing mechanisms for the settlement of disputes between States is satisfactory. Recourse to the ICJ is expected to be facilitated by the establishment of the Standing Chamber for Environmental Disputes. Also, the International Tribunal for the Law of the Sea will soon be installed.

Participation of foreign States in the domestic process of major projects of other States, particularly of the same regime, is a constructive idea. The same can be said on the requirement of EIA for activities that might have transboundary effect or affect the global commons and the inter-State apportionment of liability.

The shortcomings of representation of the individual to access dispute settlement mechanisms have prompted consideration of the question of direct access by the affected individuals. Granting of this right under international regimes will be subject to the consent of State parties. Foreign claimants may have direct recourse to foreign domestic courts and remedies. However, if no rights exist for the State's own citizens, these limitations will apply to transboundary claimants. "Nevertheless, the potential of equal access as a means of resolving some transboundary problems without resort to interstate claims is significant. As Sand has observed : "opening local remedies to foreign parties can go a long way toward de-escalating transboundary disputes to their neighbourhood level". (Birnie and Boyle, pp. 200-201). In some cases, access of foreigners is subject to reciprocity.

Decision from courts from different legal systems are likely to be inconsistent. Also, there can be a question of impartiality when claims against its own State nationals or the State itself are involved.

I have no hard feelings on the elimination of exhaustion of local remedies. However, in cases of State responsibility it should be maintained. One difficulty is that in practice it may not be possible to separate international responsibility from civil liability.

The elimination of State immunity from legal process in environmental cases is a matter of progressive development of international law.

Dispute prevention through consultation and negotiation is most important. It certainly should be privileged as an alternative to judicial mechanisms.

15. Private international law issues and solutions

As indicated in the report, different criteria to establish personal jurisdiction in cases involving a variety of multinational aspects have been admitted by courts (*lex loci delicti*, the law of the State with the most significant policy interest, the "better law"). These jurisdictional issues, as well as those related to the applicable law are dealt with under some specific legal regimes.

To secure the enforcement of judgements is a crucial issue. All forms of cooperation between courts as provided in some treaties are quite important for this purpose.

Some sort of arrangement should be considered to make financial assistance available to claimants who cannot afford the costs of litigation.

16. Advancing international regimes

Negotiations of comprehensive international liability regimes are

appropriate. These can facilitate uniform application of substantive and procedural norms by domestic courts.

Private associations and foundations (NGOs) "may be the best situated and most willing to bring suits, but are barred from doing so and must look for their own countries to expose their cases" (Harvard Law Review Study, p. 1562). The granting of legal standing to environmental groups in the context of comprehensive liability regimes would strengthen these regimes and bring an important change in the prevailing State-centered system.

Comprehensive conventions will facilitate harmonization of national legislations and coordination with other international conventions. Negotiation of liability regimes on a sector by sector basis favoured by international law thus far appears to be the most practical option. Effective liability requires different levels of stringency, limits, exceptions, and other characteristics relating to the specific nature of the activity. I agree that in the case of groups of closely interrelated countries, like the members of the European Union, comprehensive liability regimes can follow the model of national legislations.

The suggestion contained in the last paragraph of the Report as to the contribution which the *Institut* may make on this question, consisting in the identification and development of the basic principles of responsibility and liability under international environmental law, which might be then applied by governments and organizations to different types of regimes, is quite appropriate.

Hugo Caminos

Reply by M. Sucharitkul

January 31, 1996

1. Conceptual framework

(a) Liability has become a primary rule of customary international law obligating a recalcitrant State to pay compensation or make amends for the resulting damage for which the State is accountable.

Once this primary rule is breached, regardless of the origin of the rule whether it is derived from a Treaty or is based on a norm of customary international law, the liable State is responsible for secondary obligations under international law. Thus, a State which is held liable as Canada was in the Trail Smelter Arbitration, is further responsible to ensure the non-repetition or non-recurrence of the same or like

environmental damage to the United States by taking all measures necessary to prevent the recurrence of such damage.

In a manner of speaking the function of liability may be said to be of a dual character, but to be more precise the primary rule of liability, as derived from the maxim : *"sic utere tuo ut alienum non laedas"*, entails a secondary obligation to restore or restitution and to make reparation. These are measures *ex nunc* and *ex tunc* under the law of State responsibility which is engaged as soon as a primary rule of international obligation is breached. The final consequences of secondary rules of State responsibility may also encompass the adoption of measures *ex ante* or preventive measures, now perfectly consistent with the precautionary principle advocated for all conducts of States in environmental law.

(b) The concept of punitive damages is not favoured under international law, although preventive measures could be regarded as a form of sanction, but the purpose is to prevent harm and not to punish the polluter. This does not preclude the polluting State from viewing the obligation to take measures *ex ante* or precautionary measures as a penalty for past misconduct, wilful or unintentional.

It is important to distinguish punitive sanctions from preventive measures, and consequently also punitive damages from mandatory precautionary measures. Thus, provisional measures indicated by the International Court of Justice to maintain the status *quo ante* of both parties or to prevent further deterioration of the existing situation are not punitive sanctions imposed by the Court. They are not designed to punish either party, but merely to preserve the rights and obligations of all concerned.

Furthermore, it should likewise be observed that as State practice begins to favour the concept of offenses against humanity as including offenses against the environment, equating environmental crime or international damage to the environment as a serious international crime or a grave crime against the law of nations, there is no reason why punitive damages should not be assessed.

However, the purpose of punishing a criminal is not the same as awarding excessive and exorbitant compensation to the victim of environmental damage as a punishment as may be done in some domestic legal systems. For instance, punitive damages in cases, such as the Bhopal Incident, could be awarded by a jury if the trial took place in the United States, and if the victims were American, and the negligent corporation foreign, which could be as high as US$ 45 million per head, whereas in reality the damages paid by the wrong-doing corporation in that case were no where near compensatory, let alone exemplary. In other words,

punitive sanctions in international law or punitive damages for that matter would be intended to punish or penalize the offender or wrong-doer, and would take the form of FINES collected by the international community or as a contribution to the common fund to pay compensation to unpaid victims and never to overpay the privileged few who happen to incur environmental damage or suffering. Thus, in Exxon Valdez Case, the fines collected were not only to punish the negligent misconduct but to contribute to the expenses of cleaning up the oil pollution caused by negligent navigation. Fines and punitive damages are not for the individual victims or sufferers of the injurious consequences of an activity under the control or within the jurisdiction of the State, hence its liability for compensation and answerability for future recurrences of the harmful effects. Fines are not advanced payment for future damage or suffering but should contribute to preventive or pre-emptive measures.

(c) The new links of international environmental law with intergenerational equity, sustainable development, environmental security and human rights are clearly indicative of the current perspectives on the question of responsibility and liability. The links are logical and inevitable. They have always existed although unnoticed until recently. More linkages will emerge as new perspectives on the fundamental question of responsibility and liability which must at all times remain evolutionary, as long as law continues to evolve for the international community as well as within a member nation of the global society.

2. *Legal distinctions*

(a) The distinction between State responsibility and liability or international liability or accountability of a State is very useful. It is conducive to a broader scope of measures destined to prevent harm or its recurrence and measures of restitution, restoration or reparation. Thus, liability is a primarily rule, a breach of this rule by a State will engage its responsibility. The consequences of State responsibility may entail the adoption or award of measures *ex nunc*, *ex tunc* and *ex ante*. But there is no breach of the primary rule if the offender, or in the case under examination the offending State, has undertaken to pay, or better still, has proceeded to make reparation or to pay the compensation which satisfies the requirement of international law and/or of the domestic law of the State or States concerned. Thus, liability could be pre-empted or aborted by the decision of the State to pay compensation.

Attention is drawn to the legislation in force in some countries, such as the United States, where certain industries are allowed to generate some pollution up to the extent to which they have been permitted to emit. Thus, a pre-paid compensation is tantamount to a license to commit environmental harm without entailing the liability to make any further

reparation or to pay any more compensation other than the licensing fees already paid in full.

Further consideration needs to be given to the broader scope of measures as to prevention rather than allowance of pre-paid licenses to injure one's neighbour, even within the national boundary. Transnational or transboundary injury could not be pre-condoned unilaterally by the system of licensing operative in one or more States, merely to ensure sufficient fund to pay for the compensation. The establishment of such a common fund is not unusual for accidents resulting from incidents of navigation at sea or on the high-seas, which could occur in spite of all the precautionary measures taken, even *ex abundante cautelae.*

(b) If the primary rule could be stated in terms of an obligation not to harm others, then in the context of international environmental law the very inducement of harm or damage or harmful effect triggers the duty to compensate or to make reparation. At this stage, environmental law does not yet admit "*injuria sine damno*". There must be clear and convincing evidence of physical damage to the environment or to a person or property on which a right of action can be based. There is no right of action, hence no liability, without actual damage, *i.e.*, personal injury or harmful effects. Thus, assessment is essential, and impact assessment must now be made for every industrial project. Such assessment is made to ensure the taking of effective measures to prevent harm, especially in regard to ultra-hazardous activities or substance. The law tends to presume the engagement of liability whenever injury ensues or harmful consequences occur. *Res ipsa loquitur* is appropriate to allocate the risk which should be placed squarely on the producer or transporter of ultra-hazardous materials or substance.

(c) Liability or international liability of States is a shortened version of international liability for injurious consequences arising out of acts not prohibited by international law. It happens that most instances of international environmental damage entail international liability of a State under international as well as national laws. On the international law side, the breach of a primary obligation not to harm others engages the State responsibility of the country whence emanate the harmful effects. The engagement of State responsibility triggers legal consequences prescribed by the series of secondary rules, in terms of rights and obligations as between the injured State and the offending State, and possibly also third parties. In national jurisdictions, local remedies may be available to redress the harmful effects, by way of reparation, compensation, cessation of harmful activities or preventive measures to avoid future harms, or to reduce and abate the harms already caused.

Liability regimes may be in place within a national legal system or systems. They may have been created as the result of a decision reached at a sub-regional or regional level, such as the Malacca Straits Council, or the ASEAN Convention or an international agreement on a global scale, such as compensation fund for oil pollution, or for a special geographical area such as the United Nations Claims Commission in Geneva in respect of compensation for environmental damage in Kuwait. Liability regimes can also create secondary rules, supplementary to or supplanting the more general secondary rules under the law of State responsibility. For instance, injury to aliens may fall under a special regime with regard to economic injury or loss of investment which could trigger a recourse to International Centre for the Settlement of Investment Disputes (ICSID) arbitration or conciliation or additional facilities and might also be covered by arrangements under Multilateral Investment Guarantee Agency (MIGA).

(d) The expansion of the geographical scope of the law is clearly relevant in terms of the nature and extent of the liability regimes. Several special regimes of international liability have been created by treaties, and, as such, are necessarily limited in its scope of application to parties to the treaties. Some treaties and conventions are regional and therefore not applicable generally unless by special agreement of the regional or founding members.

(e) Certainly the existing conflicts of interest relating to sovereignty, culture or economic development in terms of issues will to a larger or smaller extent affect the prospect of a negotiated liability regimes as well as the likelihood of their future success or failure.

3. The evolving role of State responsibility

(a) State responsibility is based on the existence of an internationally wrongful act attributable to the State. Such an act could be an action or omission. A State is responsible because it has committed an internationally wrongful act, whether by positive action or by sheer omission. An internationally wrongful act is committed when the State breaches an international obligation, by failing to perform what is required of it under international law. This is not to say that it is fault-based or non-strict. The questions of fault or culpa or intention or state of mind are to be found in the various primary rules creating international obligation for States. "Due diligence" to my mind is more American parlance than an international term of art. Assuredly, the test of State responsibility depends on the requirement mandated by the particular primary rule of international law, a breach of which will entail the responsibility of the State in breach. It is not infrequent that subjective as well as objective criteria have been used.

(b) Internationally agreed standards, if any — and there should be an increasing collection of such standards, will reduce the ambit of discretionality and subjectivity.

(c) The concepts of extra- or ultra-hazardous operations and risk are influencing the making of primary rules and the formulation of primary obligations incumbent upon States. A breach of any of the newly evolved obligations inevitably entails State responsibility as envisaged in the Draft Articles, Part I, on State Responsibility provisionally adopted on first reading by the International Law Commission.

(d) Yes, the concept of an international crime in connection with environmental obligations is a useful instrument for a more effective system of State responsibility. The question that remains controversial is the extent and practicability of punishing the State, or head of State or the minister responsible, or the official or private person committing the international crime against the environment. For instance, should we prosecute the head of State or head of government or the national army responsible for the grave environmental damage maliciously caused in Kuwait ?

(e) Liability as a primary rule for environmental damage cannot be fault-based. There must be *injuria* for every *damnum*. There can be no cases of *damnum sine injuria*. Under liability rule *ubi damnum ibi injuria*, wherever that is harm, there is actionable liability. On the other hand, the law of State responsibility in its definition and general principles does not require any injury or damage, it is *injuria sine damno* or responsibility regardless of injury or absence thereof.

(f) Concurrent obligations are cumulative and will increase the likelihood of State responsibility for non-compliance.

(g) Yes, the system of State responsibility and all national and international systems of civil liability should operate concurrently, in a complementary manner, to assist the victims or injured States and not to promote forum shopping or enhance the opportunities of vexatious litigations or malicious prosecutions. The last two deserve punitive sanctions from the international community.

(h) Positively, States cannot pretend to be innocent by-standers, reaping only the benefits and sharing no burdens when it is within their control and jurisdiction to permit, refuse, allow or tolerate certain activities which could result in harmful effects for other nations.

4. Strict liability and new interlinkages

(a) Apparently the liability for injurious consequences arising out of acts not prohibited by international law is stricter under international as well as national laws. It has to be strict since it is regardless of

wrongfulness and independently of legal prohibition. This is an evolution on its own, and not related to any alleged fault-based liability or its contrast to liability without fault (*responsabilité sans faute*).

(b) Such generalization appears dangerous and not very helpful to any problem-solving attempt.

(c) There is primary obligation incumbent on the part of every State to see to it that no harm occurs outside its territory as the result of activities inside its territory or within its control. The State is held accountable by international law to answer for the injurious consequences. Once the State fails to comply with this obligation, it becomes responsible and all the legal consequences of State responsibility flow from its international liability.

On the other hand, this does not release actual operators from primary civil liability both for the harms caused to outsiders and for the wrongful acts committed whether or not through negligence, criminal negligence, or without due diligence. There is a dual regime of liabilities, nationally and internationally. The operators are directly and primarily liable under the national laws of the country in which they operate, while that State is primarily liable under international law to the injured State for the harmful consequences suffered by the victims across the boundary line. Under the national legal system, the operators could find no comfort nor relief from the absence of legal provisions proscribing the operations. Whether or not this liability is strict, absolute, without fault, etc., under the national law of the host State, the State could accept international liability or be condemned to pay compensation internationally, and obtain reimbursement from the operators under its own law, by subrogating the rights of the injured parties.

(d) The apportionment of liability is not feasible between international and national legal system. Rather the question of priorities must be settled as between the State responsible for allowing harmful consequences to generate from its territory or under its control and the actual operators answerable for the harms caused with or without fault. Allocation and priorities is not essentially or too remotely different from apportionment of burden or duty to compensate. Priorities also relate to the primary and subsidiary character of liability, depending on the legal system under which compensation is sought. Thus, the State has primary liability if proceeded against by another State, while under its own legal system the operators have uncontested primary responsibility or civil liability regardless of any residual responsibility of the territorial State.

(f) Dual liability should be concurrent, or joint and several, rather than subsidiary. It is not always convenient to regard the international adjudication as the primary system. There is indeed the possibility of

exhaustion if not the requirement of primary recourse to local machinery for dispute resolution.

(g) The State back-up or primary system of liability, depending on the stand-point of the injured parties, should operate in conjunction with, rather than in isolation from, other concurrent mechanisms such as insurance and international funds.

(i) There is an enigma in the phrase "multinational operators" which may beg the question. Are we concerned with the problem of the nationality of claims or that of the corporation whose stocks or shares have been internationally floated ? Is it a question of *locus standi* of a nation-State or rather a question of selection of the respondent State against which proceedings should be instituted ? Whatever the ultimate answers to these questions, the fact remains that the two-track approach should be also complemented by a two way system for each track. International law cannot allow a State or multiple States controlling a multi-national corporation to extend diplomatic protection for their economic interests without attaching to this right of protection the duty of accountability or answerability for the unsavoury activities or questionable intents of these multi-national corporations lurking in developing countries, looking for new pastures for profitable exploitation regardless of the primary interests of the host countries. States whose nationals are answerable for the activities and projects of multi-national corporations should be held liable for the harmful consequences flowing from their wilful misconduct. Failure to meet the international standard of care to prevent harm caused by their nationals, natural and juridical, including multi-nationals, should lead to a breach of duty to prevent harm, and consequently, engaging the responsibility of the States of which multi-national corporations are nationals. Of course, here an order of predominance of control should dictate the order of priorities for their right to protect as well as their duty to compensate for the misadventures of multi-nationals.

5. Strict liability and the need for legal certainty : limits, insurance and collective reparation

(a) Any open-ended system of liability, strict or fault-based, is to be avoided. Stricter liability should be limited in the upper ceiling of compensation, otherwise no investor would dare to undertake the risk. This is not unnatural as we have seen in the context of the Warsaw Convention of 1929 in international air transport. On the other hand, liability for harm caused by industrial activities across the frontier cannot be limited except to the extent of the injury suffered. Thus, compensation or redress to be accorded should be tantamount to the injury suffered without limitation, whereas remoteness of consequences should be tested by a more acceptable theory of causation, whether it be *causa causans,*

causa sine quanon, direct causes, combination of independent causes or approximate causes, thereby foreclosing the open-endedness of liability severing from it all remote consequences.

(b) Full compensation should remain the ideal criterion, while limitation is placed at that point. There should be no more than full compensation in the sense of unlimited, excessive, exemplary, punitive or exorbitant damages without regard for the actual injury suffered or the damaging consequences incurred. Beyond full compensation lie preventive or precautionary measures.

(c) It is pertinent to consider full or unlimited liability schemes, commensurate with the injury suffered, taking into account the need for appropriate or apportioned contributions from operators, insurance companies, liable States and the available special funds, each with its own ceiling or limitation which together provide an aggregate whole covering the fullest (unlimited) compensation without imposing penalty on any of the parties accountable for the contribution.

(d) Yes, an unlimited overall liability scheme in the sense discussed would be an answer to any allegation of unfairness.

(e) Yes, but appropriateness depends on the particular circumstances of each type of damage.

(f) That may depend on the amount of the premium set or the insurance policy chosen by the insured.

(g) "Unlimited liability" is a very ambiguous term, and can only be used in the limited context in which the subject-matter is circumscribed. For instance, a company which is not a limited company is still limited in its liability by the existence and availability of the assets that can be marshalled to pay for all the debts in case of bankruptcy or dissolution. The unlikelihood of uninsurability is something only an insurance company could answer.

(h) A system of mandatory insurance is preferred in many instances, such as compulsory insurance for diplomatic motor-vehicles.

(i) Requirement by the State is consistent with the precautionary principle. Insurance can best fulfil its role in such operations which may entail harmful consequences.

(j) Reconciliation may well depend on the terms and conditions of the insurance policy. There may be several levels of intention. For instance, there is a clear intention to drive a motor-vehicle, but no intention to skid, or to hit a pedestrian in any given case of a road accident.

(k) An appropriate and ideal solution need to be found which must be just as well as equitable for all concerned.

(l) There should be a mechanism for collective compensation where the source of harm cannot be clearly determined. Even if the source is determinable, such as oil pollution from a sea-going vessel, a collective mechanism like the common fund would be helpful.

(m) Adequacy of such funds depend on the imagination of contributors and the seriousness and frequency of the occurrences of disasters, such as earthquakes. In which could trigger a chain of events. In any event, inadequate funds could be replenished.

(n) Yes, to an appreciable extent.

(o) Yes, they contribute noticeably to this preventive role.

(p) Each of the new principles mentioned, the precautionary principle, the polluter-pays principle, and the principle of common but differentiated responsibility has its impact on liability regimes with varying degrees of legal consequences.

(q) International assistance to avoid environmental damage is desirable, but it is far from being adequate substitute to liability regimes, and it will take time before a meaningful mechanism of international assistance can be put in place. For instance, the Malacca Straits States have devised the traffic separation scheme which constitutes but an initial minimum measure to prevent oil pollution caused by incident of navigation at sea.

6. New issues associated with liability and response action

(a) Yes, primary responsibility of response actions should be placed on the operators, several duties are incumbent upon them, such as the duty to give warning, notification and immediate response actions including restoration and cleaning-up measures.

(b) Yes, it would entail additional liability because it constitutes a separate breach of a secondary obligation, following from the breach of the primary rule or obligation.

(c) Compliance with the secondary obligation is normally designed to ensure stoppage, abatement or mitigation of injurious consequences. It neither reduces nor eliminates the liability for the accomplished breach of the primary obligation. However, if compliance with secondary obligations does prevent the occurrence of harmful effects, then no liability is created because no actual damage was caused. State responsibility is not engaged in this instance as the incidence of harm has been obviated. There is no victim, no injured party, hence no liability.

(d) Ideally, it should be the duty of any able-bodied entity to assist in the response action, as in other cases of national calamity, such as major earthquakes, forest fires, etc.

(e) Yes, contingency plans, etc., constitute the necessary tools for initial minimal discharge of response action obligations. They may or may not be adequate for the situation, depending on the swiftness with which response actions are taken, see, for instance, response actions by Japan to the 1995 Kobe earthquake.

(f) Failure to prepare a contingency plan engages the primary responsibility of the State and also its liability which is not subsidiary, nor indeed secondary. Failure to comply with its contingency plan is an additional liability for breach of secondary obligation by the State.

(g) Response actions may entail some expenses. The cost of such actions should be borne by those responsible to undertake them. However, the State should feel free if not obligated to reimburse private organizations which have volunteered their services in the response actions.

(h) It is part of the chain of consequences. The cost of response actions could be claimed as part of the compensation for damage, although it could be itemized as a separate item forming part of the integral amount of the total compensation to be awarded.

7. Defining activities which may engage strict liability

(a) In every special liability regime, it is necessary at the outset to define, specify and identify activities or the type of activities deemed to be environmentally dangerous.

(b) Certainly, the nature of the risk involved and the financial implications of such identification should be taken into consideration.

(c) The current trends in State practice appears to indicate a more sophisticated differentiation of the varying degrees of dangerous activities, classifying them into at least three categories, ultra hazardous, hazardous and dangerous, depending on the likelihood of the harm generated and the seriousness or gravity of such harm.

(d) No, activities in a geographical area, even the most sensitive, cannot be presumed in advance as dangerous, only activities likely to cause harm or potentially harm-generating activities could be categorized as dangerous, hazardous or ultra hazardous, according to the nature of the resulting harm.

(e) The order of priority could be arranged in accordance with the criteria of seriousness or gravity of the danger involved or the risk incurred.

(f) A liability regime may take into account the multiple criteria for such priority to determine *a priori* the degree of strictness of the liability commensurate with the risk entailed by the regime.

8. Identifying damage in the context of liability regimes

(a) Damage to the environment as such could be assessed for the purpose of calculating compensation over and above and independently of the amount of compensation already paid or to be paid in respect of death, personal injury and loss of property, resulting from the damage to the environment.

(b) Yes, a special regime in the context of liability for environmental damage should be comprehensive enough to cover incidental injuries to persons as well as property, irrespective of the existing rules of international or domestic law. However, compensation already paid in regard to loss of property and personal injuries should be taken into account in assessing the total amount of compensation, without incurring double jeopardy for the offending State or double payment of compensation for the same victims or injured parties.

(c) The problem is where to draw the line between other types of damage arising directly from such environmental damage. How far is consequential damage to be taken into consideration under the umbrella of this comprehensive regime ? These questions may be answered in the same sense as the theory of causation adopted.

(d) Some types of damage, such as mental anguish or suffering appear to deserve a separate study and not forming part of the "all types" of damage, including physical injury sustained by persons, as the result of environmental damage.

(e) A special regime should provide for the normal types of damage associated with, or flowing directly from, the environmental damage concerned. Another limitation is necessarily placed on the extent or degree of damage which should be appreciable and not negligible. Here the rule *de minimis non curat lex* should apply.

9. Issues related to the degree of damage

(a) There should be a floor above which all damage should be covered by the liability regime. Without *de minimis* rule, there will be endless litigations, vexatious suits, malicious prosecutions and other abuses of legal proceedings.

(b) The distinctions listed appear to provide an appropriate approach to the establishment of the minimum or appreciable damage which is beyond toleration, entailing serious impact, or major or more permanent impact.

(c) Foreseeability relates to reasonable foresight which could be more subjective than an objective standard. Besides, we are concentrating on "injury" or "injurious consequence" without fault or irrespective of

intention. However, absence of any foreseeability could imply remoteness of consequence or lack of connection, thereby severing the chain of causation.

(d) Foreseeability of damage, such as from earthquakes, is a relative vision prior to actual occurrence and should in no circumstance preclude the insurance coverage. On the other hand, non-foreseeability may provide an excuse for non-coverage or incomplete coverage of a particular insurance policy.

(e) Yes, it would appear to facilitate the distinction and further clarify reasonable foresight.

(f) That depends on the definition of "minor" damage. Minimal or infinitesimal damage should be covered by *de minimis* rule. On the other hand, accumulation for a lengthy duration of repeated "minor" damage on a continuing basis may exceed the level of tolerability of injury suffered.

(g) The purpose of the exercise to place all impacts above the degree of "minor" to be defined with greater precision, at the level of actionable injury.

(h) That appears to be the logical consequence of the definition or distinction to be drawn between above the line of "minor" damage and below the line which is tolerable and as such sustainable.

(i) Assessment will entail no additional burden and should be made in any case. What it would lead to is a different proposition.

(j) As earlier indicated, the fact that an impact is foreseen should neither create nor eliminate liability for the resulting damage. Foreseen consequence is direct consequence, covered by any theory of causation. Failure to prevent foreseen consequence engages the liability of those responsible for the operation.

(k) On the contrary, the liability regime should cover foreseen, unforeseen, accidental as well as incidental damage arising out of the activity in question. Foreseeability entails additional burden of precautionary measures to be taken to prevent or abate the harmful consequences. Once occurred, harmful effects would give rise to liability in any event.

(l) No, we should therefore make sure, that none of the propositions made are designed to deviate or derogate from the duty to prevent and abate harmful effects whatever the mechanism created.

(m) Leaving out the term "due diligence" which is imprecise and devoid of internationally accepted meaning, State responsibility is clearly engaged when the State fails to fulfil any of its international obligations. It is for us now to formulate such a primary rule which generates an international

obligation incumbent upon States to undertake environmental impact assessment in every field of activities.

10. Liability and responsibility for illegal activities

(a) Definitely and positively yes.

(b) State responsibility is engaged whenever there is a breach of an international obligation arising out of a treaty regardless of damage ; but when this results in any adverse impact another international obligation is breached regardless of the treaty obligation either because of its own doing (action) or because of its failure to maintain effective control over its private enterprises (omission).

(c) The State is responsible for failure to devise rules and standards to prevent environmental damage in the first place. Whether or not the operators is also or secondarily also liable may depend on its knowledge or foreseeability. The strictness of liability imposed on such an operator will depend on the local, federal or national legislation. The State concerned may have been lenient in its rules, standards and governmental controls, but may nonetheless hold the actual author of the environmental damage absolutely liable under its own law of tort for absolute or strict liability for hazardous or ultra hazardous activity in spite of conformance with its internal regulation.

(d) That depends on what constitute "wrongful" enforcement measures. Do they include incompetent or inefficient enforcement measures or corruptible measures ?

(e) There should be no need to prove significant impact or injury as the classification of substances as highly dangerous is sufficient evidence of the seriousness or significance of the impact or injury. However, the assessment of compensation, after establishing liability and State responsibility, is still required in the determination of the amount of compensation to be paid by the wrongdoer and other preventive measures to be undertaken by the operator.

(f) At the current stage of technological development, and in the absence of a more plausible criterion, yes, the presumption of causality is useful.

(g) No, we must search for a better formulation of a rule than the shifting of the burden of proof.

11. The debate about exemptions from liability

(a) There should be no exemption from liability, except when the State discharges its duty to pay appropriate compensation or when the injured State consents to or acquiesces in the damage or injury suffered.

(b) The instances mentioned should provide no ground for exemption from the liability to pay compensation or to undertake further preventive measures to prevent recurrence of the damage or harmful consequences.

(c) They are no exemptions. The most that can be said is only by way of mitigation or alleviation of liability which is shared by acts or omissions of a third party.

(d) To some extent it is admissible, not in complete exoneration of its direct liability, but in abatement or mitigation of the gravity of the consequences of the action taken by the operator.

(e) Yes, the State is responsible once the act is attributable to the State, but without releasing the actual operator of its primary responsibility. Both should share the liability to the extent of their respective contribution to the resulting harms. The public authority concerned becomes accountable under the administrative law of the territorial State.

(f) The fault of the victims in some legal system may be regarded as exempting or exonerating the tortfeasor from liability, as in "contributory negligence" at one time in force in a common law country. If however the activity was not undertaken at the instigation of the injured party, there is no exemption.

(g) Yes, in that case compensation may be withheld or reduced pro rata the contribution to its cause by the injured party.

(h) Yes, for the victim only if at all.

(i) No, that is a crime under international law, entailing punishment as well as liability to pay compensation.

(j) The later obligation subsist in any event. However, the response action may serve to reduce the gravity of the injury suffered, hence the amount of compensation to be paid.

(k) No, but humanitarian activities have other rewards.

(l) Exemptions should only be admitted very sparingly, otherwise they would erode special liability regimes.

(m) Yes, there must be clear and convincing evidence of a direct causal link.

(n) No, it should not constitute an exemption.

(o) There should be sufficient incentives for States to become parties to a given liability regime. Any pretext or resort to the use of flags of environmental convenience should be discouraged.

(p) That incentive would be a sound start on the road to the establishment of a workable mechanism.

(q) Yes, there should be no objection to the extra-territorial application of the stricter laws of an advanced country such as the United States to all U.S. enterprises regardless of the geographical areas of their operation. This does not mean that U.S. laws should apply to non-U.S. operators outside U.S. territory, jurisdiction or control.

(r) The differences between strict and absolute liability are very relative. Even the most absolute of liability is relative.

(s) No, partly because absence of willfulness is a negative subjective evidence not readily susceptible of concrete or objective proof.

12. A broader framework for the reparation of damage

(a) Certainly it should be so broadened as to include not only measures *ex nunc* (immediate cessation of damaging activity) but at least also measures *ex tunc* (inclusive of restoration, clean up and payment for economic loss, such as *damnum emergens* and *lucrum cessans).*

(b) It is a fair beginning. We should start with rehabilitation although it may take time and expenses, barring disproportionate spending.

(c) It would provide a fair substitute performance of that secondary obligation flowing from the breach of the primary rule resulting in environmental damage.

(d) Equitable assessment of compensation is an alternative approach, no better, nor worse, but it may or may not be appropriate for each particular incident.

(e) Contingency plans should provide necessary criteria, but no plans can cover all contingencies.

(f) Demarcation of baseline condition will be useful for restoration criteria.

(g) Where restoration or *restitutio in integrum* is not feasible, impairment of use, aesthetic or wilderness values would provide a reasonable standard of compensation for a start.

(h) International guidelines are often based on the practice of States which originates internally.

(i) Diplomatic means do not necessarily constitute an alternative to adequate compensation.

(j) For irreparable damage, nothing would provide satisfactory relief for the victim. However, a combination of measures of relief or redress might help ease the pain and suffering of the injured parties. No stone should be left unturned.

(k) It often happened in actual practice. Yet there should be substitute performance which at least is designed to establish or restore pre-existing or equivalent conditions.

(l) No, we should not allow that situation to arise.

(m) Punitive compensation by way of pecuniary damages may serve dual purpose.

13. Expanding the access to effective remedies

(a) The traditional rules of international law regarding direct or special interest may have to evolve in a more flexible way to allow an extension of a *jus standi* for a State or a close relative of an injured individual to obtain relief. If environmental damage is against the whole world or the international community, there should be grounds for a State or an individual to establish sufficient special interest to seek relief by demanding cessation of such damaging activity.

(b) It should be feasible to identify a sufficiently precise legal interest in environmental matters. However, the environment *per se* has a global implication with possibility of successive chain reactions beyond immediate calculation.

(c) Whatever rules already adopted in State practice at national or international level would be pertinent to broadening the standing of claimants. What is more important is the purpose of ending injurious consequences of an activity at source.

(d) In the absence of a direct legal interest, the public at large, or community, or society, or society of the State should be the claimant as in most criminal prosecutions with the view to arresting or abating the harmful consequences of a criminal activity.

(e) The concept of "trustees" is abandoned in most civil-law systems, although the term "trusteeship" has been revived in the context of the United Nations. Whatever our final resolution, it should be observed that the environment is a common heritage of mankind. It is for everyone, every State to protect and preserve. Any one, any State could act on behalf of the international community when it is a matter of general global concern.

(f) Yes, the United Nations or its principal organs, such as the Security Council and the General Assembly, each in its own sphere, could act on behalf of the global community.

(g) It could serve as a consolidation of class actions and the compensation obtained could be spread to all injured parties while restoration measures and response actions would benefit the collectivity of nations and peoples as a whole.

(h) Yes, their role deserves closer attention.

(i) Yes, although we already witnessed the establishment of an "environmental chamber" within the International Court of Justice, and the L.O.S. Tribunal for the marine environment.

(j) This is a different proposition. The Barcelona Traction is an outmoded remnant of stricter rule regarding nationality of claims in the treatment of aliens, long overtaken by modern developments in particular regard to international environmental law. Barcelona Traction decision is neither precedent, nor relevant for international claims for environmental damage. The Kuwait environmental claims before the Geneva claims commission provide ample proof of a clear departure from the limited application of the *jus standi* for "multinational corporation" to be represented by the State of incorporation or the State of which the corporation is national.

(k) The deciding authority, whether a Chamber or a Tribunal, should have the power to join all claims in a class or joint action to save time and expenses of duplication.

14. Securing access to remedies by the individual

(a) No, but there is ample room for improvement.

(b) It is already established and it should be encouraged to exercise jurisdiction wherever practical.

(c) This is done in several instances, such as in the Mekong Committee, at any rate for the planning and development of the Lower Mekong Basin for at least four decades.

(d) Yes, it is an absolute must, if we are ever to succeed in our conservation efforts for the common good of the environment.

(e) First, there should be a clear set of rules for the apportionment of liability among States, author States as well as victim or injured States. A mechanism may exist in various forms of international dispute settlement.

(f) It will do for a start, although further improvement in the process should be welcome.

(g) Yes, but it should not give rise to abuses which would defeat the object and purpose of the mechanism. We should learn from the experience of the Inter-American Court a century ago.

(h) No, it is neither adequate nor always useful. Some Courts assume jurisdiction without any sound legal basis. See, for instance, the Filartiga Case, which was not a criminal case. To say that torture is a universal crime, hence the exercise of criminal jurisdiction based on universality principle, is no excuse for the Court to arrogate to itself jurisdiction to

adjudicate a tort claim without any connection with the *locus delicti commissi.*

(i) Yes, but domestic Courts have a tendency to act as *judex in sua causa*, and to chide judicial responsibility on a convenient ground of *forum non conveniens* as in the Bhopal Incident.

(j) No, even the Courts in the same legal systems are not, as a rule, consistent, either within the same system acting as *judex in sua causa* or with other systems but still acting as *judex in sua causa.* See, for instance, the decision of the United States Court and of the Korean Court in the aerial incident case involving KAL 007.

(k) Reciprocity is required in some jurisdictions as a condition precedent for allowing recovery. Reciprocity is a necessary evil in international judicial relations and provide a lame excuse for a domestic Court to allow or disallow recovery, based on the existence or absence of proof of actual reciprocity. By itself, reciprocity is questionable as a solution which presupposes the pre-existing precedent set up by the other jurisdiction.

(l) No, they are dictated by considerations that are not free, from national prejudices and often tainted with political and non legal considerations.

(m) Yes, on the whole, Courts are impartial, but in several countries of dubious requirement of "due process", impartiality may be an exception rather than the prevailing rule.

(n) As long as local remedies are available, they should be resorted to. Their exhaustion is not required in every case, exceptions have enlarged, and States have dispensed with the requirement of exhaustion of local remedies rule, as in the Washington Convention of 1965.

(o) The requirement subsists in the case of injury to aliens as reflected to Article 22 of the Draft Articles on State Responsibility, precisely to show that the State still has another opportunity to be in compliance with an international obligation if by providing local remedies, its obligation is prevented from being breached.

(p) Of course, it is practical to separate State responsibility from civil liability. For one thing, the two concepts operate in different dimensions and at different levels. On the same international level, liability of a State is a primary rule relating to harmful effect, whereas responsibility is comparable to the law of obligations, torts, contracts and crimes combined.

(q) In environmental matters, State immunity in its limited application subsists in regard to activities of the State performed in the exercise of a governmental authority. When the activities are not in the exercise of governmental authority, immunity is absent if the dispute is one falling within the categories of disputes which by the rules of private international

law, the Court in question is a competent court with proper jurisdiction to decide the case in accordance with the applicable law.

(r) That appears to be a general rule. Here national treatment is generally admitted in the bilateral treaties, such as F.C.N. Treaties, between States on an equal footing, barring unequal Treaties.

(s) Dispute prevention in the sense of settlement *à l'amiable* through other alternative means of conflict resolution should be encouraged.

15. Private international law issues and solutions

(a) There are no preferred criteria for personal jurisdiction in cases involving multiple jurisdiction or conflict of laws and concurrence of jurisdiction.

(b) Whenever there is a dispute of multinational character, there are questions of choice of law and choice of forum. In some cases, States have agreed before hand to have the matter decided by an international Tribunal or to have the international Court determine which national Court should exercise jurisdiction. Compare the Treaty of Lausanne in the Lotus Case.

(c) Yes, many international regimes provide for dispute resolution at the option of the parties.

(d) Yes, such regimes often provide rules for the choice of law.

(e) Enforcement is better ensured if the decision is by a national Court. But when it is an indication of provisional measures or final judgement on the merits by an international Tribunal, execution or enforcement measures are often lacking, save in exceptional cases like the Iran/United States Claims Tribunal.

(f) In principle, yes ; but in practice legal aid is still in its infancy before the International Court of Justice. Financial resources are few and far short of what is needed to afford the costs of transnational litigation.

(g) Yes, there are reasons to hope that eventually and inevitably uniform principles regarding jurisdiction and the applied environmental law be developed to enhance further international judicial cooperation.

(h) Yes, there is a rudimentary response in the narrow scope of the 1968 Brussels Convention and the 1988 Lugano Convention, but much more need to be achieved on the global basis, beyond regional European confines.

(i) Yes, and U.N.E.P. as well as other competent specialized agencies of the United Nations should have a role to play. Ultimately the Security Council is the guardian of peaceful and healthful use of the environment.

Exchange of information is inherent in the duty of States to cooperate, while on-site inspection should be permitted wherever feasible.

16. Advancing international regimes

(a) Yes, but how comprehensive and how many such regimes ? The next question is one of priority for the negotiation and conclusion of Treaties creating such special regimes.

(b) It might assist the development of uniform application of rules of substance and procedure by national Courts.

(c) They should play an active role. Nothing to prevent their submission of a *Pro bono* or *Amicus* brief in any international or transnational litigation. Private associations and foundations should have a limited standing, not as parties to the dispute but at any rate as observers or interested friends of the Court.

(d) Enormously yes ; national legislatures often seek guidance from existing international instruments and can be inspired by the successes of relevant regimes created by Treaties.

(e) At this stage of legal development, we should aim at the creation of as many specific regimes as feasible and ultimately they could be combined or merged into a single composite regime encompassing all aspects of environmental matters. A comprehensive international regime is an ideal to be targeted with the realization that it will only be achieved in the remote future.

(f) Yes, effective liability principles require different treatments with varying degrees and levels of stringency, limits, exceptions and other characteristics relating to the specific nature of the activities.

(g) Yes, and that appears to be the current trends in the practice of States. See, for instance, the joint efforts and collective endeavours of the ASEAN States in regard to the management of environmental affairs.

(h) Yes, it is plausible and likely for States and entities to apply principles and solution albeit *mutalis mutandis* to different types of special regimes, once the issues and questions relating to them have been clearly identified.

Sompong Sucharitkul

Réponse de M. Shabtai Rosenne

11 February 1996

Your questionnaire of 26 December certainly goes into much detail. However, it raises several doubts in my mind. Those doubts all revolve around one central aspect, namely, whether your plan of action does not take us beyond the general terms of reference of the Institute. I am thinking, for instance, about those parts of the questionnaire which do not deal directly — as I see them, perhaps mistakenly — with questions of public or private international law but enter into the realm of other branches of law or other disciplines altogether, such as insurance considered not only in its legal context but also in its economic and perhaps other contexts. I have no objection in principle to our Institute adopting resolutions which impinge upon those other disciplines. But I think that it can only do so if it acts *en toute connaissance de cause*, and that can only be done after consultation with other properly authorized scientific media. I think that this must be kept in mind.

I notice that you have put your questions in groups. I do not propose to answer each question in detail except perhaps here and there but rather to give my replies also in groups, to the extent that I feel myself able and competent to do so. Some groups I pass over in silence. That means that at this stage I have no views to give you and await further developments, including further thought on the issue of principle which I have raised, namely whether we are not in danger of exceeding the general terms of reference of the Institute.

1. Conceptual framework

For the moment I think that we should remain within the limits of international [or State] responsibility as set out in Part I, articles 1 to 35, of the International Law Commission's draft articles on State responsibility. That deals with the notion of responsibility in international law and questions of imputability, which I see as the point of departure. With regard to redress and remedies, I think for the moment we should be guided by the draft articles of Part 2, articles 1-10 bis as adopted by the ILC in 1993.

I do not really understand the concept of punitive damages in the context of responsibility. If the term refers to a method for the calculation of monetary compensation, that is one matter. If it refers to something else, we would have to know more what is in mind.

International law is not static and while the conceptual framework will give expression to the law as at the date on which the instrument is adopted, I see no reason why it should not contain an in-built flexibility

to account for the intertemporal law and future developments in the law. Article 304 of the United Nations Convention on the Law of the Sea of 1982 furnishes a model for this.

2. Legal distinctions

I do not understand the distinction between responsibility and liability which I believe originates in technicalities of the English common law and is better avoided in an international context (think of the difficulty of differentiating between the two expressions in French — and I suppose also in Spanish). Therefore damage is essential to trigger reparation, and quantifiable damage to trigger quantifiable reparation.

In the nature of things, a negotiated regime will reconcile conflicting interests, whatever they be.

3. The evolving role of State responsibility

So-called *soft-law* is something to be avoided as the very idea is too controversial. With that limitation, which may well be a matter of drafting, the approach of internationally agreed standards carefully prepared by competent expert bodies and adopted after examination in a representative political body is a commendable approach. What those standards are is something to be individualized, and already international law and practice takes account of especially hazardous forms of pollution. It is central to Part XII of the United Nations Convention on the Law of Sea, which in my view is an excellent guide for this.

I think that all questions of international crime — an ambiguous expression at the best of times — should be avoided at this stage, save to the extent that treaties introduce this conception into positive international law as regards individuals and draw the necessary conclusions as regards the attribution to the State of the individual's criminal acts.

I do not understand the precise import of the distinction you apparently make between State responsibility and civil liability. Of the latter refers to an individual's responsibility — a natural or a juridical person — under the internal law of a State (including relevant rules of private international law), I have no difficulty.

I do not think that the last question in this group is a legal question, but the answer is probably in the affirmative.

4. Strict liability and new inter-linkages

I do not think that strict liability as known in domestic legal systems as yet a rule or principle of general public international law. I know that the International Law Commission has been grappling with the topic for some time now, without much acceptable progress.

Be that as it may, I believe that as indicated earlier in connection with State responsibility generally, there should not be brought into existence a special regime of strict liability only for environmental matters. The rule for environmental matters should be carefully crafted to fit into whatever general rules of international law on the matter exist, or come into existence.

I think that your groups 5 and 6 go far beyond legal limits and that our Commission is not in a position to provide answers to them. The most it should do is to signal the existence of these problems without adopting a formal position on them.

7. Defining activities which may endanger strict liability

I do not think our Institute is qualified to do this. It is qualified to indicate, both *de lege lata* and *de lege ferenda* what it thinks ought to be the consequences of activities which competent bodies decide could or should engage strict liability.

8. Identifying damage in the context of liability regimes

I do not fully understand the question. Reparation should cover all the damage caused by an act which international law defines now or in the future as an act engaging responsibility or strict liability.

9. Issues related to the degree of damage

In principle, the same answer applies here, with possible room for mention of the *de minimis* argument, which would affect the reparation due without affecting the bare responsibility or strict liability. Diplomatically, satisfaction of this kind may be desirable in certain circumstances.

10. Liability and Responsibility for illegal activities

The general rules apply, and a special regime should be avoided.

11. The debate about exemptions from liability

If this question refers to State responsibility, the ILC's draft of Part I answers the question. If the competent public authority requires something to be done, it is responsible if that activity engages the international responsibility of the State to which that public authority belongs. I do not see why there should be any departure here from the general rules regarding attribution in cases of State responsibility. I am inclined to assume at present that the same principle should apply if the law of strict liability is or becomes part of general international law. If it is not and the matter is left to the interpretation or application of a

given international instrument presumably a treaty in one form or another, by analogy the same principle would apply.

12. A broader framework for the reparation of damage

I am not sure that the question really arises. Properly calculated monetary reparation should cover all the costs of restoring the *status quo ante*.

13. Expanding the access to effective remedies

To be effective, the remedies should be available to all interests which suffer damage from environmental damage. If this cannot be achieved within the framework of existing institutions, then consideration has to be given to the establishment of special instances. This is in fact being done. Of course, a link has to exist in the form of an identifiable legal interest between the claimant and the subject of the claim. If there is no legal interest, there can be no claim. If the international community whishes to institute something like an *actio popularis* or obligations *erga omnes* for a given form of environmental damage, it will have to do so by an appropriately drafted instrument. The law regarding *erga omnes* obligations and the procedure for enforcing them is very underveloped, and perhaps this is a topic in itself which we could recommend to the Institute as a matter for a proper study. I do not think we should get involved in this incidentally to our primary duty. The same answer goes for group 14.

15. Private international law issues and solutions

I am not sure whether we can really get involved in a comprehensive way in the private international law or conflict of law aspects of environmental damage. This too might be a topic which we could signal to the Institute as one requiring full treatment by the Institute.

16. Advancing international regimes

I do not think that it is appropriate or possible to negotiate a single comprehensive liability (or responsibility) regime covering all forms of environmental damage. I think that the present system, by which individual regimes for individual aspects of the protection of the environment, is really the more satisfactory approach. At the same time, there is room for closer integration of the procedural aspects. I notice that the recent Convention on Straddling Fish Stocks and Highly Migratory Fish Stocks, which originated in a decision by the Rio Conference, integrates itself with the relevant parts of the general United Nations Convention on the Law of the Sea as regards the settlement of disputes, and I think that this could serve as a model.

With best wishes for the successful outcome of your difficult work.

Shabtai Rosenne

Réponse de M. Ibrahim Shihata

14 February 1996

Introduction

As many of the questions are interrelated, I shall not attempt to address them always one by one in the order presented in the questionnaire but will combine some of them as appropriate. Before doing so, however, I wish to clarify some of the underlying concepts. In the absence of such a clarification, my answers may not be fully understood. The clarification may also explain why a few questions were left unanswered.

To begin with, I do not understand the distinction which permeates the questionnaire between responsibility and liability. To me, both terms can be used interchangeably. Other distinctions are justified, however.

One relevant distinction is between responsibility or liability for damages caused by fault or negligence, on the one hand, and strict or absolute liability, regardless of any such fault or negligence, on the other hand. Such a distinction exists in domestic law and may have a clear bearing on certain areas of international law, such as the rules applicable to the world's environment. The term "strict liability" supersedes the term "absolute liability" in most writings (in view of admitted exceptions when liability is imposed independently of the existence of wrongful intent or negligence). These two terms should not, however, be used as if they covered different concepts.

Another relevant distinction, in the context of liability for environmental degradation resulting from private activities, is that between the responsibility or liability of the operator (whether or not it is based on fault or negligence) and the responsibility or liability of the State of the operator (mainly for not taking adequate measures to prevent the operator from harming the environment).

A third useful distinction is between civil liability and criminal liability, to the extent that certain acts or omissions are or can be criminalized under applicable law, be that with respect to operators or States. (While international crimes traditionally relate to acts or omissions of individuals, violations of international law increasingly entail the application of State sanctions, *i.e.*, punishment of the delinquent State and not only of responsible officials.)

My following answers to the questions will deal with them both *de lege lata* and *de lege ferenda*. This may in fact be inevitable in an area where the legal regime is still in an emerging state and the borderline between the "is" and the "should be" is often blurred.

Answers

- Does liability play a dual role, combining both a preventive and a compensatory function ? I would say this is normally its role. In the environment field, this should always be the case. Environmental degradation often introduces irreversible damage. Compensation may provide a satisfactory remedy to the aggrieved party ; it cannot do so to nature, to the population at large or to future generations. An issue which should concern us in this respect is that the causality requirement and uncertainty about the contents of the applicable rules often prevent the concept of liability from effectively playing this dual function. Until satisfactory customary rules are in place, there is a need for clarity in the international agreements covering liability for environmental degradation, including a delineation of the areas where liability ought not to be based on fault or negligence.

- Do I favor the concept of punitive damages in international environmental law ?

Because of the irreversible nature of environmental damages, compensation, as I mentioned, while possibly adequate for the present victims, cannot be an adequate remedy for the environment itself. Punitive damages may therefore help as a greater deterrent. They should also assist in financing remedial actions. The question in this case centers around who should receive such punitive damages. Ideally, the recipient should be a state fund or an international fund (depending on the type of damage) to be set up to receive the damages and use them for conservation purposes.

- International environmental law is part of the broader body of rules which constitute international law. It interacts with the rules addressing developmental and human rights issues. The principle of intergenerational equity should be seen as one of the basic principles underlying international environmental law, rather than as a separate rule of international law.

- State responsibility, as is the case with responsibility in general, has preventive (deterrent) and compensatory functions. The details of such functions are likely to differ according to the subject matter and according to whether the issue is addressed from the perspective of international law or a given domestic law. In this respect, monetary damage is not the only factor to be taken into account. Assuring compliance with the rule of law could be an objective in itself ; non-compliance may trigger responsibility before any damage has actually occurred. This is particularly relevant in areas where damage, once it occurred, cannot be reversed.

- The "geographical scope of the law" is relevant for environmental law which, by definition, addresses phenomena that transcend state boundaries. This applies to both primary and secondary rules.

- I do not necessarily envisage "conflicts of interest" between sovereignty, culture and economic developments in environmental issues, as assumed in the questionnaire. I see state sovereignty as the jurisdiction of the State, properly defined by international law. As the domain of international law expands, State jurisdiction becomes more regulated. What matters here is the participation of all States in the making of international law rules. Also, culture and economic development need not be seen as "conflicting" with the environment. Complementarity between cultural, economic and environmental concerns should be achieved to assure culturally and environmentally sustainable development. Law has an important role in reconciling these concerns and allowing them to interact in a mutually re-enforcing manner, taking account also of the political realities in the society addressed by it, whether this society is domestic or international.

- Internationally agreed standards do diminish the discretionary, subjective element in the application of rules, generally. The rule of due diligence, when applicable, is no exception.

- If the evolution of domestic law is any guide, extra-hazardous operations call for strict liability and in that sense can influence the evolution of State responsibility in that direction. We have already seen examples of this, *e.g.*, in the 1972 Convention of International Liability for Damages Caused by Space Objects.

- The concept of international crime in connection with environmental obligations can also be a useful tool for a more strict system of responsibility if the legal consequences are clearly defined. A distinction between crimes committed by operators and violations committed by States would call for different types of sanctions. The current work of the ILC on State responsibility is relevant in this respect.

- The difficulties encountered in establishing a fault-based liability may call for more demanding standards (*e.g.*, absolute liability for ultra-hazardous activities). State responsibility complements the civil liability of the operator but does not have to be invoked simultaneously with the latter. As I explained in my letter of December 26, 1995, the State may be accountable for setting up civil liability mechanisms, with additional components such as an insurance scheme or compensatory fund to be financed by the operators in whole or in part. States cannot, however, exonerate themselves from any liability once these mechanisms are in place. The need for residual State obligations becomes all the more relevant when such mechanisms are non-existent or fail to provide adequate

remedies. The operators' civil liability and State liability should not be seen as mutually exclusive, but rather as complementary.

- In international law, as in domestic law, liability based on fault or negligence is the general rule ; absolute liability is the exception. This exception is justified, however, in all high risk activities where the operators and their States control the activities and stand to benefit from them while the victims have no choice. In such circumstances, what is otherwise an exception becomes the rule.

- The State which has control over the environmentally damaging activities of a multinational corporation should have jurisdiction over such corporation. International conventions addressing operators' liability can identify the responsible parties, the applicable rules and the methods of settlements of disputes.

- Strict liability can of course result in excessive losses, but this has not deterred states from agreeing on it in the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and the Draft Protocol on Responsibility for Hazardous Waste. Establishing a ceiling on liability may be acceptable if the ceiling is reasonably adequate. Considerations of equity may call for fairness in weighing the need for the activity and its benefits to the operator against the harm which may result from it. Experience in other fields, *e.g.*, liability of air carriers, points to the advantages of establishing ceilings by prior agreement among States. It also points to the shortcomings of this approach when the ceiling is deemed to be inadequate in relation to the harm. Obviously, previously known limits on liability facilitate insurance against it. However, such limits can also encourage expansion of the activity. Some balance has to be established to discourage hazardous activities and ensure adequate compensation.

- Insurance normally does not cover self-inflicted or intended harms but this should not mean denying insurance for every fault-based liability. Insurance for car accidents is a good example. Spreading liability among a great number of entities is a form of insurance (collective self-insurance) and may therefore be helpful. It is not, however, a guarantee for full reparation ; nor is it a substitute for establishing the basis of liability, if it is not absolute by law. In any case, joint liability should not conflict with the principle "polluter-pays."

- Funds for collective reparation may be helpful if adequately financed through state contributions, taxes, operators' contributions, etc. They should not, however, be structured in a way to reduce liability based on fault or negligence.

- EIAs, notification, consultation and other measures can reduce the chances of damage to the environment and thus cases of liability. The

need for introducing adequate safeguards to reduce as much as possible environmental degradation is a matter of international public policy which must be addressed both in international environmental law and international aid efforts. In addition, the deterrence caused by substantive rules reflected in the precautionary principle, the polluter-pays principle and the principle of common but differentiated responsibility serves the same purpose.

- Establishing an obligation on the part of states and operators to take "timely and effective response actions," such as contingency plans, early warning, notifications, EIAs, and dissemination of information, can of course be helpful, although it cannot substitute for the obligation of due diligence. Carrying out the required response action cannot be an adequate defense against all forms of liability. An operator may be exonerated vis-à-vis the State if he does all what is prescribed by law. It is doubtful, however, that this would be an adequate defense vis-à-vis other parties who suffer harm in spite of the operator's compliance with the required measures. As far as international environmental law is concerned, any agreement should specify the actions required by the State parties and should also be explicit on whether the carrying out of such actions exempts the State from responsibility. If the actions are beyond the institutional or financial capacity of the less developed States, the agreement should be clear as to the measures of assistance these States would receive to meet the costs.

- It is always required to define the cases where strict liability is established by law (including treaty law), unless there is a binding general assumption of strict liability. However, cases of strict liability may be defined as categories (generic cases), not necessarily specific cases.

- If more than one domestic law or one liability convention is applicable, there will be a need for resolving conflict among the applicable rules, using the usual rules of conflict resolution in this respect. Compensation would then be set according to the rule which is deemed to be the most relevant ; it would not be a combination of all compensations due under the different rules.

- Damage to the environment as such should be a cause for liability, regardless of any damage to a specific party. In many jurisdictions this is already the law (*e.g.*, the 1980 US Superfund Law). The reason, as mentioned earlier, is that nature belongs also to future generations.

(It is interesting in this respect to recall the principles of Islamic law established since the seventh century. This law assumes that man, being the "steward of God" on earth, is under an obligation "not to corrupt the earth." From this general obligation, many subsidiary obligations ensue, including obligations with respect to the protection of water sources, land reserves, reclamation of land, treatment of animals and plants, etc.

The liability resulting from non-compliance with these obligations is not always based on private damage suffered by a specific party.)

- A regime concerned with liability for damage to the environment should not, however, exclude liability for personal injury or property. These should not be seen as mutually exclusive. Different approaches may, however, be designed for the different types of damage, given the different magnitudes of harm and the different interests involved.

- The magnitude of damage should not affect the principles of liability for it, although there can always be a way of dealing differently with *de minimis* claims. It should not be appropriate to have different rules regarding the more serious damages. The extent of precautionary measures and the level of compensation will clearly depend on the degree of damage, actual or anticipated. The use of EIAs focuses attention on the degree of damage and the need for escalating precautionary and corrective actions against the more dangerous damage. An EIA cannot, however, address *force majeure* or unforeseen situations. Nor should it be an excuse for non-compliance with the polluter-pays principle, especially with respect to private damages. An EIA cannot be a "certificate of liability-free activities." State liability for not carrying out EIAs should be part of *de lege ferenda* international law.

- State liability for the violation of international law rules in the field of the environment should not be different from general liability for any violation of rules of international law. Even the rule of strict liability for ultra-hazardous activities has many other applications outside the environment field.

- In principle, the liability of an operator who complies with government regulations should not be any different from that of any person who, in spite of his compliance with applicable rules, causes damage to others. The owner of a factory is not always exonerated from compensating for the damages resulting from a fire in his factory which extends to neighboring buildings simply because he followed the instructions of the Fire Department. Liability could still be based on other forms of fault or negligence or it may be absolute in nature. The matter will depend on the substantive liability rules in the law applicable to the particular case.

- The presumption of causality is a useful mechanism for dealing with issues such as the accumulative effects of pollution. It should be based, however, on prior agreement (on the international level) and on pre-existing legislation (on the domestic level). It should also be subject to possible rebuttal by the defendant. The presumption that an activity has a harmful adverse effect unless the opposite is proven cannot be reasonably adopted as a general rule. It may, however, be adopted for

specific hazardous activities where reasonable grounds for such a presumption may exist.

- Exemption from liability should not be excluded when there are compelling grounds for it *e.g.*, in case of *force majeure* or *fait du prince* (for the operator) or due to third party action. (In the latter case, liability would fall on the third party causing the damage). Applicable rules in this respect, whether international or domestic, should be the same rules which govern liability for similar activities. Exemptions being exceptions to the general rule of liability should be interpreted strictly ; for instance "environmental warfare" cannot be equated with "armed warfare" for exemption purposes. Humanitarian activities cannot be used as an excuse to harm the environment unless the damage averted by these activities is much greater than that caused by them. A causal nexus should be established between the event justifying the exemption and the damage incurred and no exemption should be based solely on the unforeseen nature of the impact (unless it reaches the proportions of *force majeure* or *fait du prince*).

- Private firms operating across national borders are exposed to greater risks when it comes to liability for their activities. Access to foreign markets often means compliance with the laws and standards of these markets and can put certain international law rules into play. The national law applicable to the private corporation may also be applied in an extraterritorial manner. If that law has higher standards than those of the host country, its extra-territorial application would provide a measure of protection to the environment which would not otherwise be achieved.

- Compensation should cover all the costs resulting from the damage, including clean up and restoration costs or the costs of rehabilitation when feasible. In case of damage to living resources, when rehabilitation is not possible, covering the cost of acquiring other biological resources should be considered. In any event, polluters should pay and should not benefit from the absence of "baseline conditions." Here again, the generally applicable rules (both substantive and procedural) should be applied, although domestic and international guidelines specific to compensation for environmental damage could certainly be helpful. Diplomatic consultations, arbitration and adjudication provide mechanisms for dispute resolution in this, as in other fields. No damage should remain uncompensated for simply because it is irreversible. On the contrary, this may call for (additional) punitive damages, as explained earlier.

- Because the environment often falls outside private ownership or the jurisdiction of a single State, there is room to consider claims not based on the own interest of the claimant. (Unless one assumes that every human being has an interest in a clean and healthy environment, and can

therefore always be characterized as an interested party.) However, environment should not be used as an excuse by foreign governments to interfere in matters falling within the domestic jurisdiction of other States. Ideally, only an international organization with an agreed upon mandate should take up claims at the international level on behalf of the environment, in which case an international fund would receive the compensation and use it for rehabilitation and conservation purposes.

- A standing World Environmental Court may not be needed at this stage. If the chamber for environmental disputes of the ICJ is not deemed adequate or sufficiently specialized for environmental disputes among States, a facility for the international arbitration or adjudication of these disputes as well as of disputes between States and operators could be established following the systems of the International Court of Arbitration or ICSID, *i.e.*, by having a list of potential arbitrators or judges to be drawn upon when needed and a small secretariat to serve it. Indeed, existing systems (with some modification in the case of ICSID) can serve the purpose. Under this approach, the standing of the parties and the jurisdiction of the tribunal will have to be carefully described.

- We should be careful in using the term "global commons." While it can be used to describe areas outside the jurisdiction of any State, it is now being used in environment literature to describe areas such as rain forests which are part of the territory of certain States. If the argument for doing so (interest of the international community) is taken to its logical limits, no place would be left for the national jurisdiction of States. By definition, environmental concerns have no political borders. This justifies the establishment of new rules of international law. It does not justify turning any part of the territory of a State into "global commons."

- Individuals, as a general rule, should have remedies at the domestic level. If these are exhausted to no avail, their States may espouse their claims. Nothing prevents States to agree on giving access to individuals or private parties generally under an international regime, as is the case in the ICSID regime. Enthusiasm for such private access to international facilities should not lead to destroying confidence in local courts or to assuming that they are useless, simply because they exist in foreign countries. While I advocate equal, non-discriminatory treatment before national courts of both nationals and foreigners and support judicial reform efforts in all countries, I find the trend to discredit national courts particularly disturbing. In any event, dispute prevention should receive particular emphasis.

- Questions regarding the jurisdiction of international tribunals and the enforcement of their decisions or awards should not be different just because the dispute is over environmental questions. The general rules on

the choice of applicable law should be applied here without exception. A more effective regime can always be established at the international level by the States concerned in this as in other areas of international law.

- Harmonization among the domestic legislations of different countries in a specific field has proved useful, especially at the regional level. This need not lead to a comprehensive liability regime for environmental damage. The latter task can be time-consuming and may distract attention from many other priority areas. Harmonization of national legislation and coordination among international conventions could facilitate eventual agreement on a comprehensive liability regime (unlike the assumption underlying question 16(d)). I would put the emphasis on strengthening national legislations and ensuring its enforcement and on international efforts to specify the applicable standards and rules in specific areas.

Ibrahim Shihata

Reply by Mr Louis B. Sohn

26 December 1996

Your Questionnaire on Responsibility and Liability for Environmental Damage under International Law, deals with 16 topics and presents a very large number of issues. I assume that you don't expect just "yes" or "no" replies but wish to obtain the views of the members of the Commission on each of the points raised. Accordingly, I have tried to give substantive replies to each question. I hope that they will prove helpful in preparing your final report.

Here are my answers, question by question, though some answers deal with a group of closely related questions.

1. While there is a duty to prevent damage to the environment affecting another State or its citizens, as well as damage to the marine environment, there are various limitations on liability for violations of that duty. The Restatement of Foreign Relations Law notes, *e.g.*, in Reporters' Note 3 to section 601 (Vol. II pp. 102), various international instruments limiting liability to cases involving significant, substantial or serious harm to the environment. Theoretically, there probably should be a liability in every case, but, of course, compensation has to be proportional to damage done. A nuclear explosion in the Ukraine may cause significant damage in Romania, but relatively insignificant one in Belgium.

There seem to be general objections to punitive damages, except in a case of action pursued by a State for a big economic gain regardless of catastrophic consequences to another State.

The factors mentioned in the third paragraph of this question increase perhaps the scope of necessary preventive action and may result in broader responsibility for violating simultaneously several international rules. Often it might be possible to provide separate compensation for each distinguishable violation.

2. It is perhaps easier to determine that a State was responsible for a damage, directly or indirectly, then to decide on the needed preventive measures or the scope of reparation. The State may be obligated to pay certain amount of compensation for damages already done, and — separately — to take various steps to prevent the reoccurrence of the environmental damage in the future. Special monitoring of the situation by an international authority may also be provided, as was done in the Trail Smelter case between Canada and the United States (Restatement, supra, vol. II, pp. 109-10).

If, luckily, no damage occurs, it still may be desirable to order some stringent preventive measures. A next situation may be less lucky.

There is, of course, a link between primary and secondary rules, but it might be easier to agree first on primary rules in a framework agreement, and put secondary rules in an annex that may be subject to a procedure allowing easier revisions, adapting the application of the principles to constantly changing circumstances.

In some situations it might be desirable to have world-wide rules, but it should also be possible for regional or functional groups of States to adopt more stringent rules.

It is possible to achieve agreements of general scope regardless of conflicts of interest relating to sovereignty (usually exaggerated), culture or economic development. If absolutely unavoidable, it may be necessary to provide a special transitional period for some States, or special international assistance in educating local population or providing alternative employment or other economic incentives.

3. It seems clear that responsibility should not be limited to fault-based harm, but "due diligence" also does not seem to be a sufficient standard. It is desirable to consider instead more objective standards. Of course, any generally agreed specific standards are very helpful, such as those included in the environmental agreements relating to the ozone layer and global warming.

The concept of extra-hazardous operations creating a risk of damage in another State, especially when disproportionate to the benefit sought by the actor State, are helpful.

The concept of international crime results in an additional remedy — the punishment of the criminal, and helps to consider certain actors as responsible not only for the crime but also for compensating adequately the victims of the criminal act. The liability of Iraq for the consequences of its attempted conquest of Kuwait has been very broadly interpreted by the Security Council and the claims commission established by it.

The result of concurrent obligations under various provisions of international law should enlarge a State's responsibility for the failure to comply with these obligations and should result in an increased compensation.

To the extent that a situation results both in State responsibility and civil liability, these systems operate in complementary manner. In particular, because of likely differences in the burden of proof required in these two situations, a negative reply in the first instance, does not preclude a positive decision in the second one.

It is likely that States will increase arrangements to share liability with private operators.

4. The evolution of civil liability under international law toward strict liability is being influenced by the preparation by the International Law Commission of a draft convention on international liability for injurious consequences arising out of acts not prohibited by international law. This draft is having as difficult and as slow progress through the Commission as its yet unfinished predecessor, the draft on State responsibility.

Strict liability is likely to become the main standard, but in cases of obvious or easily provable fault, the old standards are still likely to be used.

While primary strict liability of operators may be a desired goal of States, limiting the subsidiary liability of States to the due diligence standard might not be generally acceptable.

Subsidiary liability should be limited to the portion of liability not covered by the primary system, except when the resort to that system does not result in payment of the awarded compensation, *e.g.*, because of the bankruptcy of the operator or the exhaustion of an international fund.

The back-up system of State liability should operate also in conjunction with other mechanisms, as insurance and international funds might prove insufficient.

Multinational operators might be more able to use a two-track approach to frustrate recovery than the victim plaintiff to obtain recovery.

5. An open-ended system of strict liability may be sometimes abused, but the excessive financial burdens, especially the costs of a litigation, are more often the result of manipulations by the defendant's lawyers rather than by those of the plaintiff. Whether, they would discourage investments or create economic inefficiency would depend on the operators, who can often transfer some of those costs to the general public or deduct them from their tax bill.

The concepts of a ceiling to liability and of full compensation are clearly in conflict, and in times of constant inflation most ceilings prove unsatisfactory, though it might be possible to provide a flexible ceiling changing with inflation and/or the extent of damage or clear fault of the operator. It may be necessary to establish a separate ceiling for each available contributor to the compensation, or only for some of them, provided that unlimited liability, as noted in the previous sentence, should continue to apply in certain circumstances, or the operator should be obliged to pay the remainder of the necessary compensation.

The application of the concept of unlimited liability should normally end the arguments about the shortcomings of limited liability, provided it is really unlimited.

Whether some limits should be put on compensation for some damages but not for others depends on the circumstances of a particular activity that caused the damage.

Whether unlimited liability can be insured depends on the likelihood that the damage will happen. A factory built in an earth quake zone may, for instance, have more difficulty to obtain insurance. In some dangerous circumstances, it is often difficult to obtain insurance, but even then there are still some insurers that are willing to gamble. In principle, insurance and financial security should be an important condition for allowing a dangerous activity. Whether States can by treaty impose such obligations on operators depends on their constitutional system. There is a growing tendency to accept the principle that a treaty prevails over domestic law.

The insurance agreement can provide for payment of damages to the victim regardless of the circumstances that caused the damage, including the fault of the insured.

Channelling and apportioning the liability to a greater number of entities, may provide the best guarantee that compensation will be paid.

If the exact source of pollution cannot be identified, there should be a special fund to take care of the needed compensation, or the cost should be distributed among all likely responsible parties. If a river

becomes polluted, all factories using it for dumping waste should be responsible, unless some can prove that the particular chemical could not have come from them. Each State can devise an appropriate fund and decide who should contribute to it, and how much each contributor should pay ; any remainder may be distributed among the appropriate local authorities and the central government.

Should the whole process of compensation become to burdensome to the operator and/or the government, more emphasis would be put on preventive measures or completely prohibiting an increasing number of extra-hazardous activities. Of course, for governments the easiest way out is to enact the "polluter-pays principle", and to establish a proper monitoring and investigating system able to ascertain who are the polluters.

6. Several international agreements include obligations to promptly inform all interested parties about the danger, and to provide all available assistance as quickly as possible.

Any effort spent on reducing the damage would be its own reward, as compensation would thereby be diminished. On the other hand, any neglect in assistance that results in an increase of the damage often results in turn in an increase in compensation.

Assistance by private entities sometimes is the result of voluntary humanitarian action, and in some circumstances such as an accident at sea, there is an international obligation to assist the passengers and crew of a sinking vessel.

Recent treaties provide appropriately for early warning or prompt notice, and for contingency plans to assist neighbors or other parties to such treaty (as in case of nuclear disasters). In some cases, when some steps taken by a State threaten to endanger the other parties environment, an Environmental Impact Statement may be required, and its absence may be taken into account in determining the compensation. Wherever there's an agreement requiring such measures, any violation of the agreement may create liability.

7. A list of extra-hazardous activities that may create a risk of damage is included in some treaties and was presented by one of the rapporteurs of the International Law Commission (ILC Report, 1990, 50 GAOR, Supp. N° 10, p. 252).

In areas such as Antarctica measures have been approved to limit any activities that may affect the environment ; *e.g.*, limits have been established on tourism.

If several conventions provide for different standards, the one most favorable to the environment should apply, by analogy from the judgement of the Permanent Court of International Justice in the Electricity Company

of Sofia and Bulgaria case, where the Court decided that "the multiplicity of agreements concluded accepting the jurisdiction is evidence that the Contracting Parties intended open up new ways of access to the Court rather than to close old ways". (PCIJ, series A/B, N°. 77, p. 64, at 76). Similarly, by concluding several overlapping agreements to protect the environment, the parties intend to provide more protection to the environment, not less. It is a most-favorable to the environment clause.

8. If a damage to the environment caused also death, personal injuries or loss of properties, additional claims can be presented, as was done in the *Exxon Valdez* oil spill near Alaska. International claims would have arisen in that case if that spill had affected an area in Canada. These other claims, while treated together with the environmental damage, would have to be decided in accordance with the relevant rules of international law. Nevertheless their success may depend on ascertaining liability for the environmental damage. As was done in the U.S.-Iran Claims Tribunal, intergovernmental claims may be separated from individual claims, and individual claims may be in addition separated into large and small. Similarly the Claims Compensation Commission established for Iraq has divided claims into several categories, one of which includes damages to the environment in Kuwait and possibly applies also to damage caused to the environment of other Gulf States.

9. As noted in paragraph 1, some treaty provisions exclude minor damage to the environment. Old Roman rule, *de minimis non curat practor*. If damage is foreseeable, advance arrangements should be made for dealing with it, such as a special fund to which claims would be submitted. It is not possible to exclude such liability in the Environmental Impact Statement. The Environmental Authority, on the contrary, should require that a guarantee be given for proper compensation if actually needed. Otherwise, the permission to proceed should not be granted. A State would be responsible to another State if permission was granted without such guarantee. While such things can be allowed on domestic plane, international law cannot tolerate activities that are known in advance that they may affect another State. More properly, the other State should be allowed to participate in the proceedings before the domestic authority, and its participation may lead to arrangements that would allow certain necessary activities but would provide in advance how any claims for damages would be dealt with.

Once there is a clear obligation to prepare an adequate environmental assessment, this must be done with due diligence, and there should be responsibility if a lack of due diligence resulted in a substantive damage.

10. Any activities undertaken in violation of binding international rules and standards would engage liability in case of substantial damage. A

State is responsible not only for its own activities but also for activities of persons and entities under its control, when there is an adverse impact on another State, its environment, or its citizens.

If the event was caused by a State's failure to enact appropriate rules, the State is responsible for damage caused by that neglect. The Convention on the Law of the Sea contains clear obligations to enact the necessary rules, which must take into account internationally agreed rules, standards, and recommended practices and procedures. The operator who has complied with the existing local law might be exempt from liability, unless the local law contains a general obligation of all citizens and residents to comply with the State's international agreements. Lack of enforcement measures, or neglect in enforcing existing measures should create responsibility of the State to another State, and, in case of a damage also a liability.

The more dangerous a substance, more preventive measures should be required, without waiting for a substantive damage.

Even if the exact source of damage cannot be identified, the State to which damage can be traced should be responsible for it. It should at least establish monitoring measures that would help to establish the sources, the cumulative effect of which is causing damage in another State.

A shift in the burden of proof that would permit authorizing only activities that would not have an adverse effect would be helpful, but it would not help in cases where the authorizing authority has given authorization on the basis of faulty evidence presented to it by the operator of the supposedly environmentally clean facility. Scientists discovered that grave dangers to the ozone layer or global temperature were caused by widely-used substances which seemed completely innocent or only locally harmful.

11. The less exemptions, the better. Even natural disasters can be prevented, *e.g.*, a flood caused by a weakened dam, or a forest fire caused by allowing tourists to smoke cigarettes. Armed conflict is also no excuse for using damage to the environment as a weapon. Any exemption needs to be carefully circumscribed. While certain acts by a third person, such as terrorist acts, cannot be completely prevented, and such a person, even when captured, can be only punished, but seldom can pay reparations to all the victims of the act, there should be a way to compensate innocent victims. Such irresponsible act should be treated like the acts of nature, where the government steps in and provides as much compensation as possible to the victims.

Similarly, a wrongful order by a public authority, the compliance with which caused damage, may sometimes exempt the actor, but not the

authority or its government, especially when neglect in supervision can be proven.

If a fireman dynamites a house in order to save a group of houses from destruction, those whose houses were saved and the city which has avoided the spread of the fire, should be obliged to compensate the owner of the house sacrificed for the purpose, even if the house would have also been burned if the fire were not stopped. In maritime law, if the weight of a ship in danger is lessened by throwing overboard a part of the cargo, the rule since the ancient Rhodian Code has been that the owner of the sacrificed cargo has to be compensated by the owners of the cargo and of the ship saved. The same rules should apply on land.

Contributory negligence of the victim should be taken into account in determining the amount of compensation.

The considerations noted above apply also to the various exemptions listed on page 11.

The use of a flag of convenience should not allow the State to avoid responsibility for vessels that were allowed to sail regardless of known failure to comply with international standards. The existence of port jurisdiction under article 218 of the Convention on the Law of the Sea, and under a European convention with a similar objective, is in addition to, but not a substitute for the responsibility of the flag State. There should be also responsibility of the State who benefitted from the activities of the ship as long as it was in good condition, but got rid of it when it no longer met international standards, by allowing the owners to find a flag of convenience. As in some cases involving corporations, international law should remove the veil from non-seaworthy vessels. The vessels should be scrapped, not sent away to cause harm.

Extraterritorial application of domestic environmental law provides only a temporary answer, as the State using that device against other States, usually becomes very uncomfortable when by reciprocity other States apply it to its citizens and entities. It is necessary to find an international solution, even if it may require strengthening international organizations and tribunals.

Absolute or strict liability is a lesser evil than insufficient liability. The law should not protect the wrongdoers but the victims.

12. Compensation should no longer be limited to the payment of economic loss, but should include also cleanup and restoration costs, whenever possible. Grossly disproportionate expenditures should not limit liability. The bigger the likely liability, the more it can act as a deterrent. "In case of doubt, don't do it".

Of course, if living resources are destroyed, the nearest possible substitute should be found.

As the International Court of Justice is stating in one case after another, what is needed is an "equitable result" ; it is not sufficient to apply equitable principles. A "reasonable restoration" would comply with this approach.

(I do not understand how the "impairment of use" can be a substitute for restoration).

In all these cases, international guidelines, such as those that are to be established under the Law of the Sea Convention, are preferable. Of course, domestic law should be allowed to provide greater, additional protection to the environment.

The amount of compensation can be established by diplomatic negotiations, with the help, if necessary, of an international mediator, conciliator or facilitator. In complicated cases, involving many claims, an international commission may be necessary. Arbitration or adjudication are the final remedies, but depend on the existence of prior *ad hoc* agreement.

Voluntary, *ex gratia* contributions may avoid expensive litigation.

Because a damage is irreparable, it does not mean that it cannot be compensated. In such a case, the liable entity should not benefit, but on the contrary should be subject to punitive damages.

13. There must be some connection between the claimant and the environmental damage. One may distinguish between a claim for compensation, where the evidence of a measurable damage is required, and the preventive stage, where there might be a broad group of interested persons that might be, but not necessarily would be, affected and they wish to stop or limit the danger. For instance, a plan for nuclear power plant might be endangering a whole neighborhood. Once an accident has occurred, only persons directly victimized are interested. Sometimes, only after activity has started, it becomes obvious that it is hazardous, and a claim for termination may be brought, even before a serious problem has arisen.

Thus a "trustee" or "ombudsman", representing the general public may speak for the environment, in order to protect the whole community. In most cases, there will be some interested non-governmental organization that would be willing and able to protect the public interest. In many countries, a government agency is now in charge of the environment, and it may step in to diminish or terminate the potentially dangerous activity or to fine the operator for actually having caused damage.

On the international level, a similar High Commissioner for Environment might be established to act on behalf of the international

community and to protect the environment against old or new hazards. This function would be separate from establishing a commission to determine the amount of damage caused and to provide for compensation of various claimants. An International Environmental Court might be also possible, and the forthcoming International Tribunal for the Law of the Sea has already a broad jurisdiction over disputes between States arising with respect to environmental provisions of the Law of the Sea Convention, and additional agreements can enlarge its jurisdiction, including even claims by entities other than States. As far as corporations are concerned, the Institute of International Law has recently adopted a report broadening the international responsibility of the parent corporation for acts of the subsidiary entities in other countries and vice versa. This trend may be also reversed, permitting one of these groups to bring claims on behalf of the other.

14. In general, it would be difficult for international tribunals to be able to deal with almost 200 States, if they actually should use it. Opening their doors widely to national or juridical persons is not likely. The General Assembly recently did the opposite; it quietly closed the door to requests for advisory opinions of the International Court of Justice on appeal from the U.N. Administrative Tribunal, as the doorkeeping special committee, which was in charge of deciding whether a complaint by an official of the United Nations for his or her mistreatment raises an important issue deserving the Court's attention, became swamped with hundreds of complaints. This shows that if a door is to be opened to individuals, proper guarantees have to be devised that only issues of general importance, requiring an authoritative interpretation of an international environmental rule, be sent to the suggested International Environmental Court. Perhaps the jurisdiction of that Court, in addition to disputes between States, should be limited to requests by the highest domestic courts for the Court's interpretation of a customary or treaty-based rule of international environmental law. The case would have to be raised by a natural or juridical person before a domestic court, but that court would be entitled to receive an authentic interpretation of the rule in question from the highest international authority on the subject. It is easier for States to accept that kind of jurisdiction than to allow appeals from a domestic tribunal to an international one, that may reverse a domestic decision, thus creating a conflict between the two tribunals. (Similar procedure had proved very helpful in the European Economic Community).

There has not been yet an attempt to use the Environmental Chamber of the International Court of Justice, and there are proposals to establish a conciliation and arbitration facility for environmental disputes within the Permanent Court of Arbitration at The Hague. Either of them would deal

with disputes involving States, and the second might be also open to other entities, broadly defined.

Domestic environmental impact statements should be required for projects that may have transboundary effects or affect the global environment.

A mechanism for the inter-State apportionment of liability would be required only if several States should be found to be responsible for a particular damage. This is not likely except in cases of joint action which would be under the auspices of an international institution which might be held responsible for violations committed by its joint force. In several cases, the United Nations agreed to pay compensation for damage caused by its peacekeeping forces.

Access by individuals to international tribunals was discussed in comment 14 above. As far as access of foreign claimants and foreign States to domestic courts or remedies is concerned, there were some good recommendations by the OECD, which resulted in proposals by a joint committee of the American and Canadian Bar Associations which led to a Uniform Act enacted by some States of the U.S. and some provinces of Canada for facilitating access by citizens of one of the entities to the courts of the other. There are also special provisions on the subject in the environmental supplement to NAFTA. In all these cases reciprocity is required.

When there are various domestic courts interpreting the same treaty, decisions are often inconsistent. A good (or bad) example may be found in the Warsaw Convention on damage suffered during an international air flight, which has been interpreted differently by various American and European courts. There is seldom a question of impartiality ; it is more a question of different approaches to treaty interpretation.

Exhaustion of local remedies is generally desirable, as often the problem can be properly decided in the local court, especially if it knows that an appeal to an international tribunal may be available. This became quite clear in the US-Canada Free Trade Agreement and the NAFTA agreement, as the presence of international panels made national administrative tribunals much more careful. In any case, the requirement should be kept in cases of State responsibility for a denial of justice.

As far as State immunity is concerned, States are often immune in their own courts, and they are very reluctant to loose immunity in other States, except in commercial matters. If they have to defend themselves, they prefer an international tribunal.

Equal access to remedies is provided for in the OECD report mentioned above.

In principle, all international disputes should first be the subject of negotiations. Some agreements establish also special joint commissions which try to prevent disputes, mitigate or even solve them by patient consultations. Their goal is to find a generally acceptable joint solution rather than make one party accept the other's proposal.

15. There is a need for common agreement on two related issues : which tribunal should have jurisdiction of a particular category of cases, and which law should that tribunal apply to decide the case. Where a contract is involved, it should contain answers to these questions. It would be necessary to establish a private international law tribunal to decide these questions where there is no contract, or where the contract contains no provisions on the subject. A convention can establish a regime that would contain the rules to be applied with respect to the jurisdiction of domestic courts, the applicable law and the enforcement of judgements.

It has been fashionable in establishing an international tribunal to provide for a fund to provide assistance for States that cannot afford an international litigation.

Instead of relying on the 1968 Brussels and 1988 Lugano Conventions, it would be desirable, because of the strong public law aspect of environmental questions, to have a separate convention on these subjects, as mentioned above.

Exchange of information in respect to projects with possible transnational effects is provided in recent treaties. They provide also for government consultations, and on site-inspection are sometimes allowed.

16. The need for a comprehensive international environmental responsibility and liability regime is mentioned in several recent agreements, including the Convention on the Law of the Sea (article 235). Even if it is not widely ratified by States, such a generally agreed upon convention will influence the practice of States and of national courts. Any provision for access of private associations and foundations should probably allow States to opt out of it.

It is so difficult to reach an agreement on a regime, that it would make the task very difficult if attempt were made to create separate regime for different types of activities. As was done in the Convention on the Privileges and Immunities of Specialized Agencies, there may be annexes to the convention containing adaptations to the need of each regime. In ratifying such convention each State would be entitled to specify which of these annexes it is willing to accept.

If a group of States is not completely satisfied with the new convention, its members can ratify it nevertheless, and agree in addition

what other provisions favorable to the environment they would be willing to accept *inter se*.

Louis B. Sohn

Reply of Mr G. E. do Nascimento e Silva

15 May 1996

The exhaustive list of issues you raise obliges the reader to think twice about most of them and thanks to such an analysis it will be possible to adopt the suggestion made at the end of your Preliminary Report of 22 August 1994, namely that the *Institut de Droit international* will be in a position to proceed "first to identify and develop such basic principles of responsibility and liability under international environmental law and next to consider the question of their application in different types of regimes".

In other words, after having gone over the questionnaire, we must try to isolate the main principles in this field avoiding the discussion of minor issues, capable of provoking interminable discussions that might end up by thwarting our main objective.

In many of the issues you raised, I hesitate to take a stand and, therefore, I will side-track some of the questions.

1. Conceptual framework

While agreeing in principle with the three positions raised, I feel that as yet international law has not embraced the concept of punitive damages.

The principles of intergenerational equity, sustainable development and human rights are already being dealt with in the field of responsibility and liability.

2. Legal distinctions

In the search for the basic principles, it is important to keep in view the various distinctions mentioned, but at this stage it would be advisable to leave the issue for future study.

Issues linked to sovereignty and to economic development cannot be ignored in this field, in view of the importance given by developing countries.

3. The envolving role of State responsibility

Fault based responsibility, due diligence and strict liability continue to be applied indistinctly, depending on the problems involved and the seriousness of the damage. In the case of extra-hazardous operations, the tendency is to apply strict liability.

The last question can be answered in the affirmative, *i.e.* there is a tendency in certain fields, as can be seen in the answer to question 4, adopt a three and even four phase system, taking into account private insurance, pooling of funds by operators, residual State funding, and adoption of global or regional funds to cover damage. However, many States are reluctant to adopt unlimited indemnity.

4. Strict liability and new interlinkage

In answering this question, I feel that the question of civil liability for nuclear damage, that has been under study for quite a long time in the IAEA, is the best example.

The Tchernobyl disaster, brought into focus the vacuum in regard to State liability and certain shortcomings in the regimes of the Vienna and the Paris Conventions and on the need to up-date the Vienna Convention on Civil Liability for Nuclear Damage, of May 21, 1963.

In the discussions held in Vienna, the three hypothesis mentioned by you have been invoked, namely primary responsibility of the operator, State responsibility, and other mechanisms such as insurance and international funds. In 1991, the United Kingdom, developing an idea tabled previously, suggested a four-tier scheme of compensation for nuclear damage, which envisaged :

1) funds to be provided by the operator in accordance with the Paris or Vienna Convention ;

2) a further tier of funds to be provided by the operator ;

3) funds to be provided by the State of the operator liability ;

4) funds to be provided jointly by the States parties to a Vienna Supplementary Convention to be negotiated.

The idea behind this scheme is the adoption of unlimited liability.

5. Strict liability and the need for legal certainty : limits, insurance and collective reparation

Once again, the solution of some of the problems raised could be preferably taken up at a later stage.

Another point we must keep in mind is that the solutions will depend on the nature of the pollution, ultra-hazardous or not, and the

existence of treaties. In the case of nuclear damage, we have important conventions, which are in the process of revision, and that deal with most of the issues raised, namely limits, insurance and collective reparation.

As was mentioned in the previous answer, the question of limits is one of the key issues relating to civil responsibility for nuclear damage. The 1963 Vienna Convention provides that liability of the operator may be limited by the installation State to not less than US$ 55 millions for any nuclear incident. This limit, after Tchernobyl, is considered insufficient. It will be increased, and will be based on *Special Drawing Funds*.

Regarding the difficulties in identifying pollution, it should be pointed out that modern technology is capable of identifying most sources of pollution, including transboundary air pollution.

Even though we should avoid certain issues which are not ripe for codification, I feel that we must keep in mind the position taken up in Stockholm in 1972 and in Rio de Janeiro in 1992 that approximately 80 per cent of world pollution can be laid at the doors of industrialized nations. In other words, responsibility for this worldwide pollution is theirs and the polluter-pays principle accepted on the domestic sphere should apply equally on the international sphere. Should the international community consider that there should be collective compensation in the case of non-identified pollution, those 80 per cent should be shouldered by them.

The idea of collective reparation in the case of nuclear damage has been raised in Vienna where the Latin American countries rightly pointed out that there are only three nuclear power stations in South America and that it would be disproportionate if they should have to respond collectively in the case of a nuclear disaster in Western Europe.

The possibility of contributions to funds in general, taxes and fees should be discarded at this stage.

6. New issues associated with liability and response action

Once again some of the important issues raised could be left for future deliberations.

As far as early warning and notification are concerned, we can accept Principle 18 of the Rio Declaration on Environment and Development (1992).

I think that we can endorse article 8 of the Institute's resolution on *Transboundary air pollution* (Cairo, 1987) that provides that States in carrying out their duty to co-operate shall "regularly inform other States concerned of all appropriate data on air pollution in their territories, including its causes, its nature, whether man-made or natural, the damage

resulting from it, and the preventive measures taken or proposed". The resolution innovates in a sense since it mentions *natural* causes, and not only man-made.

7. Define activities which may engage strict liability

This is a tricky issue since the adoption of a list of activities considered environmentally dangerous has always the risk of leaving out activities that may turn out to be dangerous.

Should the adoption of a list be desirable, I would suggest the adoption of a *reverse listing*, that would enumerate the activities that are not dangerous.

In the eventuality of two or more conventions dealing with a given activity we should follow article 30 of the Vienna Convention on the Law of Treaties (1969), always remembering that with a judicious interpretation the idea of a conflict of obligations can be avoided.

8. Identifying damage to the context of liability regimes

Damage to the environment should only be considered for the purpose of liability in the case of death, personal injury or loss of property.

We would include all types of damage related to the purpose of the regime and the nature of the activities undertaken.

9. Issues related to the degree of damage

In principle only those damages that represent a certain gravity or seriousness should be included in a liability regime. The difficulty lies in determining the limit : in the field of nuclear damage, the IAEA has been trying for years to determine the *de minimus*.

Consequently, minor damages should not be included. This does not mean that all impacts above the degree of minor should necessarily be regarded as damage.

It is difficult to envisage the possibility of States accepting responsibility for not undertaking environmental assessment with due diligence.

10. Liability and responsibility for illegal activities

The violation of binding international rules and standards accepted by States incur, without a shadow of a doubt, liability. In the case of violation of customary international law, States also incur, in principle, in liability.

In the case of damage caused by highly dangerous substances, it is necessary to prove that significant impact or injury occured.

11. The debate about exemptions from liability

States are free to admit exemptions from liability under international regime.

Armed conflict, terrorism and natural disaster of exceptional character are cases in which, generally, exemption is admitted.

Incentives to accede to important markets or entities accepting international obligations on liability can only be considered if formally accepted in an international treaty. The adoption of discriminatory measures by a given number of States, but not accepted by a significant number of States, is inadmissible.

The exterritorial application of domestic environmental laws, usually aimed at protecting national interests, is equally inadmissible.

12. A broader framework for the reparation of damage

In principle, liability should be broadened so as to include cleaning and reparation costs ; but in practice it may turn out to be difficult.

Obviously, the adoption of guidelines would be useful, but, once again, the drafting of these might turn out to be difficult.

In the case of irreparable damage, voluntary contributions and diplomatic negotiations might be appropriate alternatives. Arbitration should not be ruled out, but only after the exhaustion of the two previous solutions.

Damage may end up uncompensated.

Punitive compensation should be ruled out.

13. Expanding the access to effective remedies

The traditional rules of international law are becoming more flexible *au fur et à mesure* that the ideas underlying environmental damage become stronger.

If there is a written commitment in this sense, international institutions can be empowered to proceed on behalf of the community of participating States.

Depending on the case itself, the International Court of Justice could revert the criteria of the *Barcelona Traction*.

14. Securing access to remedies by individuals

The rules governing the access of States to dispute settlement mechanisms are constantly improving.

Access to the International Court of Justice should be restricted to really important issues in which the existence of a Standing Chamber would be irrelevant.

Foreign States should only be allowed to participate in the domestic-planning process of major projects of another State if participation is formally requested.

The access by foreign individuals or States to domestic jurisdiction and remedies depends on the legislation of the respective State. However, there is a trend aimed at placing nationals and foreign citizens on the same footing in environmental issues, on a non-discriminatory basis.

One cannot expect decisions by court from different legal systems to be consistent.

Even though a judge will try to be impartial there is usually a natural tendency to favour nationals.

The rule of exhaustion of local remedies is firmly established in international law and must not be abolished.

State immunity in environmental matters should continue to be the rule of international law.

15. Private international law issues and solutions

As a general rule, there is no preferred criteria to establish personal jurisdiction in cases involving a variety of multinational aspects.

It is up to the legislation of the State where the environmental damage occured to decide which court is competent.

16. Advancing international regimes

It is desirable for States to negotiate, on a bilateral or regional basis, liability regimes for environmental damage.

Consequently, comprehensive conventions will facilitate the harmonization of international legislations and the coordination with other conventions.

In the case of closely related countries, the adoption of broad and comprehensive regimes is desirable.

Once again my congratulations on your questionnaire and my apologies for not having answered all the questions.

G. E. do Nascimento e Silva

Réponse de J. Salmon

4 juin 1996

Encore une fois mes très vives félicitations pour un rapport d'une extrême richesse qui établit une typologie particulièrement fouillée de la matière. La mariée étant trop belle, je crois que l'Institut devra faire un choix dans les problèmes les plus importants pour ne pas se lancer dans une tâche impossible.

Afin de répondre à votre questionnaire de la façon la plus courte et la plus efficace possible, je compte procéder de la façon suivante : pour ne pas avoir à répéter le texte de vos questions et raccourcir mes réponses je donnerai à vos sous-questions la désignation (a), (b), (c), etc.

Pour chaque sous-question qui me paraissent en dehors du mandat de la sous-commission ou trop détaillées ou secondaires pour que l'Institut les examine j'indiquerai : "inopportun". Si la Commission devait avoir un autre avis, je me réserverais d'y revenir ultérieurement.

1. Conceptual framework

J'avoue ma perplexité en ce qui concerne certains aspects du cadre conceptuel que vous proposez. Je dois dire que je suis réticent à voir l'objet de notre sous-commission qui est "Responsabilité et environnement" *Annuaire*, Milan, 11, p. 361) s'élargir en y ajoutant le concept de "liability" qui presente l'inconvénient fondamental d'être un concept confus, sauf à s'expliquer sur le sens dans lequel on l'emploie. II recouvre à la fois l'obligation primaire de réparer un dommage dans le cas d'une responsabilité sans acte illicite (ce qui relève du mandat de la sous-commission), mais aussi toute une série d'autres obligations primaires éventuellement attachées à la prévention d'un dommage à l'environnement (notifications, consultations, études d'impact, etc..). Ces autres obligations primaires, pour autant qu'il faille en traiter, me semblent relever des principes dont notre Confrère Luigi Ferrari-Bravo a la charge.

Les questions de responsabilité qui me semblent relever de notre sous-commission sont de trois ordres.

1) Dans le domaine de l'environnement le champ est aujourd'hui à ce point couvert d'obligations primaires contractuelles, sinon coutumières, susceptibles d'être violées que l'on se trouve pratiquement toujours dans l'hypothèse d'une responsabilité pour acte illicite. Les travaux de la CDI sur la "responsabilité internationale pour les conséquences préjudiciables découlant d'activités qui ne sont pas interdites par le droit international" sont assez éclairants à cet égard ; ils aboutissent finalement à décrire un régime d'obligations primaires en cas d'activités à risque. Leur violation entraînera une responsabilité pour acte illicite.

2) Le seul point de la "responsabilité internationale pour les conséquences préjudiciables découlant d'activités qui ne sont pas interdites par le droit international" qui devrait dès lors rentrer dans vos préoccupations, est celui de déterminer s'il existe des obligations de réparer des atteintes à l'environnement du seul fait d'un dommage alors que ces atteintes ne seraient pas en elle-même illicites.

3) Me paraissent enfin relever aussi de notre sujet la responsabilité de droit interne créée par certaines conventions internationales, que ce soit pour faute, pour faute présumée ou pour risque (objective ou absolue), et qui ont pour destinataires des personnes privées exerçant une activité donnée, mais aussi l'Etat dans la mesure où il exerce cette activité. Dans ce cas si l'Etat est visé, c'est non comme sujet de droit international, mais comme sujet de droit interne de l'ordre juridique considéré.

J'estime que ces trois sources de responsabilité sont un menu suffisant pour notre sous-commission pour qu'on ne la charge pas d'autres obligations primaires.

Dès lors mes réponses à la question 1. sont :

(a) Non.

(b) Non.

(c) Non. Elles ne relèvent que des autres normes primaires.

2. *Legal distinctions*

(a) La question de la prévention devrait rester en dehors des préoccupations de notre sous-commission.

(b) Oui en cas de responsabilité pour acte illicite si le but est d'obtenir une réparation ; oui par définition dans le cas d'une responsabilité pour dommage sans acte illicite si le but est d'obtenir une réparation. A noter toutefois que la violation d'obligations relatives à la prévention d'un dommage à l'environnement qui n'est pas suivie d'un dommage peut appeler d'autres conséquences que la réparation.

(c) Devrait rester en dehors des préoccupations de notre sous-commission.

(d) Cette extension ne me semble nous intéresser que pour le cas où le dommage atteint une zone qui n'est sous la juridiction d'aucun Etat. Qui peut alors en prendre la défense ? Comment réparer ? Mais est-il opportun d'en traiter en détails ?

(e) De tels facteurs me semblent étrangers au problème de la responsabilité telle que je vous propose de la circonscrire.

3. The evolving role of State responsibility

(a) J'avoue ne pas partager l'idée de ceux qui considèrent que la responsabilité internationale est fondée sur le concept de "faute". Pour moi — et je pense ne pas être seul à penser de cette façon — il vaut mieux éviter l'emploi de cette terminologie "faute" et s'en tenir au concept plus clair d'acte ou fait illicite. Evitons un débat théorique àl'Institut sur cette question. Il est au demeurant inutile d'employer le terme "faute" ; votre question est très claire si vous vous bornez àparler d'obligations de vigilance (*due diligence*). Sous cette réserve la réponse à la question est oui.

(b) Oui.

(c) C'est déjà fait : certaines conventions prévoient une responsabilité objective ou absolue qui s'applique à des opérateurs particuliers ou Etats et peuvent envisager une responsabilité subsidiaire de l'Etat.

(d) Les conséquences d'un tel acte illicite seraient distinctes. Voir rapports CDI sur la responsabilité des Etats.

(e et f) L'evolution des expectatives des sociétés internes, les exigences de plus en plus grandes d'une opinion publique rendue attentive à des préoccupations écologiques me font augurer que la pratique conventionnelle s'orientera de plus en plus vers des prescriptions décrites en termes d'obligations de résultat plutôt qu'en termes d'obligations de moyen. On exigera que l'Etat fasse en sorte que les activité se déroulant sur son sol ou sous sa juridiction n'aboutissent pas à tel résultat dommageable. L'obligation de vigilance en sortira renforcée. Ceci soulève une belle question de fond : celle de savoir si l'Etat ne doit pas mieux contrôler l'initiative privée ou àdéfaut en subir les conséquences. Voila certes une question qui mérite l'attention de l'Institut et dont on relèvera les conséquences plus loin.

(g) Oui ; chaque fois que la source de la pollution réside dans le fait d'un opérateur privé.

(h) Oui.

4. Strict liability and new interlinkages

Ici l'utilisation de l 'expression *fault-based* ne soulève pour moi aucune objection puisqu'on est dans des régimes de droit interne. (Toutefois, je ne suis pas convaincu que la faute civile soit par nature intentionnelle, comme vous l'indiquez page 13 de votre rapport ; elle peut l'être ; mais elle ne l'est pas nécessairement).

(a, b) Je n'ai pas les éléments statistiques pour répondre à ces questions de fait.

(c) Réponse aux deux premières lignes : oui. Toutefois, si l'Etat est lui-même l'opérateur, son obligation — de droit privé — est directe. Réponse aux deux lignes suivantes : les modalités de la responsabilité subsidiaire de l'Etat sont diverses en pratique. II n'y a lieu de rendre l'Etat responsable subsidiairement que s'il a manqué à une obligation de vigilance à l'égard des actvités des particuliers. Je ne vois pas pour quelles raisons l'Etat devrait payer pour les déficiences du secteur privé à respecter l'environnement. C'est à ce secteur à respecter ses obligations et à se couvrir pour ses activités à risque. Lorsque le privé fait des bénéfices il ne les partage pas habituellement avec les pouvoirs publics. L'Etat n'a à répondre que de sa déficience propre, celle d'assurer que l'opérateur privé respecte ses propres obligations. Pour être crédible cette obligation doit être formulée comme une obligation de résultat. Est-il besoin de souligner qu'on est ici en partie dans le *de lege ferenda*.

(d, e, f) Inopportun.

5. Strict liability and the need for legal certainty

(a) Voir commentaire sous 4 c).

(b) L'objectif doit être la réparation intégrale, la manière dont on y parvient doit répondre aux choix politiques mentionnés sous 4 c).

(c à k) Inopportun.

(l) Il serait équitable socialement parlant de prévoir la réparation de victimes innocentes ou de dommages à l'environnement par des mécanismes de réparation collectifs mis sur pied par ceux qui retirent les bénéfices des activites polluantes.

(m à o) Inopportun.

(p, q, r, s) :

Ces obligations primaires relatives à la prévention au sens large ne devraient pas relever de notre sous-commission.

6. New issues associated with liability and response action

J'ai le sentiment que les *response actions* conservent pour l'essentiel la nature d'une prévention attardée. La remise en état, qui est une forme de réparation, relève en revanche de l'objet de nos travaux.

(a) Relève des obligations primaires : inopportun.

(b et f) Sans doute, comme toute violation d'une obligation primaire, mais ceci est inopportun.

(c) Non.

(d, e, g, h) Détails inopportuns.

7. Defining activities which may engage strict responsibility

(a) Non, ce serait plutôt l'inverse. On pourrait imaginer le contenu-type d'une convention imposant un régime de responsabilité pour risque en laissant aux Etats le soin de définir à quel type d'activités, dans quels lieux ou pour quels produits elle s'applique. Il est impossible pour l'Institut de rentrer dans ces distinctions complexes.

(b) Inopportun.

(c) Les deux approches peuvent être suivies, mais il me semble inopportun de rentrer dans ces détails.

(d) Idem, approche possible pour les Etats ; inopportun pour l'Institut.

(e, f, g) Inopportun.

8. Identifying damage in the context of liability regimes

(a, b, c, d, e). Une fois acquis que le dommage à réparer inclut non seulement celui qui a été subi par les personnes juridiques intéressées (matériel et physique), mais aussi celui subi par l'environnement non approprié, les modalités sont affaire de circonstances dans les détails desquelles il n'est pas possible de rentrer.

9. Issues related to the degree of damage

Pour ma part, j'ai toujours considéré la question de l'importance du dommage dans le domaine de la protection de l'environnement comme parfaitement artificielle pour les raisons suivantes. La pollution n'est pas un concept absolu ; ce n'est pas une simple atteinte à un état de nature, d'ailleurs mythique. La plupart des activités humaines ont pour effet de modifier l'environnement. Les êtres humains ont toujours fait subir à leur environnement certaines agressions. Lorsqu'un certain seuil de tolérance est atteint, intervient la prise de conscience d'un abus et la protestation. Cette tolérance est affaire relative car elle dépend des utilisations de l'environnement que l'on juge essentielles et que l'on entend protéger. Ce n'est que lorsqu'il existe un consensus social que celles-ci sont mises en danger que l'on proteste. Si, par exemple, l'utilisation protégée est la pêche, la pollution sera réalisée si les poissons sont atteints dans leur santé ou cessent d'être consommables pour les êtres humains ou sont menacés par la surexploitation. Si l'utilisation des eaux est l'irrigation de terres, certains rejets, de nature à compromettre cette fin deviennent intolérables. La définition même de pollution est donc liée à un dommage ; mais celui-ci n'est jamais absolu ; il est relatif à l'utilisation protégée. Les seuils de protection font l'objet d'après discussions entre des intérêts opposés : ceux qui veulent défendre une activité économique déterminée

et ceux qui veulent éviter les rejets jugés nocifs ou l'exploitation jugée excessive des ressources naturelles liés à cette activité.

Le législateur international va déterminer soit par des normes abstraites soit par des normes quantitatives ou qualitatives les moyens de protéger l'utilisation envisagée. La même méthode sera suivie s'il s'agit de protéger non une utilisation mais l'environnement en tant que tel. Il n'est, cependant, de secret pour personne que depuis trente ans on assiste à une prise de conscience grandissante de la nécessité de protéger l'environnement pour les générations actuelles et futures et, par voie de conséquence, à l'élaboration de normes internationales de plus en plus protectrices, même si les tenants de l'écologie considèrent que l'on est loin de compte. Les normes quantitatives relatives aux rejets considérés comme nocifs pour un milieu donné ou aux prises de ressources autorisées, les listes de polluants interdits, font l'objet de constantes remises en cause dans un sens plus protecteur de l'environnement. Ceci étant, une fois l'utilisation ou telle partie de l'environnement reconnus comme protégés, il ne peut leur être porté atteinte, un point c'est tout.

Sans doute le dommage doit être prouvé et dès lors ne peut être que "sensible" car *de minimis non curat praetor*. On imagine mal une association de protection de la pêche dans les rivières protestant à la suite du "décès" de quelques poissons. Mais il n'y a aucune raison d'exiger que le dommage soit "important" ou "sensible". On remarquera au surplus que si la pollution est caractérisée par le dépassement de normes d'environnement rédigées en termes quantifiés ou des listes d'exclusion de produits considérés comme nocifs, l'infraction existera dès que ces seuils numériques seront atteints ; personne ne soutient que les chiffres doivent être dépassés de manière "importante" ou "sensible" pour que le dommage existe. La permissivité, le seuil de tolérance, à l'atteinte à l'environnement se trouvent déjà inscrits dans la détermination de ce qui doit être protégé. Il n'y a pas lieu d'ajouter à cette permissivité originelle une tolérance supplémentaire.

Dois-je rappeler que l'Institut, dans les trois résolutions où il s'est penché sur cette question, a refusé de qualifier le dommage d'une manière quelconque :

- Résolution d'Edimbourg, 1969, Mesures concernant la pollution accidentelle des milieux marins, article B, VI :

> "L'Etat qui a pris des mesures en contravention avec les dispositions précédentes causant à autrui un préjudice, est tenu de le dédommager".

- Résolution d'Athènes, 1979, La pollution des fleuves et des lacs et le droit international, article 11 :

> " ... les Etats ont le devoir de faire en sorte que leurs activités ou celles exercées dans les limites de leur juridiction ou sous leur contrôle ne causent pas, au-delà de leurs frontières, de pollution aux eaux des fleuves et des lacs internationaux".

L'article I définissait la "pollution" comme "toute altération ... qui porte atteinte aux utilisations légitimes de ces eaux et qui cause ainsi un dommage".

- Résolution du Caire, 1987, La pollution transfrontière de l'air :

Article premier paragraphe 1 : définition de "pollution" : "produisant des effets dommageables ou nocifs".

Article 2 " ... les Etats ont le devoir de prendre toutes mesures propres à assurer que leurs activités ou celles exercées dans les limites de leur juridiction ou sous leur contrôle ne causent pas de pollution tranfrontière de l'air".

Mes réponses à votre questionnaire sont donc :

(a et b), f, g, h) : les concepts de gravité ou de sérieux doivent être écartés.

(c, d, e, i, j, k, l) : inopportun.

(m) Relève des obligations primaires. Tout dépend de la façon dont l'obligation de procéder à une "évaluation environnementale" est rédigée dans la norme.

10. Liability and responsibility for illegal activities

Rappelons tout d'abord que la responsabilité peut être engagée en cas de violations d'obligations en matière d'environnement même si aucun dommage n'a été causé. A supposer le rejet de produits interdits dans une rivière, sans qu'aucun dommage ne soit perçu, il n'en demeurerait pas moins qu'il y aurait violation de l'obligation et donc responsabilité pour acte illicite. Dans ce cas, certes, les conséquences de la violation ne seront pas une indemnisation, mais d'autres conséquences de l'illicite peuvent être envisagées.

(a) Oui.

(b, c et d) L'Etat est responsable des actes de ses propres organes ; il n'est responsable pour les actes des particuliers que s'il a manqué à ses propres obligations de surveiller l'activité privée ou de prendre des mesures précises à cet effet. Sa responsabilité sera automatique s'il a souscrit, à cet égard des obligations de résultat.

(e) Non.

(f, g) Les questions de causalité sont trop complexes et spécifiques pour être examinées sérieusement à ce stade. Inopportun.

11. The debate about exemptions from liability

Il convient de distinguer les causes d'exonération de la responsabilité dans le cadre de la responsabilité de droit international et celles pouvant être prévues dans les différents mécanismes de conventions portant un régime de droit privé. La typologie est totalement différente.

Dans le premier cas, on peut, avec des réserves mineures, se référer aux travaux de la CDI. Dans le second cas, la tâche est plus difficile car les exceptions que vous signalez sont variables selon les divers régimes concevables de responsabilité sans faute et selon diverses circonstances y compris des jugements de valeurs. J'estime donc impossible ou inopportun de répondre aux dix-neuf sous questions.

12. A broader framework for the reparation of damage

Ici encore il me semble problématique d'entrer dans trop de détails. Il conviendrait de rester dans des principes généraux. A cet égard, j'estime, pour ma part, que le concept de réparation inclut les coûts de nettoyage et de remise en pristin état. Je confirme l'opinion émise déjà ci-dessus, qu'il convient de proclamer la nécessité que le dommage à l'environnement en tant que tel doit faire l'objet d'une réparation appropriée.

On peut donc répondre par l'affirmative aux questions (a), (b) et (c), ainsi d'ailleurs qu'à la question (d), car je pense que l'équité est toujours implicite dans une opération de réparation.

(e, f, g, h) : inopportun.

(i, j, k, l, m) : non.

13. Expanding the access to effective remedies

Cette section soulève des questions très intéressantes et délicates. D'une manière générale je pense qu'il convient de distinguer le cas des conventions internationales de droit international public créant des obligations pour les Etats de celui des conventions de droit privé international créant des régimes de responsabilité interne àcharge d'opérateurs dans un secteur défini.

(a) Dans le premier cas, il me semble que les particuliers ne peuvent agir pour demander le respect par les Etats de conventions internationales que si ces textes internationaux produisent des effets directs au profit desdits particuliers. La question de l'intérêt à agir, dans la seconde hypothèse variera selon les régimes conventionnels. La question fait l'objet de developpements substantiels et complexes en droit interne.

(b) Le droit subjectif des Etats ou des particuliers à défendre l'environnement en tant que tel est difficilement envisageable sans des textes de droit positif qui le prévoient et en organisent le régime. Un développement dans cette direction me semble *de lege ferenda* souhaitable.

(c) Je ne pense pas que ce soit le cas à ce stade de l'évolution du droit international.

(d) Il me semble difficile d'envisager une réparation financière pour quiconque n'a pas subi lui-même de préjudice. Mais c'est là réduire considérablement l'ampleur de l'intérêt à agir. L'*actio popularis* est beaucoup plus plausible s'il s'agit d'une action en cessation de l'illicité ou de remise en état des milieux pollués.

(e) Si cela est prévu par traité.

(f) Peu probable.

(g) La commission créée dans le cas irakien, dans les conditions aussi exceptionnelles que discriminatoires et avec des pouvoirs exorbitants du droit commun, a peu de chance d'être un précédent quelconque.

(i) Le précédent de la chambre de la Cour n'incite pas àl'optimisme.

(j) et (k) improbables.

14. Securing access to remedies by the individual

(a) Non, mais le problème n'est pas là ; les Etats évitent tout contentieux entre eux à ce propos, sans doute car aucun n'a la conscience tranquille.

(b) Jusqu'à présent cette possibilité n'a pas eu d'effet concret.

(c) Règle primaire — inopportun.

(d) Règle primaire — inopportun.

(e) Détails — inopportun.

(f, g, h) La règle traditionnelle de la protection diplomatique s'applique si les Etats ne prévoient pas la solution de l'accès direct des particuliers aux procédures. Le système traditionnel est certainement très inefficace. Le second permettrait sans doute une meilleure protection de l'environnement ; encore faudrait-il que les Etats soient disposés à le prévoir.

(i, j, k) : détails — inopportun.

(l) L'épuisement des voies de recours interne est une condition de recevabilité de la protection diplomatique. Je ne pense pas que le problème se pose dans ce cas puisque ces régimes sont de droit interne : les particuliers ont évidemment le droit de mettre en cause la responsabilité des opérateurs selon les moyens juridictionnels de droit commun propres

à chaque ordre juridique. La question ne se poserait qu'au cas où la convention instituant ce régime de droit privé international viendrait à être violée et où les particuliers rechercheraient une protection diplomatique. Mais comme les particuliers intéressés seraient probablement ressortissants de l'Etat où agit l'opérateur, on n'imagine pas qu'il cherchent à obtenir une protection diplomatique pour agir contre leur propre Etat.

(m) Comme l'accès des particuliers semble en général plus efficace que l'action étatique, je ne vois pas pourquoi on devrait l'éviter.

(n, o) : détails — inopportun.

(p) Oui, cela est souhaitable.

(q) Règle primaire — inopportun.

15. Private international law issues and solutions

Ces questions, qui se posent dans l'éventualité d'un régime de responsabilité civile établi conventionnellement, sont sans doute intéressantes. Je pense toutefois que ces problèmes sont trop spécifiques pour être abordés à ce stade par notre sous-commission.

16. Advancing international regimes

(a) Oui.

(b) Oui.

(c) Oui, cela est souhaitable, mais la réalisation technique de ceci variera selon le type de responsabilité envisagé (international ou interne). Beaucoup plus difficile dans la première hypothèse.

(d) Sans doute.

(e) Les deux approches, sectorielle et globale ont leur mérite et il n'y a pas lieu de trancher entre elles.

(f) Cela me paraît relever moins d'un jugement de valeur que d'un jugement de vérité. C'est ce qui justifie l'approche sectorielle.

(g) Cela semble souhaitable, en effet.

(h) C'est justement le rôle de notre Institut.

Jean Salmon

Commentaires de M. Manuel Diez de Velasco

(Il s'agit de la fin de la note de M. Diez de Velasco, dont le début est publié ci-après avec les travaux de M. Paolillo)

23 juin 1996

...

Dans la mesure où dans les rapports découlant de l'application et la mise en oeuvre de normes du droit de l'environnement interviennent, à côté des sujets internationaux, des autres acteurs internationaux tels que les entités privées, il se pose nécessairement la question de la responsabilité pour fait illicite et par risque des différents participants à ces rapports.

Dans le domaine de l'environnement apparaît, à côté du fait générateur du droit commun, constitué par l'infraction ou fait illicite international, un autre type de fait générateur, pour fait licite correspondant à la responsabilité objective (l'accomplissement de certaines activités qui sont licites mais créent des risques graves engage la responsabilité des Etats). En effet, il existe plusieurs conventions dans le cadre de l'environnement prévoyant la responsabilité objective pour les dommages transfrontières ou pour les activités qui créent un risque appréciable de causer de tels dommages (obligation de prévention). Il existe un liant entre dommage et réparation et entre risque et prévention, la *liability* privilégie la prévention (une sorte d'obligation de résultat).

Il convient de rappeler à cet égard la position de la délégation italienne devant la Sixième Commission en soutenant que "pour souligner les différences avec la responsabilité des Etats pour actes illicites, il y aurait peut-être lieu d'utiliser un autre terme (au lieu de réparation), par exemple celui d' "indemnisation" (...). L'obligation de réparation de l'Etat d'origine pour dommages causés par des activités qui ne sont pas interdites par le droit international doit avoir un caractère subsidiaire et ne doit être invoquée que lorsque les mécanismes prévus pour éviter ou minimiser les dommages, ainsi que pour les réparer dans le cadre de la responsabilité de droit privé, n'ont donné aucun résultat. Par conséquent, la CDI devrait élargir et développer le contenu des normes de coopération et de prévention (...) En mentionnant, même simplement à titre d'exemples, les assurances obligatoires, les fonds de garantie et l'adoption de normes appropriées sur les autorisations, inspections et contrôles".

En ce qui concerne la réparation (indemnisation), on assiste au déplacement du niveau de règlement des demandes en réparation : du niveau interétatique, celui du droit international public où se situent les différends internationaux proprement dits, le problème de la réparation des dommages transfrontières a été transféré à celui des relations directes entre pollueur et pollué, en d'autres termes, dans le domaine du droit international privé. La personne pouvant être tenue à indemniser doit maintenir une assurance ou toute autre garantie financière couvrant sa responsabilité (garantie subsidiaire des Etats et participation aux Fonds internationaux de garantie).

S'agissant du domaine du droit international, il me semble que le principe fondamental est celui de la responsabilité de l'Etat. Celui-ci a l'obligation de ne pas user de son territoire ou d'en permettre l'usage de manière que des activités provoquent un préjudice sur le territoire d'un autre Etat. Dans la mesure où le fait des entités privées résulte d'une carence de prévention, d'une insuffisance de contrôle, d'une négligence, d'un défaut de diligence des organes de l'Etat, ces faits lui sont alors imputables. En matière d'environnement il devient de plus en plus rare qu'une activité qui risque de causer des dommages à l'environnement ne soit pas soumise par l'Etat à une autorisation préalable. En cas de dommage né d'un manquement aux obligations de prévention on se trouverait en présence d'une responsabilité pour faits illicites, en cas de dommage survenu en dépit du respect desdites obligations, on serait devant une responsabilité objective (liability for ultra-hazardous activities). En d'autres termes, la responsabilité internationale d'un Etat ne peut être engagée pour une pollution transfrontière que si ledit Etat a lui-même causé le dommage ou, quand celui-ci est imputable à des exploitants privés, s'il n'a pas pris toutes les mesures indispensables et appropriées pour le prévenir, dans les situations restantes on serait en présence de la *liability* (dans ce domaine il existe plusieurs traités définissant les obligations, les spécifications techniques et les précautions qu'un Etat est tenu de respecter avant d'autoriser certaines activités privées qui risquent de provoquer une pollution transfrontière ou de causer un dommage au territoire ou à l'environnement d'autres traités.

En outre, en droit international l'élément fondamental, le fait générateur de la responsabilité est, en général, le fait illicite (qui peut naître d'une action ou d'une omission violant une règle de droit international) plutôt que le dommage qui est, par contre, l'élément central dans la *liability*. L'exception viendrait représentée par la responsabilité objective, ici la responsabilité peut être engagée en raison du seul dommage causé et sans qu'il y ait eu un acte ou un fait illicite initial. Il s'agit, dans ces derniers cas, des hypothèses conventionnelles dont la préoccupation est plus axée sur la prévention des dommages que sur leur réparation adéquate.

Manuel Diez de Velasco

Réponse de M. Luzius Wildhaber

14 November 1996

First of all I wish to congratulate you on your Final Report and wish to say that it constitutes an impressive piece of research and synthesis. This being so, I have very few suggestions to make.

At p. 1 : I do not think we should congratulate ourselves for having taken up the study of a problem which other institutions have found topical even before our Institute. I would strike out the initial words in the second paragraph, "in a most timely manner."

At p. 2, top paragraph : your report correctly stresses that the various concepts should, and do, contribute to the prevention of environmental harm. Perhaps you might wish to refer back to the *Chorzów* Case with its passage that *restitutio in integrum* is the natural form of reparation. It would seem that if one insists on *restitutio in integrum* in environmental matters, one tries to prevent future damage in a way which, in essence, contributes to the prevention of environmental harm.

At p. 13, top paragraph : there is a suggestion that environmental regimes should provide for the allocation of jurisdiction over multinational operators. This suggestion is somewhat at odds with the more detailed description of pp. 41-43. I am not convinced by the suggestion at p. 13, because it seems to create two problems. First, there is a risk that different environmental regimes would provide for different allocations of jurisdiction, thus only adding to existing uncertainties. Second, there is a risk that providing for jurisdictional rules in an admittedly difficult and complex field would prolong negotiations and further complicate the finding of consensus. Given this remark, I am bound to be opposed to Article 32 of the Draft Resolution, of p. 15. It would seem sufficient to reduce Article 32 to one sentence only as follows : "In the setup of environmental regimes, the question of concurrent jurisdiction and forum-shopping should be taken into account so as to prevent abuse."

At pp. 29-30 : your report discusses an issue of great importance, but in a somewhat too gingerly fashion. It is stated that the use of flags of environmental convenience is becoming common, which, unfortunately, is only too true. The report proceeds to suggest that the use of such flags should be specifically prohibited, without explaining how this could happen. Of course, if all States parties to an environmental regime could agree on a prohibition (and then could even proceed to ratify and execute the respective treaty) we would have no problem. That is not however what is likely to happen. What is likely to happen is that after an enormous amount of haggling, the States which offer flags of convenience would not ratify the treaty if it contained an effective prohibition. The other States would then have to proceed unilaterally or would choose not to observe the prohibition. At p.30, the report similarly (and correctly) remarks that the extraterritorial application of domestic environmental laws would prevent potential loopholes, but then again adds that this would require a special agreement.

I think we should try to take the argument one step further. We should get to the point at which we would have certain international environmental minimum standards. The lack of observation of such standards should constitute sufficient grounds for other States to apply their domestic laws extraterritorially to operators of flags of convenience. This should be interpreted less as a unilateral application of domestic environmental laws, but rather as an incentive towards making international environmental minimum standards effective ; where one is confronted with States which continue to destroy the environment unilaterally. As for the Draft Resolution, I think that in Article 7, first sentence, the word, "normally" could be stricken out since the second sentence provides for seemingly all the necessary exemptions.

In Article 24, second paragraph, second sentence, such damages as the cost of environmental reinstatement and rehabilitation, equitable assessment and other criteria "should be included" in calculating compensation, rather than "be considered" only. This would be better in line with Article 25. Also it would make it possible to strike out the reference to the questionable notion of punitive damages in Article 25, third paragraph, second sentence, at p. 13.

Luzius Wildhaber

Final Report

December 1996

1. An evolving conceptual framework

The *Institut de Droit international* appropriately decided to undertake the study, among other aspects, of the question of responsibility and liability under international law as applied specifically to the needs of environmental protection.[1] Current environmental concerns arising from the increasing activities that entail risks of environmental damage with transboundary and global detrimental impacts have indeed prompted new conceptual approaches in this matter, many of which are rooted in basic principles of international law that acquire an added dimension in this context.[2]

The emphasis on preventive measures rather than on the reparation of an injury that has already taken place is at the very heart of this conceptual evolution.[3] Principle 21 of the Stockholm Declaration[4] and

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1 Institut de Droit international : "Declaration on a programme of action on the protection of the global environment", *Annuaire*, Session de Bâle, vol. 64-II, 1991, 408-412 ; see further ; "Huitième Commission : L'environnement", Rapport de M. Luigi Ferrari-Bravo, janvier 1992 ; and "Deuxième rapport", 29 mars 1993 ; both in *Annuaire*, Session de Milan, vol. 65-II, 1994, at 285, 290, respectively. See also the Preliminary Report on "Responsibility and liability under international environmental law : issues and trends", submitted to the Eighth Commission of the *Institut de Droit international*, 22 August 1994 ; and the Revised Report on the subject of 12 April 1995, both available from the Secretariat of the Institute.

2 On the evolving principles governing responsibility under international law, see generally Ian Brownlie : *System of the Law of Nations : State Responsibility*, Part I, 1983 ; P. M. Dupuy : *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle*, 1976 ; *ibid* : "The International Law of State Responsibility : Revolution or Evolution ?", *Michigan Journal of International Law*, vol. 11, 1989, at 105 ; F. V. Garcia-Amador, Louis B. Sohn and R. R. Baxter : *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, 1974.

3 Francisco Orrego Vicuña : "State responsibility, liability, and remedial measures under international law : new criteria for environmental protection", in Edith Brown Weiss (ed.) : *Environmental Change and International Law*, 1992, 124-158, at 124-127.

4 Stockholm Declaration on the Human Environment, 16 June 1972, 11 *ILM* 1416 (1972).

Principle 2 of the Rio Declaration[5] have relied on this concept in making clear the responsibility of States to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction ; the same holds true of course of the damage that may be caused to the global environment. It is therefore appropriate to make a clear distinction between the two main functions and purposes which responsibility and liability have at present. On the one hand, these concepts contribute in themselves to the prevention of environmental harm, particularly by means of encouraging the fulfillment of specific obligations and of deterring potentially damaging types of conduct. On the other hand, such concepts also keep up with their traditional functions relating to restoration and compensation.

It follows that responsibility and liability for environmental damage under international law should not always be regarded as a negative sanction but rather, and to the extent possible, as a positive inducement to prevention, restoration or compensation as the case my be. This approach might prove particularly relevant in the negotiation and management of regimes on responsibility and liability for environmental damage established under international conventions (environmental regimes), since it might better ensure the attainment of the objectives of adequate environmental protection.

Scientific evidence about the irreversible nature of given environmental impacts has had a profound influence on this new conceptual framework and on the nature and extent of responsibility and liability, both domestic and international. A number of important principles of international law on the matter have been identified, adapted or developed in order to meet these new realities. Paramount among these emerging principles are the precautionary approach,[6] the concept of intergenerational equity,[7] and that of sustainable development.[8] The principles of shared but differentiated responsibility and environmental security are also indicative of this evolving conceptual framework and have a specific influence on the issues relating to responsibility and liability. The growing linkages

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5 Rio Declaration on Environment and Development, 14 June 1992, 31 *ILM* 874 (1992).

6 See generally David Freestone and Ellen Hey (eds.) *The Precautionary Principle and International Law*, 1995.

7 Edith Brown Weiss : *In Fairness to Future Generations : International Law, Common Patrimony, and Intergenerational Equity*, 1989.

8 Philippe Sands : *Principles of International Environmental Law*, vol. 1, 1995, 198-208.

between the environment and human rights should also be noted in this respect.

2. *Appropriate legal distinctions*

Useful legal distinctions have emerged in the context of this evolution. Firstly and foremost the distinction between State or International Responsibility and International Liability has allowed for a greater flexibility in terms of the situations which may be brought under the scope of measures aimed at the prevention and reparation of damage. In point of fact, as revealed by the interesting discussion of the *Institut de Droit International* and other contributions,[9] while the concept of international responsibility is normally associated with the breach of a legal obligation, that of international liability may operate independently of any such breach or of a specific prohibition under international law, encompassing activities which are in themselves lawful but which end up in a harmful result.[10] Important civil liability regimes under domestic law and the governing rules of international law as expressed in a number of special conventions have also contributed to the enlarged application of liability in respect of private and other operators, again irrespectively of the lawfulness of the activity concerned and taking into consideration the environmental damage that could have resulted from those activities.[11] These distinctions also

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9 Institut de Droit international, "Deuxième Rapport" *cit., supra* note 1, at 196-298 ; Alexandre Kiss and Dinah Shelton : *International Environmental Law*, 1991, at 347-348.

10 On international liability see generally Julio Barboza : "International liability for the injurious consequences of acts not prohibited by international law and protection of the environment", *Recueil des Cours*, Académie de Droit international, vol. 247, 1994-III, 295-405 ; and the Reports on the subject to the International Law Commission, 1985-1995. See also M. Akehurst : "International liability for injurious consequences arising out of acts not prohibited by international law", *NYIL*, vol. 16, 1985, at 3 ; D. B. Magraw : "Transboundary harm : The International Law Commission's Study of International Liability", *AJIL*, vol. 80, 1986, at 305 ; K. Zemanek : "State Responsibility and Liability", in Lang, Neuhold and Zemanek (eds) : *Environmental Protection and International Law*, 1991, at 187 ; S. C. McCaffrey : "The work of the International Law Commission relating to transfrontier environmental harm", *New York University Journal of International Law and Politics*, vol. 20, 1988, 715-731.

11 International Law Commission : "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", prepared by the Secretariat, U.N. Doc. A/CN. 4/471, 23 June 1995. See also Alan E. Boyle : "Nuclear energy and international law : An environmental perspective", *British Yearbook of International Law*, 1989, 257-313 ; J. Barron : "After Chernobyl. Liability for nuclear accidents under

(Suite page suivante)

allow for different legal requirements to be applied to each such concept, including questions relating to the burden of proof or presumptions.

These distinctions and associated issues have been of course much debated and this report does not purport to take up this discussion.[12] The essential point is that both the breach of an international obligation and damages originating in lawful activities may now be encompassed in environmental regimes or even in application of general principles of international law, extending if necessary beyond States so as to include a variety of private operators and other entities. It should also be noted that these various concepts do not exclude the question of criminal personal responsibility of natural and eventually juridical persons as an additional remedy.[13]

The distinction between primary and secondary rules, the former related to environmental obligations under international law and the latter to the legal consequences of the failure to comply, has been helpful as an analytical tool which evidences, among other questions, that while States have significantly developed environmental rules they have been rather reluctant to simultaneously agree on the pertinent rules on responsibility and liability.[14]

(Suite de la note 11)

international law", *Columbia Journal of Transnational Law*, Vol. 25, 1987, at 647 ; H. Bryant : "The leading legal regimes dealing with liability for oil pollution from ships", *European Environmental Law Review*, Vol. 2, 1993, 64-72 ; G. Handl : "International liability of States for marine pollution", *Canadian Yearbook of International Law*, 1983, at 86.

12 A. E. Boyle : "State responsibility and international liability for injurious consequences of acts not prohibited by international law : a necessary distinction ?", *International and Comparative Law Quarterly*, vol. 39, 1990, 1-26.

13 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August - 7 September 1990, Resolution on "The Role of Criminal Law in the Protection of Nature and the Environment", UN Doc. A/CONF. 144/7, paras. 49-62 ; A/CONF. 144/28, Ch. 1.C.2. See also G. Gilbert : "The criminal responsibility of States", *International and Comparatiave Law Quarterly*, vol. 39, 1990, at 345.

14 *Introductory Document prepared by the Italian Government for the Forum on International Law of the Environment*, Sienna, 17-21 April , 1990, at 53. See also F. Francioni and T. Scovazzi (eds.) : *International responsibility for environmental harm*, 1991 ; B. Conforti : "Do States really accept responsibility for environmental damage ?", in Francioni and Scovazzi, *op. cit.*, at 179 ; G. E. do Nascimento e Silva : "Responsabilidade internacional em virtude de poluição transfronteriça", *Anuario Hispano-Luso-Americano de Derecho Internacional*, vol. 11, 1994, 13-28 ; J. Combacau and D. Alland : " 'Primary' and 'Secondary' rules in the Law of State Responsibility : Categorizing International Obligations", *NYIL*, vol. 16, 1985, at 8.

This report will not deal with primary rules except to the extent that new obligations will have a meaningful influence on the conceptual approach to responsibility and liability, as is the case for example of the precautionary approach and its influence on the preventive role of responsibility and liability, or the obligation to undertake prompt and effective response action in case of environmental damage which has added a new dimension to both responsibility and liability.

It must also be emphasized that a system of secondary rules should be fully integrated into the system of primary rules so that liability might contribute to achieve the objective of comprehensive environmental protection normally envisaged by the primary rules, or in any event to ensure that liability will provide as much protection as permitted under the obligations set up by the regime. Secondary rules may of course be appropriately included in annexes to the pertinent treaty as current international practice favors. Given the preventive emphasis noted above, secondary rules should also encourage preventive care, particularly by means of supporting response action and restoration, including the reimbursement of costs related thereto. By means of fully integrated primary and secondary rules negative discrepancies, contradictions and loopholes will be avoided. To this end environmental regimes should clearly identify their main purposes and objectives and provide for specific rules on international responsibility and liability, as well as on civil liability, related thereto. This would not only advance environmental protection but would also contribute to clarify and settle international practice, which until now has been many times uncertain.

Perhaps the most significant feature of the evolution taking place lies in the expansion of the geographical scope of the law. The early transboundary concern evidenced by cases such as the Trail Smelter[15], the Lake Lanoux[16] or the Gut Dam[17], which is always of paramount importance, has been supplemented by a broader regional scope covering situations of long-range pollution or environmental effects of a similar nature. The concern for areas beyond national jurisdiction meant a further step forward. It would not take long for environmental concerns to reach a global level and to determine the emergence of the most recent geographical scope

15 *Trail Smelter Arbitration* (U.S. v. Can.), 11 March 1941, 3 *RIAA* 1905 (1949).

16 *Lake Lanoux Arbitration* (Spain v. France) 1957, *ILR* 101 (1957).

17 *Gut Dam Arbitration* (U.S. v. Can.), 22 September 1968, 8 *ILM* (1969).

of the law, as evidenced by the conventions on the protection of the atmosphere[18] and the outcome of the United Nations Conference on Environment and Development.[19] The nature of the respective regimes should be taken into account in establishing the extent of the secondary rules on responsibility and liability. To the extent of the broader geographical scope of the law, however, conflicts of views and differing interests have become more apparent, as it is evident in the tensions between sovereignty and environmental solutions, contrasting national cultures and their respective approaches to given issues and, above all, in conflicting priorities of economic development and environmental protection, all of which are today a characteristic of global negotiations.

Parallel to the growing importance of global environmental regimes, regional and bilateral developments have many times allowed for more elaborate mechanisms of environmental protection and occasionally for stricter standards of responsibility and liability. Recent examples can be found in the environmental arrangements agreed to under NAFTA between Canada, Mexico and the United States[20] ; in the Peace Treaty between Israel and Jordan, establishing management criteria, environmental protection and joint prohibition of certain damaging activities[21] ; and in the commitments reached by the ASEAN member States.[22] Important developments in Europe and Antarctica will be discussed further below.

This evolving framework has posed a number of new legal questions in relation to the issue of responsibility and liability, involving aspects of both public and private international law, which this report will explore next.

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18 See in particular the Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 26 *ILM* 1516 (1987) and the Montreal Protocol of 16 September 1987, 26 *ILM* 1541 (1987).

19 United Nations Conference on Environment and Development : *Agenda 21 : Program of Action for Sustainable Development*, UN Doc. A/CONF. 151/26, 1992.

20 Canada-Mexico-United States : *North American Agreement on Environmental Cooperation*, 1993, 32 *ILM* 1480 (1993).

21 Treaty of Peace between Israel and Jordan, 26 October 1994, particularly Annex II and IV.

22 On recent ASEAN developments see generally Sompong Sucharitkul : "ASEAN and the environment", Regional meeting of the American Society of International Law, Golden Gate University School of Law, 19 March 1993.

3. The evolving role of State or International Responsibility

The principles of international law governing State or international responsibility will also apply generally to the breach of obligations relating to environmental protection. The point at issue, however, is what standard will be required in order to engage State responsibility. Fault-based responsibility,[23] generally expressed in terms of the due diligence test,[24] has been thus far the preferred approach under international law as well as under domestic law.

This situation does not mean that State responsibility has not been in itself evolving in order to meet new challenges and requirements. Earlier reliance on "hostile intention" (*Dolus*) gave place to the broader concept of "manifest negligence" (*Culpa*) which in turn led to due diligence understood as an expression of conduct to be expected of a good government.[25] To this extent due diligence in a sense was detached from subjective intentionality and acquired the meaning of a more objective test. More recently the conduct to be expected of a good government has been defined with greater precision by means of the enactment of internationally agreed standards,[26] an approach which has introduced greater uniformity in the applicable standard and further diminished the ambit of State discretion.

It follows that it is highly desirable that if an environmental regime utilizes the due diligence test in connection with State responsibility such standard be measured in accordance with objective criteria. To this extent the problem of States refraining from making claims of State responsibility because of the mere concern of establishing a precedent as to the subjective aspects of the conduct expected in environmental matters might also be minimized.

It should be noted further that in view of a number of concurrent obligations binding the State under contemporary international law, even if some of these are duly complied with, State responsibility may anyhow

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23 M. Bedjaoui : "Responsibility of States : Fault and Strict Liability", *EPIL*, vol. 10, 1987, at 358.

24 P. M. Dupuy : "La diligence due dans le droit international et la responsabilité", OCDE : *Aspects juridiques de la pollution transfrontière*, 1977, at 369 ; H. Blomeyer-Bartenstein : "Due diligence", *EPIL*, vol. 10, 1992, at 138 ; R. Pisillo Mazzeschi : "The due diligence rule and the nature of the international responsibility of States", *German Yearbook of International Law*, vol. 35, 1992, at 9.

25 Boyle, *loc. cit.*, *supra* note 11, at 273, with particular reference to OECD : *Legal aspects of transfrontier pollution*, 1977, at 385 et seq.

26 Boyle, *loc. cit.*, *supra* note 11, at 273, with particular reference to Articles 210 and 211 of the 1982 Law of the Sea Convention.

be engaged because of the failure to give effect to some other such obligations. A typical conflict has emerged in this regard between obligations relating to environmental protection and those relating to free trade and ensuring international competitiveness.[27] Although converging steps between trade and the environment have recently been undertaken, the utilization of environmental measures as an excuse to justify protectionist policies has made this effort a particularly difficult one. Environmental regimes should provide rules for dealing with issues of State responsibility arising from concurrent obligations, bearing in mind the objectives of the protection envisaged and the need to avoid an undue burden upon the State.

In spite of the important changes taking place the fact remains, however, that State responsibility is still largely based on fault and this poses many times insurmountable problems of proof for claimants of environmental damage. It can therefore be expected that the trend towards more demanding standards of State responsibility will continue to develop.

4. The emerging role of State or International Liability

The natural outcome of this evolution has been that extra-hazardous activities and other operations entailing a high degree of risk or involving other special characteristics have been accommodated within the scope of current international law. This was firstly done by means of encompassing these activities under the principles of State responsibility[28] and next by developing the concept of risk as a foundation of liability.[29]

Most significantly, it is this very evolution that led the International Law Commission to consider in detail the question of international liability for injurious consequences arising out of acts not prohibited by international law.[30] Although this concept has been much debated and not generally accepted,[31] it has made abundantly clear that the governing element in

27 Edith Brown Weiss : "Environment and trade as partners in sustainable development : a commentary", *American Journal of International Law*, vol. 86, 1992, 728-735.

28 Brownlie, *op. cit., supra*, note 2, at 50 ; C. W. Jenks : "Liability for ultra-hazardous activities in international law", *Recueil des Cours*, Académie de Droit international, vol. 117, 1966-I, at 105.

29 Boyle, *loc. cit., supra* note 11, at 288 ; E. Jimenez de Aréchaga : "International responsibility", in M. Sorensen (ed.) : *Manual of Public International Law*, 1968, at 531.

30 See *supra* note 10.

any environmental regime providing for international liability attributable to the State shall be the objective fact of harm having occurred.[32] Even if State practice has not favored much the application of more stringent standards in connection with the engagement of liability,[33] this doctrinal development is also indicative of the trend to establish objective standards, particularly in the context of environmental protection. Also much debated has been the effort to typify an international crime in connection with environmental obligations of essential importance,[34] and irrespectively of whether the concept is accepted or not, again the trend to provide for stricter criteria is apparent in this initiative.

Because environmental regimes usually involve the active cooperation of States in ensuring their effectiveness, the failure of a State to enact appropriate rules and controls to this effect at the domestic level, even if technically not amounting to the breach of an obligation, might engage its international liability if damage ensues as a consequence, including damage caused by operators under its jurisdiction and control. The distinction between "*obligations de moyens*" and "*obligations de résultat*" can play a useful role in determining the legal extent of the failure of the State in this connection. The use of criteria facilitating the proof required to make effective a claim for environmental damage should be considered by environmental regimes in the context of international liability, although the matter will not be as pressing as in the case of responsibility

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31 Boyle, *loc. cit.*, *supra* note 12 ; C. Tomuschat : "International liability for injurious consequences arising out of acts not prohibited by international law. The work of the International Law Commission", in Francioni and Scovazzi, *op. cit.*, *supra* note 14, at 33 ; N. L. Horbach : "The confusion about State responsibility and international liability", *Leiden Journal of International Law*, vol. 4, 1991, at 47.

32 See for example the Convention on International Liability for Damage Caused by Space Objects, 1972. On the question of damage see generally B. Bollecker-Stern : *Le préjudice dans la théorie de la responsabilité*, 1973 ; B. Graefrath : "Responsibility and damages caused : Relationship between responsibility and damages", *Recueil des Cours de l'Académie de Droit international*, 1984-II, at 2. See also generally L. F. E. Goldie : "Liability for damage and the progressive development of international law", *International and Comparative Law Quarterly*, vol. 14,1965, at 1189.

33 Boyle, *loc. cit.*, *supra* note 11, at 288-289. For comparative tables of the extent of liability regimes under major conventions see Allan Roasa : "Issues of State liability for transboundary environmental damage", *Nordic Journal of International Law*, 1991, vol. 601, 29-47, at 33, 38.

34 See generally *Report of the International Law Commission*, U.N. Doc. A/31/10, 1976, 31 U.N. GAOR Supp. (N° 10), Article 19 (3) (d), at 226 ; P. M. Dupuy : "Observations sur le 'Crime International de l'Etat'", *RGDIP*, 1980, at 449.

in view of the objective standards associated with the concept of international liability.

5. Strict civil liability and new interlinkages

Although fault-based, strict and absolute standards of liability are usually provided for under domestic law, the evolution from fault-based liability to strict liability has been much more marked in environmental regimes. Unlike fault-based liability that relies again on subjective intentionality, and unlike absolute liability that allows for no exemptions or limits, strict civil liability operates on the basis of the objective fact of harm, generally involving an obligation of result, and also allows for appropriate exemptions and limits. The Convention of the Council of Europe on Civil Liability for Damage resulting from Activities Dangerous to the Environment is illustrative of this last approach.[35]

Although examples of different standards can be found in the environmental regimes established by treaties and conventions,[36] it is important to note that the main trend of current international practice points in the direction of strict civil liability being the preferred standard under such regimes, and this trend certainly should be encouraged. Fault-based approaches and the standard of absolute liability have become more exceptional expressions, albeit by no means important.

This trend does not of course exclude the role of the harmonization of national laws and the application in this context of the standards generally prevailing under such national legislations, including fault-based liability, without prejudice to the changes that are also taking place in this context at the domestic level. Given the difficult burden of proof to establish fault and its subjective intentionality, it is only natural that the fault-based standard is being increasingly questioned in the context of environmental damage. This does not mean of course that objective standards are free from criticism[37] or from legal difficulties, but they do offer a more solid ground for building an effective environmental regime.

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35 Council of Europe : Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993, 32 *ILM* 1228 (1993).

36 Patricia W. Birnie and Alan E. Boyle : *International Law and the Environment*, 1992, 139-149.

37 W. J. Ovwerkerk : "Environmental Liability from the Perspective of an Operator : Council of Europe Draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment", in Kroner (ed.) : *Transnational Environmental Liability and Insurance*, 1993, 85-96, at 89.

Given the complexity of many environmental regimes, States cannot realistically expect that the whole burden of liability might fall upon private operators or other entities. A significant process of interrelationship has accordingly begun between the systems of International liability and civil liability, combining the complementary participation of both in given international regimes. These systems will in fact operate simultaneously in most cases and ought to be considered as complementary.[38] This usually takes the form of subsidiary or residual State liability, contributions to international funds or some other form of State participation in compensation schemes also involving private operators. A number of liability conventions have adopted this approach and most current diplomatic negotiations on liability regimes have also concentrated on the participation of both systems of liability.[39]

Because of these growing interlinkages, it can be expected that in practice, the regimes assigning liability for environmental damage will operate on a two-track approach. Firstly, operators will normally be assigned primary liability and this should be defined in terms of the standard of strict liability. It should be noted in this regard that States engaged in activities *qua* operators will be governed also by this track of liability since such an activity falls evidently in the category of *iure gestionis*. The thought of assigning primary liability to the State having jurisdiction over operators could also be entertained, but this would be hardly acceptable to States parties to any diplomatic negotiation on the matter.

The second track might entail subsidiary State liability, contributions by the State to international funds and other forms of State participation in compensation schemes. This approach operates as a back-up system of liability in case the primary liable operator is unable to pay the required compensation, and does not prejudice the question of the State obtaining reimbursement from operators under its domestic law. State subsidiary liability and other back-up systems should generally be limited to that portion of liability not covered under the primary assignment and may operate in conjunction with insurance and other financial mechanisms. Rules should also be provided under environmental regimes for allocating jurisdiction over multinational operators because this would facilitate the determination of State subsidiary liability and other back-up arrangements.

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38 Boyle, *loc. cit.*, *supra* note 11.

39 See Roasa, as cited in *supra* note 33 ; see also generally G. Handl : "State liability for accidental transnational environmental damage by private persons", *AJIL*, vol. 74, 1980, at 525.

The allocation of liability to States under this type of arrangement does not affect the question of State responsibility for failure to comply with the obligations devolving upon the State under a specific regime, in particular the obligation to establish and implement civil liability mechanisms under national law, including insurance schemes, compensation funds and other remedies and safeguards that the regime might call for.

On the other hand, there is also the case in which an operator has fully complied with the applicable domestic rules and standards and government controls, but anyhow the activity undertaken results in environmental damage. In such a situation the operator might be exempted from liability, but State responsibility or State liability may again be engaged because of its failure to enact appropriate rules in compliance with obligations under the regime or other situations. Responsibility and liability for wrongful enforcement measures should also be developed in this context. Claims for State responsibility may be made independently from international liability or civil liability claims in accordance with the governing rules of international law.

The question of establishing a causal nexus between the activity undertaken and the damage will inevitably arise in the context of liability regimes and their implementation. Suggestions have been made to the effect that when pollution is caused by highly dangerous substances there should be no need to prove a significant impact or injury.[40] Some presumptions of causality have been established under national legislation for given dangerous activities.[41] This approach is particularly important for situations of cumulative effects of pollution or long standing damages which make difficult to identify a single potential liable entity but do provide for a causal nexus with sectors of activity. Here again State subsidiary liability or collective reparation might intervene.

6. *Strict standards and the need for legal certainty : the question of limits to liability*

The strict standard of liability has the advantage of not requiring the proof of fault, but it needs to provide for a framework of legal certainty since if left open-ended it might result in serious financial burdens, excessive costs and discouragement of investments or economic efficiency.

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40 Restatement (Third), *The Foreign Relations Law of the United States* (1987), vol. 2, at 113.

41 Commission des Communautés Européennes : *Livre Vert sur la réparation des dommages causés à l'environnement*, Com. (93) 47, 14 mai 1993, at 14, with particular reference to the 1990 German legislation on civil liability for environmental damage.

Because of this need for legal certainty and economic considerations the question of putting limits or establishing a ceiling to the amount of compensation resulting from liability has oftenly been raised in the preparation of specific regimes, and in point of fact many conventional regimes do provide for such a limit.[42] It follows that it is recommendable that reasonable limits be provided in this context under environmental regimes bearing in mind both the objective to achieve an effective protection and the need to avoid the excessive financial burdens mentioned above. In any event the limits established should be periodically reviewed to allow for inflation adjustments and other factors.

However, there is also a need to take into account the objective of paying full compensation for the damage caused, a perspective which has led to the suggestion of implementing unlimited liability schemes. In this context a pertinent approach has been suggested in order to make compatible such objective with the need to provide for limits : the liability of operators could be limited to a given ceiling, and the amount of reparation exceeding such limit could be covered by insurance, State subsidiary liability, Funds or other forms of collective action ; in turn each segment of the chain would have a ceiling of its own but the aggregate result would ensure payment of full compensation. The Convention on the Regulation of Antarctic Mineral Resource Activities is one example of this approach.[43]

Viewed in this broader context the question of limits to liability could no longer be regarded as a mechanism the purpose of which would be solely to restrict or reduce the amount of compensation as has oftenly been the case in the past. Full compensation would still be provided for but the financial commitment of each segment would be predictable.

To an extent this approach of an unlimited overall liability scheme might also take care of the problem that limited liability involves a kind of subsidy to the activity benefited by such limitation, a situation which distorts competition and introduces other economic issues. It is also possible to provide for limits in relation to some kinds of damage and not for other, for example by providing for a regime of unlimited liability in relation to the cost of response action. In this case the different nature

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42 See for example the International Convention on Civil Liability for Oil Pollution Damage, 1969, Article 5, 973 UNTS 3. See generally N. Gaskell : "Compensation for Oil Pollution : 1992 Protocols to the Civil Liability Convention and the Fund Convention", *International Journal of Marine and Coastal Law*, vol. 8, 1993, 286-290.

43 Rüdiger Wolfrum : *The Convention on the Regulation of Antarctic Mineral Resource Activities*, 1991, at 66-67.

of the damage involved and the environmental and financial implications of such a distinction should be taken into account.

7. The role of insurance

In comprehensive environmental regimes dealing with issues of liability, States parties will need to ensure that operators will have an adequate financial capacity and that they shall be required to maintain insurance and other financial security. Financial institutions are also increasingly seeking insurance coverage for lenders liability, which is an important aspect of the financing of major projects. On occasions insurance and financial security become mandatory, a case in point being that of the Convention of the Council of Europe,[44] in this connection, however, it might be necessary to take into account the terms specified by domestic law, as a number of liability conventions do,[45] since under the domestic legislation of some countries private entities cannot be compelled to take insurance.

It must also be noted that standards of liability have a direct bearing on the question of insurance for environmental damage. In point of fact, insurance will normally operate only in the case of unforseeable damage due to accidents, fortuitous events or other non intentional elements.[46] In this regard fault-based liability will be difficult to reconcile with insurance because of its intentional nature, while strict liability will facilitate its operation. However, foreseeability of damage in general terms of risk should not affect the availability of insurance. On the other hand, it has been rightly noted that absolute liability not allowing for limitations or exemptions amounts in fact to a mechanism of automatic compensation,[47] a mechanism which will be most difficult to insure. The question of limits to liability also becomes particularly significant in terms of obtaining insurance to cover the compensation for environmental damage corresponding to individual operators or involving other segments as described above, since unlimited liability is also difficult or most expensive to insure.

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44 Council of Europe, Convention *cit.*, *supra* note 35, Article 12.

45 Boyle, *loc. cit.*, *supra* note 11, at 305, with particular reference to the conventions on nuclear liability. See also Council of Europe, Convention *cit.*, *supra* note 35, Article 12.

46 Christian Larroumet : "La responsabilité civile en matière d'environnement : Le projet de Convention du Conseil de l'Europe et le livre vert de la Commission des Communautés européennes", *Recueil Dalloz Sirey*, 1994, 14e Cahier, 101-107, at 103.

47 *Ibid.*, at 102.

Given the increasing importance of insurance and financial guarantees in the environmental field and its close interrelations with economic activity, it can be expected that this area of the law will evidence substantive developments in the near future. One present shortcoming is that these mechanisms will not always be available or will not cover the necessary amounts or types of activity required by the industry. National insurance funds have begun to emerge for specific activities and their establishment should be encouraged.

8. Channeling and apportionment of liability.

New approaches have also emerged in relation to the questions of channeling and apportionment of liability in order to reach a greater number of entities which can be legitimately requested to participate in the payment of full compensation and reparation of damage. The assigning of primary liability directly to operators under international regimes is one important expression of this trend. In addition, forms of several and joint liability will always be available so as to share the burdens of liability among various operators, an aspect that will have growing importance in the context of major consortia participating in complex and expensive international projects.

The concept of "product liability" has also been devised to reach the entity ultimately responsible for environmental damage, such as the manufacturer of a defective equipment, but has found thus far limited application in international regimes, among other reasons because of the legal intricacies to implement it across national borders[48] ; the European Community Directive 85/374 has devised an interesting regime in this regard.[49]

9. The role of collective reparation.

Compensation might be unavailable from the primary liable entity or from the various back-up sources mentioned above, as would typically be the case of the amount of compensation exceeding financial capability or the limits established or of damage covered by an exemption. One additional difficulty arising from the expanding geographical scope of environmental problems is that the identification of the source of pollution and damage or of the entity causing it will not always be possible.

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48 See in particular *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

49 Directive 85/374/CEE du Conseil, 25 juillet 1985, J. O. N° L 210, 7 août 1985, p. 29.

In such situations damage might remain totally or partially uncompensated or else a mechanism of collective reparation might intervene. The latter kind of mechanism is being increasingly utilized in environmental regimes[50] and its resources can be used not only for the payment of compensation but also for covering expenses in connection with response action or other preventive or restoration measures. This type of mechanism is introducing an important change in the scope of compensation : in a pure civil liability regime the payment of compensation falls upon the real polluter once the damage has been produced, while under collective reparation usually contributions are paid by potential polluters in advance of any damage.[51]

The various international Funds created in the case of oil pollution damage, including those established by the industry, are early examples of this approach.[52] CRAMRA and other regimes have also provided for such a step beyond the liability of operators, insurance and States.[53] The most difficult problem associated with these mechanisms is that of securing the necessary financing. Government contributions are increasingly resisted to in view of the many Funds being created for environmental and other purposes, while taxes and other fees payable by the industry have also a limited possibility. The question of government and industry financing of such Funds should be approached with necessary restraint.

The United States, Sweden, France, the Netherlands and other countries have created mechanisms of this type at the national level, which will normally operate in cases of emergency or when a potential liable entity cannot be identified.[54] Given sectors of industry have been required to contribute to such Funds by means of taxes and other mechanisms (prelevements), which is also a form of collective reparation by the industry when a single entity cannot be readily identified. This approach might also be utilized under environmental regimes in respect of sectors of industry engaged in activities likely to produce environmental damage of the kind envisaged by such regime.

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50 Commission des Communautés Européennes : *Livre Vert sur la réparation des dommages causés à l'environnement*, Com (93) 47, 14 mai 1993, at 19-23.
51 Larroumet, *loc. cit., supra* note 46, at 104.
52 See in particular the Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, 11 *ILM* 284 (1972).
53 Convention on the Regulation of Antarctic Mineral Resource Activities, 1988, Article 8 (7) (iii) 21 *ILM* 859 (1988).
54 Commission, *op. cit., supra* note 50, at 21-22.

10. Role of other preventive mechanisms associated with liability

As a consequence of the above developments the preventive functions of liability are being increasingly interconnected with other preventive mechanisms established under environmental regimes. This is particularly the case of notification and consultation with other States in given environmental matters, and the increased recourse to Environmental Impact Assessment under environmental regimes. All such mechanisms respond to the needs of enhancing the preventive role of environmental regimes.

Some of the principles of international environmental law developed with a view to prevention have important implications for the operation of responsibility and liability, but on occasions they are not easy to implement at the international level. Such is the case, for example, of the Precautionary Principle, the Polluter-Pays Principle and the Principle of common but differentiated responsibility.[55] Much of the preventive emphasis of current international environmental law is founded on the application of the Precautionary Principle which in turn involves a measure of scientific uncertainty.

One particular form of preventive cooperation in this field which is gaining ground is that relating to bilateral or multilateral assistance to avoid environmental damage, as evidenced by the practice of some members States of the European Union in relation to neighboring countries. This type of cooperative preventive action goes on occasion beyond the avoidance of damage and it involves the undertaking of a proper environmental management. In spite of the importance of this cooperation the assisted State is not entitled in case of damage to claim a diminution of its eventual responsibility, liability or civil liability as the case may be.

11. New issues associated with liability and response action

Given the prevailing emphasis on preventive measures, response action directed to prevent further damage and to control, minimize or eliminate damage already produced, has become an important element in the preparation of liability regimes. Environmental regimes should provide in this context for the mechanisms necessary to ensure that operators

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55 See the Rio Declaration *cit. supra* note 5, Principles 3, 15, 16 ; and Sands, *op. cit., supra* note 8, 217-220. A. E. Boyle : "Making the polluter-pays ? Alternatives to State responsibility in the allocation of transboundary environmental costs", in Francioni and Scovazzi, *op. cit., supra* note 14, 363-379 ; S. R. Chowdhury : "Common but differentiated State responsibility in international environmental law : from Stockholm (1972) to Rio (1992)", in Ginther, Denters and de Waart (eds.) : *Sustainable development and good governance*, 1995, at 322.

undertake this response action in a timely and effective manner. Response action and eventually restoration might also be undertaken by States parties to such regimes[56] or even by private entities or individuals, particularly in situations of emergency. The same may apply to technical bodies established under such regimes. The preparation and enactment of contingency plans at the international and domestic levels is a most important element of response action.

Failure to comply with these mechanisms should engage the liability of operators, and to this extent liability might provide an incentive to undertake response action. Back-up liability and eventually State responsibility might also be engaged. Compliance with these arrangements, however, should not forestall liability for the ensuing damage except to the extent that the action undertaken has eliminated or significantly reduced such damage.

The entities undertaking response action and restoration should be entitled to the reimbursement of the costs incurred by them. In point of fact, it is only reasonable that States Parties and other entities which may have proceeded to undertake response action and restoration — or even provide additional public services — should be compensated for the costs of such actions. These amounts can be claimed independently from liability claims since they arise from a different legal arrangement, but many times they will be consolidated into other claims for compensation for environmental damage.

Response action and restoration are closely linked to the basic principles of international environmental law establishing a duty not to degrade the environment.[57]

12. Defining activities which may engage international or civil liability

In the preparation of environmental regimes the definition of which activities might engage international liability or civil liability becomes an important question. The essential point will be of course to identify which activities can be considered dangerous or hazardous from the environmental point of view, thereby providing a first major criteria to be included in the regime. As indicated in the Green Paper of the European Commission on the reparation of environmental damage, it is a basic requirement in this context to identify which activities or production processes will be subject to the strict standard of liability and to take into account the nature of the risk involved and the financial implications.[58] One first

56 See for example the Protocol to the Antarctic Treaty on Environmental Protection, 1991, 30 *ILM* 1461 (1991), Article 15.

57 Orrego Vicuña, *loc. cit., supra* note 3, at 151-152 ; and principles *cit., supra* notes 4, 5.

58 Commission, *op. cit., supra* note 50, at 7.

approach is to identify specific sectors of hazardous activities; a number of national legislations have included, for example, air and railway transportation, pipelines, nuclear energy or biotechnology.[59] A similar approach is followed by some international regimes, such as oil pollution and nuclear energy,[60] since conventional regimes are linked to specific activities identified as dangerous, hazardous or ultra-hazardous.

A different approach is to include hazardous activities in general, providing basic criteria for listings of dangerous substances, as is the case of the Convention of the Council of Europe.[61] Still another approach is to consider hazardous all activities taking place in a given sensitive area, as it has been suggested for the annex on liability to the Protocol on Environment Protection to the Antarctic Treaty.[62] But even under comprehensive protocols such as the latter there is the question of activities which were not meant to be covered by the original treaty, thus requiring a listing of exceptions. In some other occasions the precise extent of activities relating to response action might not be entirely clear. The discussion about the scope of application of the draft liability Protocol relating to Transboundary Movements of Hazardous Wastes and their Disposal is illustrative of these difficulties.[63]

Comprehensive regimes will also need to accommodate differences existing between various sectors of activity and eventually provide for coordination with other international norms applicable to some of such sectors. It is not unusual that more than one liability convention might apply to a given activity, as will probably happen for example with waste disposal, in which case there is a need to provide for an order of priority. The application of the strictest standard in force, the standard most

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59 *Ibid.*, at 14, with reference to Denmark, Italy, Portugal, the Netherlands and Germany.

60 See for example the International Convention on Civil Liability for Oil Pollution Damage, 1969, *cit., supra* note 42. See also the Convention on Third Party Liability in the Field of Nuclar Energy, 1960, 55 *AJIL* 1082 (1961), and the Protocols and Supplements thereto.

61 Council of Europe, Convention *cit., supra* note 35, Article 2 and Annex I, II.

62 Protocol *cit., supra* note 56, Article 16. The matter has been under consideration since the XVIth Antarctic Treaty Consultative Meeting (1991) and meetings of legal experts under the chair of Professor Rüdiger Wolfrum have been held periodically thereafter.

63 United Nations Environment Programme : *Ad hoc* working group of legal and technical experts to consider and develop a Draft Protocol on Liability and Compensation for damage resulting from transboundary movements of hazardous wastes and their disposal, *Report of the First Session*, UNEP/CHW.1/WG.1/1/5, 16 September 1993, Article 3.

favorable to the environment, the option more favorable to the claimant or the choice of the claimant, are some of the criteria suggested to establish a priority.[64] The general rules of the Law of Treaties also offer guidance in this respect. In any event, in case of concurrent regimes or applicable rules on liability, compensation granted under one arrangement should be offset by the amount of payments made under other arrangements.

13. Issues related to the degree of damage

An important question in the discussion of liability regimes has been the seriousness or degree of the damage to be considered, with particular reference to whether all damage should be included or only that above a given threshold. Firstly, it should be noted that if the damage arises from the breach of an obligation compensation should be granted in all such circumstances because this will be in general associated with the concept of State responsibility. In situations not involving the breach of an obligation, the requirement of a certain gravity or significance has been generally the favored approach, making a distinction between tolerated and serious impact, or between minor and transitory impact and that exceeding this level. Minor impact can be excluded from the definition of damage and hence from liability, among other reasons because the cost of evaluating small impacts might exceed its benefits. How to establish this threshold, however, has been a most difficult legal and practical problem.

A first possible approach is to provide for the *de minimis* rule which would allow for the discarding of tolerated, minor or transitory damage as defined under a given environmental regime, and only include the damage above the defined threshold of gravity and significance. A different approach altogether is to allow for an exemption from liability of damage caused at tolerable levels,[65] an approach which may entail an important shift in the burden of proof since the evidence to justify the exemption will have to be provided by the operator and not by the claimant. But even when in application of these criteria no reparation is called for, there might be a need for diplomatic satisfaction or other measures in certain circumstances. On the other hand, there is the question of whether all impacts above the defined threshold should be regarded as damage; each specific regime will probably have to differentiate in this regard and there is also the possibility of allowing for exceptions.

The main difficulty associated with this discussion lies in the foreseeability of damage. When a potentially damaging activity or a likely

64 See, for example, *ibid.*, Article 13 and the alternatives thereto.
65 Council of Europe, Convention *cit.*, *supra* note 35, Article 8 d.

harmful result is identified beforehand, prevention and the operation of liability will be much easier than when foreseeability was not possible, without prejudice to the adoption of precautionary and other measures. There is also a close connection between the question of foreseeability and the utilization of Environmental Impact Assessments, a mechanism which has been devised with the precise purpose of anticipating potential damage and adopting the necessary preventive measures, including the operation of liability. Environmental Impact Assessment will facilitate the distinction between minor or transitory impacts and those impacts above this level. It should also be noted that an interesting shift in the burden of proof is taking place in the context of authorization of activities under recent international regimes ; in the case of CRAMRA, for example, an activity would only be authorized if it is established that it will not cause adverse environmental impacts,[66] while under traditional approaches an activity could proceed unless an adverse impact was established. This shift favors environmental protection as the first priority and it involves in general a broad Environmental Impact Assessment.

Activities which have been assessed involve also a number of problems in the context of the operation of liability. The submission of a proposed activity to Environmental Impact Assessment should not in itself exempt such activity from liability if the assessed impact exceeds the limit foreseen and judged acceptable. Neither does this procedure exclude liability for accidental or unforeseen damage as provided for under an environmental regime.

The point has been made that assessed activities should to an extent be exempted from liability ; if so, only accidental or unforeseen damage would be covered. However, Environmental Impact Assessments should not turn into a certificate of liability-free activity, a situation which would deviate from the preventive function of this mechanism. To this effect damage as such should be subject to assessment and not only the proposed activity, since otherwise it would suffice to submit a proposed activity to assessment in order to escape liability. Moreover, an Environmental Impact Assessment may require that a specific guarantee be given for adequate compensation should the case arise. On the other hand, if an assessment by States Parties to a regime is not done with due diligence it might engage State responsibility for breach of the obligation devolving upon it in this respect.

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66 CRAMRA, *cit., supra* note 53, Article 4 (2).

14. The debate about exemptions from liability

Again in respect of exemptions the distinction between State responsibility and international and civil liability should be kept under consideration. Exemptions from State responsibility are governed by the principles and rules of international law. Whether exemptions from international or civil liability should be allowed is a question that comes up in the preparation of all major environmental regimes. This issue and the problem of limits to liability discussed further above mark the essential difference between strict and absolute liability, the latter generally not accepting exemptions or limits.

Environmental regimes will normally allow for exemptions from liability to the extent compatible with their objectives. If strict liability is used as the applicable standard, the absence of willfulness or *culpa* does not constitute an exemption. Neither the mere unforeseeable character of an impact should in itself be accepted as an exemption. The proof of a direct causal nexus between the event justifying the exemption and the damage also shall normally be required to accept an exemption.

In current international practice exemptions based on armed conflict, terrorism or a natural disaster of an exceptional, inevitable and irresistible character, have been often accepted in environmental regimes and other liability arrangements. In respect of armed conflict, it has been rightly noted that only the victim should be entitled to invoke this event as an exemption, but even in this understanding the facts will be difficult to establish in many occasions. A determination by the United Nations Security Council will of course be authoritative in establishing which is the aggressor and which the victim.[67] There is also in this connection a trend to prohibit more generally the recourse to environmental warfare, a prohibition which in the view of some writers could find support in customary international law.[68] Since many armed conflicts involve State actors, there will also be a question of State responsibility in addition to issues of liability.

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67 See generally United Nations Environment Programme : Working group of experts on liability and compensation for environmental damage arising from military activities, 1994-1996. See also Bernhard Graefrath : "Iraqi reparations and the Security Council", *ZAÖRV*, vol. 55, 1995, 1-68.

68 See generally Anthony Leibner : "Deliberate wartime environmental damages : New challenges for international law", *California Western International Law Journal*, vol. 23, 1992, at 67. See also the International Law Commission's Draft Articles on the Draft Code of Crimes against Peace and Security of Mankind, Article 20 (g), UN Doc. A/51/332, 10 July 1996, at 11.

Intentional or grossly negligent acts or omissions of a third party are also a common type of exemption from liability under international conventions. However, in such case the third party should be fully liable for the damage. Another problem which should be considered in the light of specific liability regimes is whether damage originating in activities undertaken on humanitarian grounds should entail liability or otherwise be exempted. Given the priority usually assigned to humanitarian values it is likely that specific regimes might distinguish these activities from other types of undertakings and on this basis establish the appropriate exemption.

A number of other situations have also been included on occasion as exemptions. The Council of Europe Convention, for example, exempts from liability a damage resulting necessarily from compliance with a specific order or compulsory measure of a public authority, or a damage caused by pollution at tolerable levels under local relevant circumstances.[69] As noted further above, however, although in cases of this kind the operator may be exempted from liability, international liability of the public authorities concerned will anyhow be engaged. The Convention further exempts a damage caused by a dangerous activity undertaken lawfully in the interest of the person or entity suffering the damage[70] ; if the latter contributed to the damage by his own fault compensation may be reduced or disallowed where appropriate,[71] without prejudice to the question of intentional or negligent acts of a third party discussed above.

Several other legal issues are associated with the question of exemptions. Since the requirements to undertake appropriate response action under environmental regimes arise separately from the engagement of liability, the existence of an exemption from the latter should not affect the operation of such response action. Reimbursement of costs for response action should therefore be available separately from compensation originating in liability even if the respective claims might become consolidated.

In any event, exemptions must be considered in a very restrictive perspective for otherwise they may end up depriving the liability scheme of all its significance.

The broader question of damage caused by entities not subject to a given liability regime should also be taken into account in this context,

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69 Council of Europe, Convention *cit., supra* note 35, Article 8.

70 *Ibid.*, Article 8 (e).

71 *Ibid*, Article 9 ; see also generally D. J. Bedermann : "Contributory fault and State responsibility", *Virginia Journal of International Law*, vol. 30, 1990, at 335.

for in fact they constitute a kind of exemption favoring non-parties to such regimes. The use of flags of environmental convenience is becoming quite often and should be specifically prohibited. Several environmental regimes have provided for incentives to States to become parties to it and considered measures to avoid escaping its obligations or relying on possible loopholes.[72] Various measures to this effect could also be considered at the domestic level, including the incentive of acceding to important markets if the entity is prepared to accept its obligations in terms of liability. However, measures relating to international trade in this context should at all times be compatible with treaty obligations and multilateral trade arrangements, such as those of the GATT-World Trade Organization, and fully observe the principle of non-discrimination.[73] The extraterritorial application of domestic environmental laws to operators of the nationality or under the control of the State concerned is also becoming a mechanism directed to prevent potential loopholes, but this will of course interfere with other States' sovereignty and hence it would require a special agreement and should be subject to reciprocity.

15. A broader framework for the reparation of damage

Under traditional arrangements for liability the type of damage envisaged is normally related to death, personal injury or loss of property or economic value. In the context of current environmental concerns, however, there are situations which transcend those values and affect the environment as such, which becomes a value to be protected in its own merit. The *Cosmos 954*[74] had touched on this issue at an earlier stage, and now it has become paramount in the intricate stages of the *Patmos*[75]

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72 See, for example, the Basel Convention on the control o9f transboundary movements of hazardous wastes and their disposal, 28 *ILM* 657 (1989), Article 4 (5), prohibiting exports to or imports from non-parties to the Convention.

73 James Cameron and Jonathan Robinson : "The use of trade provisions in international environmental agreements and their compatibility with the GATT", *Yearbook of International Environmental Law*, vol. 2, 1991, 3-30.

74 Canada, Claim against the USSR for damage caused by Soviet Cosmos 954, Notes of 23 January 1979 and 15 March 1979, 18 *ILM* 899 (1979) ; The Protocol on the settlement of the claim is published in 20 *ILM* 689 (1981). See also generally A. Bianchi : "Environmental harm resulting from the use of nuclear power sources in outer space : some remarks on State responsibility and liability", in Francioni and Scovazzi, *op. cit., supra* note 14, 231-272.

75 *Patmos* case, Messina Court of Appeals, 1989. See also M. C. Maffei : "The compensation for ecological damage in the "Patmos" case", in Francioni and Scovazzi, *op. cit., supra* note 14, 231-272.

and the *Haven*.[76] Broad definitions of environmental damage have been included in CRAMRA[77] and the Council of Europe Convention.[78]

The question which arises in connection with the various types of damage described is whether a regime dealing with liability for damage to the environment should cover only environmental damage strictly speaking or else it should also extend to the kind of traditional values, such as personal injury or property. The latter, while easier to assess, are normally dealt with under other mechanisms in international or domestic law, and could introduce additional complications in the operation of environmental regimes. On the other hand, however, there is no reason why a comprehensive liability regime should exclude important types of damage. The prevailing trend is to provide for rather comprehensive definitions of damage, as evidenced by the negotiations on liability resulting from transboundary movements of hazardous wastes and their disposal at the international level[79] or by the United States Oil Pollution Act at the domestic level.[80]

One other alternative is for a given regime to provide for environmental damage and for other types of damage arising directly from such environmental damage, which can include life, injury and property. If not connected directly to environmental damage those other types can always be governed by existing international or domestic law.

The type of damage that any given regime will decide to include shall be of course related to its very purpose and the nature of the activity undertaken. Discussions on the Antarctic environmental liability regime have included, for example, in addition to the types of damage described above, loss or impairment of scientific use, which is a central value to the Antarctic Treaty System, and the question of damage to dependent and associated ecosystems.

Since all activities will not necessarily be treated alike in terms of liability under given regimes, it is very likely that this will result in

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76 International Oil Pollution Compensation Fund : *Annual Report*, 1993, 24-74. See also Angelo Merialdi : "The Patmos and Haven cases : recent developments", International Centre for Coastal and Ocean Policy Studies, Genoa, *ICCOPS Newsletter*, N° 3, July 1994, 12-15.

77 CRAMRA, *cit., supra* note 53, Article 8 (2).

78 Council of Europe, Convention *cit., supra* note 35, Article 2 (7).

79 Draft Protocol, *cit., supra* note 63, Article 2. See further Sean D. Murphy : "Prospective liability regimes for the transboundary movement of hazardous wastes", 88 *AJIL* 24 (1994).

80 United States *Oil Pollution Act*, 1990, Sec. 2702, b, 2.

different approaches to the type of damage to be covered as well as to the extent or degree of harm required to engage liability.

In view of this changing concept of damage, the framework for ensuring effective reparation has also been gradually broadened. The criteria developed in this respect by the International Law Commission is quite eloquent in that reparation should include cessation of the activity concerned, restitution, compensation and eventually satisfaction.[81] One significant aspect of this evolution is that compensation as the traditional measurement of liability is no longer exclusively associated with the payment for an economic loss ; since the environment has become a value in itself compensation is being broadened so as to include the cost of cleanup and restoration, a case in point being the *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*.[82]

In this last case the Court of Appeal examined the common law "diminution in value" rule for calculating damages and held that it could not be applied since the affected land had no significant commercial value. The claim was rather "for the injury — broadly conceived — that has been caused to the natural environment by the spilled oil".[83] In the opinion of the Court, the appropriate standard in a case such as this is the cost of restoration or rehabilitation of the affected area to its pre-existing condition without grossly disproportionate. Should this not be possible an alternative measure of damages could be "the reasonable cost of acquiring resources to offset the loss".[84] While the replacement value of destroyed organisms was not accepted as an appropriate standard in this case, it was suggested that the cost of replanting was a reasonable approach.[85] Rehabilitation of an area to its preexisting condition and the replenishment

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81 See, for example, International Law Commission : *Seventh Report on State Responsibility*, by Mr Gaetano Arangio-Ruiz, Special Rapporteur, UN Doc. A/CN. 4/469, 9 May 1995, at 7-14 ; Draft Articles on State responsibility, Articles 41-45, *International Law Commission*, UN Doc. A/51/332, *cit., supra* note 68, at 25-27 ; and *Eleventh Report on international liability for injurious consequences arising out of acts not prohibited by international law*, by Mr Julio Barboza, Special Rapporteur, UN Doc. A/CN. 4/468, 26 April 1995, 10-14.

82 456 F. Suppl. 1327 (1978) ; 628 F 2d. 652 (1980). See also E. D. Brown : "Making the polluter pay for oil pollution damage to the environment ; a note on the Zoe Colocotroni case", *Lloyd's Maritime and Commercial Law Quarterly*, 1981, 323-334. See also the novel approach of the International Convention on Salvage, 1989, allowing a reward for salvage operations in connection with preventing or minimizing damage to the environment and providing for an alternative special compensation in this context, for which see articles 13, 14 and generally Guido Camarda : *Convenzione "Salvage 1989" e ambiente marino*, 1992.

83 628 F. 2d. 652 (1980) at 673.

84 *Ibid.*, at 676.

85 *Ibid.*, at 677.

of damaged biological resources, could be considered as standards of compensation in the context of international regimes.

The difficulties associated with the assessment of environmental damage also became apparent in the cited *Patmos* case, in which a group of experts proposed to assess the value of the environment in terms of the market price of fish, a reasoning that was rejected by the Court since it dealt only with one affected natural resource and not with the broader environment ; the Court finally decided on equity, but it did not deal with the impacts of oil pollution beyond the Italian territorial sea. It follows that equitable assessment of compensation may also be an appropriate standard where specific costs are difficult to establish.

Where restoration of the environment is possible the reasonable costs of actions undertaken to this effect will probably be an appropriate measure of damage. To the extent that contingency plans are resorted to more often, they will normally provide the criteria for what is to be expected as reasonable action. Many times there will be the added difficulty of establishing the baseline conditions which should guide restoration.

On occasions, however, damage will be irreparable because of physical, technical or economic reasons and, therefore, restoration will not be possible. In such cases added criteria will need to be developed for the purpose of measuring damage. The essential point is that environmental damage must not remain uncompensated because of its eventual irreparable nature. Impairment of use, aesthetic and wilderness value and other non-use criteria and approaches have been suggested to this effect.[86] Guidelines developed under domestic legislation, principles of economic valuation, intergenerational equity, equitable assessment and criteria established by international bodies offer additional alternatives to be taken into account in the proceedings to this effect conducted by diplomatic means, arbitration or adjudication. The negotiations of an Antarctic liability regime have also dealt with the question of irreparable damage, an event in which operators could be called to make voluntary contributions to the International Fund proposed, and if States Parties are not satisfied a process of diplomatic consultations would be undertaken; arbitration and adjudication would be an added alternative.

The availability of additional criteria for the measurement of compensation in situations of irreparable damage is of the utmost importance, since otherwise the liable entity might end up being better

86 See generally Philippe Sands, Ruth Mackenzie and Ruth Khalastchi : "Background paper for the UNEP working group on environmental damage, liability and compensation", January 1995 ; see also *supra* note 67.

off than other entities which may have produced a lesser damage that allows for quantification and reparation. In this context, however, it will not be possible to separate the reimbursement of costs for response action or restoration from compensation originating in liability strictly speaking as it would normally happen when there is a commercial value involved.

Full reparation of environmental damage should not result in the assessment of excessive, exorbitant, exemplary or punitive damages. Punitive damages are not usually accepted under international law,[87] but where it would be equitable for compensation to exceed actual loss or some other alternative measurement punitive damages might be envisaged. Deliberate environmental damage might be a case in point. Beyond the damage to the environment, the question of compensation to affected third parties will also eventually have to be dealt with.

16. Expanding the access to effective dispute prevention and remedies

A most important aspect for the proper operation of an environmental regime is to provide access by States, international organizations and individuals to informal mechanisms devised to facilitate compliance with the rules and measures adopted to attain the objectives of environmental protection.[88] Consultations, negotiations and other dispute prevention arrangements ought to be encouraged in this context under environmental regimes.

In the event that preventive mechanisms are not successful, the expeditious access to jurisdictional remedies or other forms of settlement of disputes and submission of claims should also be considered under environmental regimes. The role of international arbitration will of course be paramount in this regard, and eventually that of the International Court of Justice might be enhanced, including the access to the Standing Chamber for environmental disputes.[89]

It can reasonably be expected that this area of the law, involving important issues of both public and private international law, will be the subject of substantive improvements in the context of international environmental law in the near future.

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87 Clyde Eagleton : *The responsibility of States in international law*, 1928, 185-197, particularly at 190-191 ; Eduardo Jiménez de Aréchaga : *Derecho Internacional Público*, 1989, vol. IV, 33-89, particularly at 64-65.

88 Ibrahim F. I. Shihata : "Implementation, enforcement and compliance with international environmental agreements : views from the World Bank", 1996.

89 Raymond Ranjeva : "Environnement, la Cour Internationale de Justice et sa Chambre spéciale pour les questions d'environnement", *Annuaire français de Droit international*, 1994, 1-9.

Under international law a direct legal interest is required for the affected or potentially affected party to be entitled to make an environmental claim and demand the termination of an activity causing damage. The recognition of an *actio popularis* has not been forthcoming in this context. However, in the global and more complex environmental context described above, it is not always possible to identify a precise legal interest, particularly when the action is based on environmental damage per se or on the damage to areas beyond the limits of national jurisdiction. Environmental regimes should consider making available flexible arrangements to facilitate the standing of claimants in situations of this type, particularly in respect of preventive actions.

The important document prepared by the Italian government on the international law of the environment in 1990, rightly points out that international law is gradually beginning to react to this situation.[90] Since the *Barcelona Traction* decision[91] the violation of obligations *erga omnes* conceived in the interest of the international community could provide a legal standing to all States to react, although this possibility is still untested in practice. The very concept of *ius cogens* could provide a similar standing irrespectively of the question of damage. The approach of the International Law Commission to the definition of an international crime, with specific reference to the environment, also points in the same direction. The breach of a multilateral treaty equally allows for the action of all States concerned. In the context of United States federal common law it has also been concluded that a State can present a claim for injury to its environment independently from any injury to its nationals or property,[92] an approach which could eventually be also considered under environmental regimes. Similar difficulties will exist for the identification of the person or entity entitled to receive compensation.

Some solutions to these issues have been devised under domestic law. The United States Oil Pollution Act provides for the designation of trustees at the Federal, State and tribe levels, who shall act on behalf of the public and are empowered to present claims and recover damages to the natural resources.[93] The Trans-Alaska Pipeline Liability Fund may also sue and be sued in its own name.[94] Under specific international regimes the entities entitled both to make claims and receive compensation in the absence of a direct legal interest should be properly identified. Institutions

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90 Introductory Doc. *cit., supra* note 14, at 63 et seq.
91 Barcelona Traction, Light and Power Co. Ltd., 1970, ICJ, *Reports*, 4.
92 Restatement *cit., supra* note 40, at 122-123.
93 United States Oil Pollution Act, *cit., supra* note 80, Sec. 1006, 2706.
94 United States Trans-Alaska Pipeline System Reform Act of 1990, Section 1653.

established under such regimes, Ombudsmen and Funds may be empowered to proceed on behalf of the community participating in the regime, decide upon the claims, consolidate various individual or concurrent claims, participate in the determination of damages and perform other functions directed to institutionalize the proceedings and representation. A limited number of precedents already exist in this regard, without prejudice to the role and experience of international claims commissions.[95] Various initiatives have also been undertaken from time to time to establish a World Environmental Court. A High Commissioner for the Environment might also be envisaged to act on behalf of the interest of the international community.

Even where it is not possible to designate a trustee or the available institutions have not been empowered to represent the collective interest, other solutions may be explored. This would be the case, for example, of a given number of parties to a regime being empowered to jointly make a claim on behalf of the collective interest or of an International Fund.

A recent and comprehensive approach to the question of remedies has been enacted by the Governing Council of the United Nations Compensation Commission, an approach which could be useful for environmental damages. Under this arrangement governments may submit consolidated claims and receive payments on behalf of individuals affected, including claims on behalf of third parties.[96] The Commission itself may intervene as a trustee on behalf of certain categories of claimants.[97] In the case of a corporation that is barred from making a claim because of its nationality, its partners are allowed to do so in proportion to their interest if not affected individually by the nationality requirement,[98] an approach which innovates in relation to some of the problems discussed in the *Barcelona Traction*. On the other hand, just as parents corporations may be held liable for acts of a subsidiary and vice versa, any such entity should also be allowed to bring a claim for environmental damage on behalf of the other.

An interesting approach directed to prevent disputes is the arrangement for the participation of qualified States and entities in the planning process of major projects of another State in the context of

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95 See, for example, CRAMRA, *cit., supra* note 53, Article 8 (9).

96 United Nations Compensation Commission : *Criteria for expedited processing of urgent claims*, U.N. Doc. S/AC. 216/1991/1, 2 August 1991.

97 *Ibid.*, U.N. Doc. S/AC. 26/1991/5, 23 October 1991.

98 *Ibid.*, U.N. Doc. S/AC. 26/1991/4, 23 October 1991.

mechanisms of international cooperation.[99] Also the requirement of domestic or regional Environmental Impact Statements for actions which may have effects on the global commons or of a transboundary nature is a useful tool to this effect.[100] Inter-state apportionment of liability is also an added feature reflecting the evolution of the law in this field.

17. Remedies available to the individual for domestic and transnational claims

While the traditional forms of representation of the individual by the State in order to have access to international mechanisms for the settlement of disputes and claims always offer a possibility, this approach has evidenced a number of shortcomings, particularly in the environmental context. Espousal of a claim will be a discretionary decision of the State, political considerations will inevitably intervene and the individual's interest will not always be the same as that of the representing State. Procedural difficulties also further complicate the use of this alternative.

As a consequence of the above mentioned difficulties other alternatives have been explored and occasionally implemented in order to facilitate direct access of the individual to effective remedies in a transnational context, without prejudice to what international conventions may provide in connection with the participation of the individuals in environmental regimes.

An important alternative is to provide for equal access to domestic courts and remedies by national and foreign entities on a non-discriminatory basis.[101] When this alternative is available it may be of course also open to claims brought by foreign States. In terms of some domestic legislation recovery by foreign claimants is subject to a condition of reciprocity,[102] but eventually this condition should not be applied to foreign private claimants.

The settlement of disputes by means of the intervention of national courts is not devoid of important difficulties. There is first a risk of inconsistency in decisions of courts responding to many different legal systems, a situation which may end up affecting the implementation of international environmental agreements and their interpretation. Referral of questions of interpretation to the institutions established under a regime or to international courts may provide an adequate solution to this problem

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99 Restatement *cit., supra* note 40.

100 See, for example, Convention on Environmental Impact Assessment in a Transboundary Context, 1991, 30 *ILM* 802 (1991).

101 OECD, Recommendation of the Council for the implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution, 17 May 1977, 16 *ILM* 977 (1977).

102 United States Oil Pollution Act, *cit., supra* note 80, Section 2707.

as evidenced by the experience of the Court of Justice of the European Community.[103] Although technical expertise on environmental matters will be often needed by domestic courts or other tribunals, this can easily be made available, as was done in the Trail Smelter arbitration. A question of impartiality may also arise when courts must pass judgment on entities having the same national allegiance or on the State itself.

Although suggestions to eliminate the exhaustion of local remedies have occasionally been made in connection with environmental claims, this does not seem to be an appropriate solution and the requirements of international law should be met in this matter.

Another difficulty confronting procedures before national courts is the question of State immunity and even the discretionary powers of the home State. These questions have become on occasion a bar to the legal process in environmental matters or to the choice of the appropriate judicial forum. The *Gut Dam* case evidenced some of these shortcomings.[104] The possibility of waiving State immunity from legal process in appropriate claims should be considered under environmental regimes. Arbitral awards and decisions rendered by international and other tribunals called to intervene in environmental disputes and claims should be granted the same power as national decisions at the domestic level, an approach that would greatly facilitate the effectiveness of the respective regimes.

It may also be useful to consider that judicial and administrative proceedings might be initiated by qualifying associations and foundations aiming at the protection of the environment to the extent compatible with applicable national legislation, as well as to allow for consultations with such entities in matters of their expertise.[105]

Most of the questions discussed above involve simultaneously important conflict of law issues. In view of the existence of multijurisdictional basis, the establishment of personal jurisdiction will not be an easy task in many cases. Questions related to the place where damage has taken place, where the defendant has its domicile or done business, the degree of minimum contact considered necessary, the influence of the doctrine of *forum non conveniens* where accepted, and other such issues have been clearly illustrated by leading cases like *Bhopal*,[106] the Amoco *Cadiz*,[107] *Mines de Potasse*

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103 See Article 177 of the Treaty establishing the European Economic Community.

104 See supra note 17.

105 See also Principle 10 of the Rio Declaration *cit., supra* note 5.

106 In Re Union Carbide Corp. Gas Plant Disaster, 809 F 2d 195 (2nd. Cir., 1987).

107 In Re Oil Spill of "Amoco Cadiz", 699 F 2d 9099 (17th Cir. 1983).

d'Alsace.[108] and many others. Environmental regimes should generally provide the criteria to establish personal jurisdiction in cases involving multinational aspects. Questions of concurrent jurisdiction and forum-shopping should also be taken into account in this context in order to prevent abuse. Alternatively jurisdiction should be determined by agreement of the States concerned or by decision of a tribunal or other mechanism established under an environmental regime.

A number of nuclear conventions have set precedent in this respect by developing the rules to determine which State has jurisdiction, and in providing that in case of multiple jurisdiction the matter be settled by agreement or by means of a tribunal that shall decide which court is more closely related to the case.[109] Also the draft Protocol on liability in the context of the Basel Convention provides for rules to determine the competent court.[110]

The identification of the applicable law is another crucial question for which also specific regimes have provided rules. The arrangements for the enforcement of judgments will have a paramount importance for securing the effectiveness of remedies. The availability of financial resources to the claimant where appropriate will also be a relevant consideration given the significant cost of transnational litigation.

In addition to the contribution of given environmental regimes, private international law solutions have been systematically emerging in conjunction with forms of international cooperation, aiming particularly at the cooperation between courts and the adoption of uniform principles in questions of jurisdiction or applicable law.[111] Significant examples are the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the 1988 Lugano Convention on the same matter.[122] The current work of the Hague Conference on Private International Law on jurisdiction and enforcement is proceeding in the same direction of contributing to the solution of these problems.[113] The

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108 Bier v. Mines de Potasse d'Alsace, (1976) ECR 1735.
109 Boyle, *loc. cit., supra* note 11.
110 Draft Protocol *cit., supra* note 63, Article 10.
111 International Law Association, Committee on International Civil and Commercial Litigation, *First Report on Jurisdiction in Transnational Torts*, by Dr. Campbell McLachlan, 9 June 1994, at 3.
112 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968, as amended, 1990 O.J. (C 189) 1 ; Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 8, 1988, 1988 O.J. (L. 319) 9.
113 Hague Conference on Private International Law, Conclusions of the Working Group Meeting on Enforcement of Judgments, 19 November 1992.

United States Restatement (Third) has also offered interesting views based both on interstate and international experiences and precedents.[114] Other relevant forms of cooperation involving exchange of information, on-site inspection and government consultations are found, for example, in the 1974 Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden.[115]

18. Advancing international regimes

The complexities inherent to liability in an environmental context have led to a new and most important trend : the enactment of comprehensive liability schemes for environmental damage, either in relation to specific sectors of activity or in a general manner. Sectoral regimes are found, for example, in the above mentioned cases of the 1969 Convention on Civil Liability for Oil Pollution Damage or the various conventions on liability in the field of nuclear energy, and work is proceeding in relation to the liability Protocol to the Basel Convention and the Antarctic environment. A general regime of particular significance is that of the Convention of the Council of Europe which may have an important influence in the action of the European Union in the same matter.

This kind of comprehensive regime will naturally lead to the harmonization of national legislations, particularly if done by groups of closely related States.[116] It will also encourage coordination among relevant international conventions.

The advancement of international regimes poses yet another important issue : whether liability should be addressed at under one single and comprehensive international regime covering a variety of activities or by means of separate regimes geared specifically to the realities and needs of such major individual sector of activity. The latter option has been that favored under international law thus far, providing for negotiated regimes on a sector by sector approach. National legislation, on the other hand, has tended to rely more on the first approach providing where necessary specific rules for individual types of activities.

The global reach of environmental problems, including its effects on oceans, the atmosphere and other common areas, will no doubt continue

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114 Restatement *cit., supra* note 40.

115 Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden, February 19, 1974, 13 *ILM* 591 (1974).

116 Andrea Bianchi : "The harmonization of laws on liability for environmental damage in Europe : an Italian perspective", *Journal of Environmental Law*, vol. 6, 1994, 21-42.

to build pressure on the need to undertake comprehensive solutions and regimes. However, for the time being it is likely that international law will keep with the sectoral approach. In addition to the difficulties inherent to the negotiation of liability schemes, there is one important reason that explains the sectoral trend. Effective liability will many times require different levels of stringency, limits, exemptions and other characteristics in relation to the specific nature of the activity in question in order to accomplish its preventive function and to ensure the appropriate reparation of damage.[117] This is also true of the need to ensure an adequate balance between the stringency of liability and economic efficiency, which will differ from sector to sector.

The approach may be different in the case of groups of closely interrelated countries, where cooperation may be advanced to a greater degree both in legal and economic terms. The examples of the Council of Europe Convention and of the eventual European Union action, including the need to prevent market distortions on the ground of environmental costs,[118] are indicative of this other reality which some times comes closer to national than to international law solutions.

In any event, both the general and the sectoral approaches share common issues, principles and solutions. The significance of the contribution of the Institut de Droit International to this subject lies precisely in the identification and development of the basic principles of responsibility and liability for environmental damage under international law, with a view to their application by governments and organizations to different types of regimes and contexts relevant to environmental protection.

Francisco Orrego Vicuña

117 Murphy, *loc.cit., supra* note 79.
118 Bianchi, *loc. cit., supra* note 116.

Draft Resolution

September 1996

The Institute of International Law,

Recalling the "Declaration on a Programme of Action on the Protection of the Global Environment" adopted at the 65th Session of the Institut in Basel ;

Mindful of the increasing activities that entail risks of environmental damage with transboundary and global detrimental impacts ;

Taking into account the evolving principles and criteria governing State responsibility, liability for acts not prohibited by international law and civil liability for environmental damage under both international and national law ;

Noting in particular Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration on the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction ;

Realizing that both responsibility and liability have in addition to the traditional role of ensuring restoration and compensation that of enhancing prevention of environmental damage ;

Seeking to identify, harmonize and to the necessary extent develop the principles of international law applicable to responsibility and liability in the context of environmental damage ;

Desiring to make useful recommendations for the negotiation and management of regimes on responsibility and liability for environmental damage established under international conventions in furtherance of the objectives of adequate environmental protection (environmental regimes) ;

Realizing that international environmental law is developing significant new links with the concepts of intergenerational equity, the precautionary approach, sustainable development, environmental security and human rights, as well as with the principle of shared but differentiated responsibility, thereby also influencing the issues relating to responsibility and liability ;

Adopts the following resolution :

Basic distinctions on responsibility and liability

Article 1

The breach of an obligation on environmental protection established under international law engages international responsibility of the State (international responsibility). International liability for environmental damage arising from acts not prohibited by international law may also be engaged.

Civil liability of operators can be engaged under domestic law or the governing rules of international law irrespectively of the lawfulness of the activity concerned if it results in environmental damage.

The foregoing is without prejudice to the question of criminal personal responsibility of natural or juridical persons as an additional remedy.

Article 2

In order to ensure their effectiveness environmental regimes should provide for specific rules on international responsibility and liability, as well as on civil liability. The object and purpose of each regime should be taken into account in establishing the extent of such rules.

International responsibility

Article 3

The principles of international law governing international responsibility also apply generally to obligations relating to environmental protection.

When due diligence is utilized as a test for engaging responsibility it is desirable that it be measured in accordance with objective standards relating to the conduct to be expected from a good government and detached from subjective intentionality. Generally accepted international rules and standards further contribute to provide an objective measurement to the due diligence test.

International liability

Article 4

International liability attributable to the State for acts not prohibited by international law may also be provided for under environmental regimes in connection with the objective fact of harm having occurred. The hazardous nature of the activities concerned, the element of risk involved or other special characteristics of such activities should be taken into account in the application of the principles and rules governing international liability.

Failure of the State to enact appropriate rules and controls in accordance with environmental regimes, even if technically not amounting to a breach of an obligation, shall engage its international liability if damage ensues as a consequence, including damage caused by operators under its jurisdiction and control.

The use of criteria facilitating the proof required to make effective a claim for environmental damage should be considered under such regimes.

Civil liability

Article 5

While fault-based, strict and absolute standards of civil liability are provided for under national legislation, environmental regimes should and have preferred the strict liability of operators as the normal standard applicable under such regimes, thereby relying on the objective fact of harm and also allowing for the appropriate exceptions and limits to liability. This is without prejudice to the role of harmonization of national laws and the application in this context of the standards generally prevailing under such national legislations.

Article 6

Environmental regimes should normally assign primary liability to operators. States engaged in activities *qua* operators are governed by this rule.

This is without prejudice to the questions relating to international responsibility which may be engaged for failure of the State to comply with the obligation to establish and implement civil liability mechanisms under national law, including insurance schemes, compensation funds and other remedies and safeguards, as provided for under such regimes.

An operator fully complying with applicable domestic rules and standards and government controls may be exempted from liability in case of environmental damage under environmental regimes. In such case the rules set out above on international responsibility and international liability of the State may apply.

Article 7

A causal nexus between the activity undertaken and the ensuing damage shall normally be required under environmental regimes. This is without prejudice to the establishment of presumptions of causality relating to hazardous activities or cumulative damage or long-standing damages not attributable to a single entity but to a sector or type of activity.

Article 8

Subsidiary State liability, contributions by the State to international funds and other forms of State participation in compensation schemes should be considered under environmental regimes as a back-up system of liability in case that the primary liable operator is unable to pay the required compensation. This does not prejudice the question of the State obtaining reimbursement from operators under its domestic law.

Limits to liability

Article 9

In accordance with the evolving rules of international law it is appropriate for environmental regimes to allow for reasonable limits to the amount of compensation resulting from liability, bearing in mind both the objective to achieve an effective protection and the need to avoid serious financial burdens, excessive costs and the discouragement of investments or economic efficiency. Limits so established should be periodically reviewed.

Insurance

Article 10

States should ensure that operators have adequate financial capacity as to the payment of eventual compensation resulting from liability and be required to make arrangements for adequate insurance and other financial security, taking into account the requirements of their respective domestic laws. Where insurance coverage is not available or does not meet the amounts or types of activity required by the industry, the establishment of national insurance funds for this purpose should be considered. Foreseeability of damage in general terms of risk should not affect the availability of insurance.

Apportionment of liability

Article 11

Apportionment of liability under environmental regimes should reach all entities that legitimately may be required to participate in the payment of compensation so as to ensure full reparation of damage. To this end, in addition to primary and subsidiary liability, forms of several and joint liability should also be considered particularly in the light of the operations of major international consortia.

Such regimes should also provide for product liability to the extent applicable so as to reach the entity ultimately liable for pollution or other forms of environmental damage.

Collective reparation

Article 12

Should the source of environmental damage be unidentified or compensation unavailable from the liable entity or other back-up sources, environmental regimes should ensure that the damage does not remain uncompensated and may consider the intervention of special compensation funds or other mechanism of collective reparation, as well as the commitment to establish such mechanisms where necessary.

Entities engaged in activities likely to produce environmental damage of the kind envisaged under a given regime may be required to contribute to the Special Fund or other mechanism of collective reparation established under such regime.

Preventive mechanisms associated with liability

Article 13

Environmental regimes should consider the appropriate connections between the preventive function of liability and other preventive mechanisms such as notification and consultation, regular exchange of information and the increased utilization of Environmental Impact Assessments. The implications of the Precautionary Principles the Polluter-Pays Principle and the Principle of common but differentiated responsibility in the context of liability should also be considered under such regimes.

Response action

Article 14

Environmental regimes should provide for additional mechanisms ensuring that operators shall undertake timely and effective response action, including preparation of the necessary contingency plans and appropriate restoration measures directed to prevent further damage and to control, reduce and eliminate damage already caused.

Response action and restoration should be undertaken also to the extent necessary by States, technical bodies established under such regimes, and by private entities other than the operator in case of emergency.

Article 15

The failure to comply with the obligations on response action and restoration should engage liability of operators, the operation of back-up liability mechanisms and eventually international responsibility. Compliance with the obligations, however, should not forestall liability for the ensuing damage except to the extent that it has eliminated or significantly reduced such damage.

Article 16

States and other entities undertaking response action and restoration are entitled to be reimbursed by the liable entity for the costs incurred into as a consequence of the discharge of these obligations. While claims for these costs can be made independently from liability they may also be consolidated into other claims for compensation for environmental damage.

Activities engaging international and civil liability

Article 17

Environmental regimes should define such environmentally hazardous activities that may engage international liability or strict civil liability in case of damage, taking into account the nature of the risk involved and the financial implications of such definition.

Specific sectors of activity, listings of dangerous substances and activities, or activities undertaken in special sensitive areas may be included in this definition.

Article 18

If more than one liability regime or set of rules applies to a given activity, the regime prepared later in time should provide criteria to establish an order of priority.

The strictest standard in force, or the standard most favorable to the environment, should prevail, without prejudice to the rules applicable under the Law of Treaties. Other criteria that may be considered if the circumstances so warrant are the option most favorable to the claimant or the choice of the claimant.

Degree of damage

Article 19

Environmental regimes should provide for the reparation and compensation of damage in all circumstances involving the breach of an

obligation. If the activity causing damage does not involve such a breach the pertinent regime should allow for compensation of damage above a threshold requiring certain gravity or significance.

Article 20

The submission of a given proposed activity to Environmental Impact Assessment under environmental regimes does not in itself exempt such activity from liability if the assessed impact exceeds the limit foreseen and judged acceptable. An Environmental Impact Assessment may require that a specific guarantee be given for adequate compensation should the case arise.

Exemptions from responsibility and liability

Article 21

Exemptions from international responsibility are governed by the principles and rules of international law. Environmental regimes should normally provide for exemptions from international or civil liability, as the case may be, to the extent compatible with their objectives. The mere unforeseeable character of an impact should not be accepted in itself as an exemption.

Article 22

Armed conflict when invoked by the victim, terrorism and a natural disaster of an exceptional, inevitable and irresistible character and other similar situations normally provided for under civil liability conventions may be considered as acceptable exemptions in environmental regimes.

Intentional or grossly negligent acts or omissions of a third party shall also normally be an acceptable exemption, but the third party should in such case be fully liable for the damage. Damage resulting from humanitarian activities should also normally be exempted from liability.

Compensation and reparation of damage

Article 23

Environmental regimes should provide for the reparation of damage to the environment as such separately from or in addition to the reparation of damage relating to death, personal injury or loss of property or economic value. The specific type of damage envisaged shall be related to the purpose and nature of the regime.

Article 24

Environmental regimes should provide for a broad concept of reparation, including cessation of the activity concerned, restitution, compensation and eventually satisfaction.

Compensation for environmental damage in the context of such regimes should include amounts corresponding to both economic loss and the costs of cleanup and restoration measures. The cost of environmental reinstatement and rehabilitation, equitable assessment and other criteria developed under international conventions and the decisions of tribunals should be considered in this context.

Article 25

Environmental damage must not remain uncompensated because of its eventual irreparable nature. An entity liable for environmental damage of an irreparable nature must not in equity end up in a condition more favorable than that of other entities causing lesser damage that allows for quantification and reparation.

Where damage is irreparable because of physical, technical or economic conditions, additional criteria should be made available for the measurement of damage. Impairment of use, aesthetic, wilderness and other non-use values, domestic or international guidelines, intergenerational equity, and generally equitable assessment should be considered as alternative criteria for establishing a measure of compensation under diplomatic procedures, arbitration or adjudication.

Full reparation of environmental damage should not result in the assessment of excessive, exorbitant, exemplary or punitive damages. However, where it would be equitable for compensation to exceed actual loss punitive damages may be envisaged.

Access to effective dispute prevention and remedies

Article 26

Access by States, international organizations and individuals to informal mechanisms facilitating compliance with environmental regimes, with particular reference to consultations, negotiations and other dispute prevention arrangements, should be provided for under such regimes.

In the event of preventive mechanisms being unsuccessful, expeditious access to jurisdictional remedies and other forms of settlement of disputes and submission of claims relating to environmental damage should also be provided for.

Article 27

Environmental regimes should make flexible arrangements to facilitate the standing of claimants, with particular reference to claims concerning the environment *per se* and damages to areas beyond the limits of national jurisdiction. This is without prejudice to the requirement of a direct legal interest of the affected or potentially affected party to make an environmental claim under international law.

Article 28

Environmental regimes should identify entities that would be entitled to make claims and receive compensation in the absence of a direct legal interest if appropriate. Institutions established under such regimes, ombudsmen and Funds might be empowered to this end. A High Commissioner for the Environment might also be envisaged to act on behalf of the interest of the international community.

Article 29

Dispute prevention might also be facilitated by the participation of qualified States and entities in the planning process of major projects of another State in the context of mechanisms of international cooperation. Domestic and regional Environmental Impact Assessment should also be required for activities likely to have transboundary effects or affect areas beyond the limits of national jurisdiction.

Remedies available to the individual for domestic and transnational claims

Article 30

Environmental regimes should provide for equal access to domestic courts and remedies by national and foreign entities on a non-discriminatory basis.

Article 31

Environmental regimes may consider to the extent possible the waiver of State immunity from legal process in appropriate claims. Arbitral awards and other decisions rendered by international tribunals under such regimes should have the same power as national decisions at the domestic level.

Article 32

Environmental regimes should provide criteria for establishing personal jurisdiction in cases involving multinational aspects. The question

of concurrent jurisdiction and forum-shopping should be taken into account in order to prevent abuse.

Article 33

Environmental regimes should provide for the rules necessary to identify the applicable law, secure the enforcement of judgments and make available financial assistance to transnational claimants where appropriate. Judicial assistance and cooperation should be encouraged to this effect.

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III. Travaux de M. Paolillo

Sub-Commission on : Procedure for the Adoption and Implementation of Rules in the Field of the Environment

Note introductive

Entre son premier Rapport et son Rapport définitif, publiés tous deux ci-après, le Rapporteur a présenté d'autres documents de travail, auxquels les réponses de membres de la Commission font parfois allusion, qui n'ont pu être reproduits ici. Les deux rapports sus-mentionnés et le Questionnaire de février 1996, donnent un reflet complet des perspectives dessinées par M. Paolillo.

First Draft

July 1995

Following the 1972 Stockholm Conference an extraordinary development of the international law of the environment has been taking place. Environmental problems were, of course, the object of concern before 1972 : several treaties and other instruments relating to the protection of the environment were concluded, and the subject was not absent from the agenda of international organizations. But in the pre-Stockholm era the approach to environmental problems was piecemeal and lacked coherence : agreements had, in general, a very limited geographical or material scope and did not deal with the environment as a whole[1] ; and international bodies acted separately and without any co-ordination.

During the last two decades, both at national and international levels, legislative activity dealing with environmental matters increased in a scale unpredictable at the aftermath of the Stockholm Conference. At present there is a growing *corpus juris* at the international level composed of a considerable number and variety of principles, rules, regulations and standards embodied in a vast array of instruments of different nature and with different degrees of legal value.

Sources of this *corpus juris* are the same as those from which rules of general international law are drawn : custom, treaties and, to a lesser degree, binding decisions of international bodies. This approach to environmental rule-setting, based on the voluntarist model characteristic of classic international law may not seem to be entirely appropriate to cope with the present environmental crisis. Effective protection of the environment commands quick legislative action of a preventive nature, ample participation of States and other agents, legal instruments flexible enough to keep pace with scientific and technological changes and effective means to ensure abidance.

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1 Pierre-Marie Dupuy : "Le droit international de l'environnement et la souveraineté des Etats" in *L'avenir du droit international de l'environnement*, Colloque, La Haye, 1984, p. 31.

A. Customary law

Customary law clearly does not meet these requirements. It is true that some of the most important general principles in the domain of the environment are customary in character, such as the principle according to which States are obliged not to use or not to allow the use of their territories so as to cause damages to other State (*Sic utere tuo ut alienum non laedas*) applied in the Trail Smelter arbitration[2] and to some extent embodied in principle 21 of the Stockholm Declaration.

But most customary rules in the field of the environment are negative in character ; they establish the obligation of refraining from doing something. Those with a positive contents, such as the duty to co-operate, the duty to have due regard for the rights of other States in case of utilization of shared resources and the obligation to inform and to enter in consultations with States that may suffer damage, are too general and do not provide precise standards against which compliance by States could be measured.

Customary law lacks flexibility and the capability to react quickly to the changes that incessantly occur in the social, economic and scientific contexts where environmental problems arise. Those changes require the continuous and rapid adaptation of the rule, something difficult to obtain from customary law.

Moreover, due to the novelty of the environmental problems, there has not been much time for States to develop consistent practice providing for the material element of customary law. Therefore, few customary rules have emerged in recent times in the field of environmental protection. For all these reasons customary law has become a source of secondary importance in the formation of environmental rules ; its role in the development of the law of the environment will continue to be confined to consolidating general principles.

B. Decisions of international organizations

The adoption of decisions by international organizations has become a new technique for the progressive development of international law. But only exceptionally decisions of international organizations or conferences are binding upon member countries. In these cases the organization is generally of a limited membership where consensus or unanimity is required and decisions only bind States that have voted for them. In order to ensure consensus or unanimity the contents of decisions is frequently

2 *RSA*, vol. III, 1965.

reduced to the highest common denominator[3] that very often is not high at all and may result in the weakest standard of environmental protection.[4]

Decisions adopted by international organizations that become binding after they have been approved by member States in accordance with their constitutional procedures are comparable to treaties adopted by a simplified procedure, "the difference being [a] formal one, that the binding text is approved orally at a meeting (by resolution), rather than embodied in an instrument signed by all parties (treaty)".[5] One example is provided by the Organization for Economic Cooperation and Development (OECD). Art. 6 of the Convention of 14 December 1960 states that "... decisions shall be taken and recommendations shall be made by mutual agreement of all the Members" and that they are not binding on any Member "until it has complied with the requirements of its own constitutional procedures". The OECD has adopted several binding decisions on environmental matters following this procedure.[6]

In some cases States have resorted to decision-making techniques that may enhance considerably the role of international institutions in the progressive development of environmental international law.

(a) One technique is the use of procedures allowing organs of international organizations to adopt binding decisions by a majority vote or without requiring explicit acceptance of by member States.

In the European Union the Council of Ministers has been empowered by art. 100A of the Single European Act to adopt directives by qualified majority vote on questions related to the harmonization of national laws on the protection of the environment. According to art. 130S of the same instrument the Council shall indicate the matters on which decisions may be taken by qualified majority.[7]

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3 Paul C. Szazs rightly points out that the right expression to refer to decisions reached by consensus after extensive negotiations and compromise, is "the highest common denominator" and not the frequently used "lowest common denominator" ("International norm-making", in Edith Brown Weiss, ed., *Environmental Change and International Law*, p. 57).

4 Patricia Birnie and Alan Boyle : "International Environmental Law", Oxford, 1991, p. 139.

5 *Cf.* "Proposals by a Commission of Norwegian experts" provided to the members of 8th Commission by Mr Finn Seyersted, p. 43.

6 Decision of 22 July 1977 on consultation and monitoring of immersion of radioactive wastes in the sea, and decision of 1st February 1984 on control of transboundary movements of dangerous wastes.

7 According to Birnie and Boyle, "this power has not yet been exercised and is not the radical departure it seems", *op. cit.*, p. 68.

In some specific cases the Governing Board of the International Atomic Energy Agency (IAEA) can adopt binding decisions by majority or special majority.[8] Standards for protecting health and minimizing danger to life and property adopted by the IAEA under its statute, are binding when the standards are applied to operations employing materials, services, equipment facilities and information made available by the Agency.

Another way to facilitate the adoption of binding decisions is the non-objection or tacit consent procedure according to which decisions adopted by a qualified majority become binding to any member that does not object to them within a prescribed period. This technique has become characteristic of fishery bodies. Most of them perform only limited advisory or recommendatory functions and their recommendations require subsequent national endorsement before they take any effect. But some fishery commissions, mainly those operating in the Atlantic Ocean, such as the North-East Atlantic Fisheries Commission, the International Commission for the Southeast Atlantic Fisheries and the International Baltic Sea Fishery Commission have the power to adopt by majority recommendations embodying management measures that become binding to all those members that do not oppose them.

(b) The other technique consists of the adoption of rules of "soft law".[9] These are norms that, although not formally binding, are generally observed by States or, at the very least, they generate a strong expectation that States will conform their conduct to their provisions. They are contained in declarations, recommendations, standards, codes of conduct, guidelines and other non-binding formulations, or included in binding instruments — a "framework" or "umbrella" treaty — but expressed in a language that can not be interpreted as imposing obligations.[10] The fact that they are contained in a non-binding instrument, or, if in a binding instrument, they are too general and vague, facilitates acceptance by States of prescriptions that would not be otherwise accepted.

Rules of soft law are not a new occurrence in international law[11] ; what is new is the frequency with which States nowadays resort to them

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8 Agreement on an International Energy Program of 18 November 1974, arts. 6 and 19, cited in "Proposals-...", p. 50.

9 Although the expression "soft law" is not of the liking of some of the members of the working group, I decided to retain it in this report because it is a short and easy way (and widely used in legal writings) to name the kind of rules I am referring to in these paragraphs.

10 Szazs, *op. cit.*, p. 70 ; "A Hard Look at Soft Law", remarks by P.-M. Dupuy, *American Proceedings of International Law*, 1988, p. 386.

11 Remarks by W. Michael Reisman, *American Proceedings*, p. 374.

to regulate some areas of modern international cooperation such as economic development or the protection of the environment. Soft law rules result from the need to overcome deadlocks in the negotiation of matters on which States want to introduce some order and predictability without tying themselves too much. Unwilling to be too rigidly bound, they voluntarily restrain their actions as prescribed in a less compelling way by rules of soft law and eventually promote their hardening.

The importance of this auxiliary means for the development of environmental law was recognized by the *ad hoc* Meeting of Senior Government Official Experts in Environmental Law held in Montevideo (October 1981) that approved the Programme for the Development and Periodic Review of Environmental Law. The meeting came to the conclusion that such law should be developed not only through the conclusion of international treaties, but also through the adoption of guidelines and other non-binding instruments that are the basis for the formation of binding rules.

Doubtless norms of soft law do have a formative influence on the development of "hard" law ; it has been recognized that non-binding acts of international organizations may give shape and substance to emerging environmental law and orient its development. They may even have stronger legal effects when soft law rules provide for efficient follow-up mechanisms, as is the case with some human rights instruments.[12]

Such an influence operates in at least two ways : first, non-binding decisions adopted by international organizations, particularly by those with a global membership contribute to the formation of customary rules, either because they are considered to be the expression of the *opinio juris* of a rule in the course of crystallizing (the act or instrument containing the rule follows the practice) or, since they reflect what States perceive as legally binding, because they reveal the need to create the rule and induce States to behave in the manner prescribed by them (the act containing the rule precedes the practice). Some of the principles contained in the Stockholm Declaration, endorsed by non-binding instruments such as General Assembly resolution 2997 (XXVII), the 1982 World Charter for Nature and the 1993 Rio Declaration, are currently considered to be a part of customary law. UNEP's Principles of Conduct Concerning Natural Resources Shared by Two or More States and the Montreal Guidelines for the Prevention of Pollution from Land-based Sources are other examples of non-binding instruments that have influenced State practice and the development of environmental law.

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12 Remarks By Bruno Simma, *American Proceedings*, 1988, p. 377.

In the second way, rules of soft law may be the starting point of a process that often culminates in the adoption of agreements or other binding instruments. A classical example is the Declaration on Human Rights, many principles of which have been incorporated in conventions widely accepted by the international community. In the field of the protection of the environment, several environmental agreements have incorporated previously elaborated rules of soft law. A recent example is the "Protocol on Environmental Protection to the Antarctic Treaty" that "transforms a broad body of 'soft law', developed since the 1960s, into a modern treaty arrangement".[13] Soft law instruments operate, then, "as catalysts in the evolution of international environmental law proper".[14]

It cannot be denied that the reiteration and confirmation, through time, of general principles and rules in soft law instruments exert a firm pressure that very often induces States to abide by them. The best proof that rules of soft law have, in the long run, actual legal effects, is the fact, observed by some authors, that States are extremely careful in negotiating such rules and in some occasions they have even felt necessary to make reservations to non-binding instruments containing them.[15]

Soft law rules have proliferated in all sectors of environmental law and it is safe to predict that their importance will increase in coming years. The frequency with which States and international organizations have resorted to the formulation of environmental rules in soft law instruments seems to indicate that they are an appropriate tool to deal with the environmental crisis. The mixed nature of soft law rules, halfway between command and advice, makes them more palatable to States. The subtle pressure that results from hortatory injunctions providing normative standards of behaviour seems to adjust better to environmental problems than the rigid constraints of interdictory rules.[16]

To use the very apt description of P-M. Dupuy, soft law is characterized by :

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13 Francisco Orrego Vicuña : "The Protocol on Environmental Protection to the Antarctic Treaty : Questions of Effectiveness", *Georgetown International Environmental Law Review*, vol. VII, Fall 1994, p. 1.

14 Handl : "Environmental Security and Global Change :. The Challenge to International Law", *Yearbook of International Environmental Law*, vol. 1, 1990, p. 8.

15 Remarks by Pierre-Marie Dupuy, *American Proceedings*, p. 386.

16 A. Ch. Kiss : "L'état du droit international de l'environnement en 1981", *JDI*, 1981, p. 536.

> " ... la fertilité évidente mais aux contours souvent imprécis, dont le mode d'expression est plus volontiers le conditionnel que le présent de l'indicatif, désignant des finalités plus que des engagements immédiats, des programmes mieux que des certitudes".[17]

No wonder rules of soft law have been considered "le laboratoire du droit de demain".[18]

C. Treaties

Treaties are the most important source of international environmental law. According to UNEP's register the number of multilateral treaties dealing with environmental issues exceeds 150, of which 102 have been concluded during the last 20 years.[19]

UNEP can be considered as "the predominant sponsor" of international environmental treaties although this was not a task specifically assigned to it by its charter.[20] The production of UNEP is outstanding; its law-setting activities in this domain intensified after the approval by the UNEP's Governing Council of the 1981 Montevideo Programme for the "Development and Periodic Review of Environmental Law", its main tool for the development of environmental law in the last decade. The Programme recommended, *inter alia*, that conventions be negotiated and concluded for the protection of the environment in several specific areas.

Many of the most important multilateral legal instruments adopted in recent times have been elaborated under the Programme, such as the Vienna Convention for the Protection of the Ozone Layer (the Vienna Convention), the Montreal Protocol on substances that Deplete the Ozone Layer (the Montreal Protocol), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention), the Convention on Biological Diversity and the Convention on Climate Change.

Around 50 per cent of multilateral environmental treaties are regional or subregional in scope.[21] The regional approach, either by itself or as a

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17 P.-M. Dupuy, *op. cit.*, p. 34.

18 P.-M. Dupuy, *op. cit.*, p. 35.

19 Edith Brown Weiss reports the existence of "over 900 legal instruments ... fully concerned with environmental protection or [containing] environmental provisions" ("New Directions in International Environmental Law", paper presented at the United Nations Congress on Public International Law, New York, March 1995).

20 General Assembly Resolution 2997/XXVII (1972).

21 UNCED : "The Effectiveness of International Environmental Agreements", Peter H. Sand, Ed., 1992, p. 9.

supplement to global action, has been praised as offering the best prospects to confront most environmental problems. In some cases the very nature of the problems and the scope of their effects, limited to a precise geographical area, impose a regional treatment. Political consensus and the functioning of regulatory and supervisory mechanisms are facilitated if they take place within a regional context. It has been said that one of the keys to the success of the legal regime governing dumping at the sea lies in the fact that the global framework provided for in the 1972 London Dumping Convention (LDC) has been complemented by regional agreements. The conclusion of regional agreements is also encouraged in the 1982 Convention on the Law of the Sea (UNCLOS) and in the Basel Convention, provided that such agreements do not set standards less stringent than those established in the global treaties.

But it has also been said that in some cases general environmental interests would be better protected if regional systems allowed some extra-regional intrusion such as the participation or membership of outsider States. The relative lack of effectiveness of some fisheries commissions, the members of which are exclusively States that participate in the exploitation of the resources in the respective area, has been attributed to their restricted composition ; instead of rationally managing the resources the commissions have furthered the economic interests of their members without regard to the general interest in conservation.[22] This is why the inclusion in the membership of regional bodies of "a constituency of outside States able to speak for the environmental interests of a wider community"[23] has been advocated. Perhaps common and regional interests are best served by the "interplay of global and regional rules and institutions".[24]

As instruments to deal with environmental problems, treaties are not free from shortcomings : their elaboration, ratification and amendment require long and complex processes and therefore their degree of adaptability to changes is low. Many environmental treaties have failed to come into force for lack of the necessary ratifications, or they do only after the political and economic contexts within which they were adopted had changed ; technical and scientific factors valid at the time negotiations commenced may be obsolete at their conclusion or when the agreement

22 A. W. Koers : "International Regulation of Marine Fisheries : A Study of Regional Fisheries Organizations", London, 1973, p. 126.

23 Alan Boyle : "Saving the World ? Implementation and Enforcement of International Environmental Law Through International Institutions" *Journal of Environmental Law*, vol. 3, N° 2, p. 243.

24 Birnie and Boyle, *op. cit.*, p. 331.

enters into force (although there are some examples of rapid action such as the adoption and ratification of the Vienna Convention and the Montreal Protocol, that entered into force shortly after their signature).

In addition, environmental treaties, particularly those concluded in the early years following the Stockholm Conference, are very often too general and vague ; they do not lay down clear and specific obligations, thus making difficult to evaluate their implementation. Provisions prescribing rights and duties are usually formulated in very broad, sometimes ambiguous terms. In some cases such an ambiguity has been deliberate so as not to impose direct and clear obligations upon States. Environmental treaties are studded with "should's" and "would's" and expressions such as "to the extent possible", "will make an effort" and "when appropriate". Some authors consider these treaties as a form of soft law.[25]

Indeed in the field of environmental protection States usually are reluctant to be bound by specific treaty obligations ; yet they are willing to accept less constraining rules that would allow them to exercise some discretion in interpreting and applying them. Rather than accepting treaty prescriptions as obligations to comply with, States prefer to accept them as targets that they are "free to implement (or not) at whatever pace they see fit".[26] Consequently the most important multilateral treaties regulating environmental questions provide only a general legal framework within which States Parties are expected to adopt further action such as enacting national legislation, concluding additional treaties or adopting protocols with more precise rules.

As regards implementation and enforcement, it has been generally acknowledged that the record of treaty compliance is disappointing. The entering into force of environmental treaties by itself does not warrant their effectiveness ; studies have shown that, with respect to many of them not even the most basic procedural duties, such as reporting, are observed by State parties.[27]

Moreover, it has been observed (and this concern was also reflected in the recommendations for action formulated in Agenda 21) that many treaties in the field of environment have been negotiated and concluded

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25 Remarks by Prof. Gunther Handl, *American Proceedings*, p. 372.

26 Hurrell and Kingsbury : "The International Politics of the Environment : An Introduction", in *The International Politics of the Environment*, Hurrell and Kingsbury, ed., p. 22.

27 Philippe Sands : "Enforcing Environmental Security", in *Greening International Law*, Philippe Sands, ed., p. 53 ; UNCED : "The Effectiveness ...", p. 12.

without adequate participation of developing countries and therefore their interests may not have been sufficiently taken into account.

In spite of their shortcomings, treaties will keep in the near future their place as the centrepiece of international cooperation to manage the environmental crisis. Conventional rules are easier to ascertain, and their contents and scope may be more precise than customary rules. Environmental treaties have — as rules of soft law do — primarily a preventive character : they emphasize prevention and conservation rather than responsibility and compensation ; they embody positive rules of management rather than negative rules of prohibition[28] ; and they frequently provide for international supervision and means of enforcement.

To this it should be added that States are not prepared to accept to be bound by obligations emerging from processes over which they do not have full control and therefore the prospects for a supranational source of authority for the regulation of environmental matters seem to be very remote.

Treaties, then, appear to be the legal tool that offers the best possibilities to respond to the need to develop environmental law, specially after having shown a considerable degree of malleability that makes them susceptible of adaptation to the changing needs and perceptions of the environmental crisis. Indeed, since the Stockholm Conference environmental treaties have undergone a process of change that has affected their form and contents and the procedures for their adoption. Conventional environmental law is becoming more sophisticated and complex, and tends towards specificity, flexibility, institutionalization and differentiation.

(a) From generality to specificity

Environmental treaties tend to be more specific and to contain not only general principles and rules, but also concrete obligations or at least mechanisms and procedures through which concrete obligations can be established.

The generality with which principles and rules have been formulated in some treaties turned out to be an advantage. Environmental questions are in a state of permanent change due to accelerating technological progress and the continuous expansion of scientific knowledge. These changes may not affect the essence of the most general principles and rules as they are embodied in treaties, but they affect specific rules, in particular those of a technical nature that require continuous review and

28 José Juste Ruiz : "Problemas internacionales del medio ambiente, Universidad de Barcelona, 1984, p. 1984.

periodical adjustment to the new circumstances. The inclusion of detailed technical rules in a treaty makes that adjustment difficult and cumbersome.

Thus the prevailing tendency in environmental treaty-making has been to separate the general legal framework for the protection of the environment from detailed provisions on specific issues, embodying the former in treaties negotiated, ratified and revised in accordance with traditional diplomatic procedures, and the latter in other, less formal instruments such as protocols and annexes to the main treaty, the negotiation and amending of which are subjected to more expeditious procedures. This technique of detaching the "diplomatic part" from the "technical part" of international regulations is not new ; in the field of environmental treaties, it was adopted in the earliest marine conservation regulations.[29]

Another method consists of adopting a framework or umbrella treaty that provides for further regulatory action through international bodies or conferences. For instance, the Vienna Convention prescribes that States shall adopt measures for the protection of the ozone layer, without specifying what kind of measures. This compromise led to the conclusion of the Montreal Protocol that sets precise quantitative restrictions on consumption and production of controlled substances and provides for subsequent amendments and adjustments. Other examples of the technique to negotiate, through institutional procedures, supplementary instruments after the main treaty has been adopted include the Protocols to the 1979 Convention on Long Range Transboundary Air Pollution and the Protocols to UNEP's Regional Seas Conventions.

In some cases even the definition or the elaboration of concepts that are essential to determine the scope and the nature of the obligations deriving from the treaty has been left to further instances. The Basel Convention provides that rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes will be adopted in a protocol "as soon as practicable" (art. 12) The adoption of technical guidelines for the "environmentally sound management of hazardous wastes or other wastes" was also left for a further stage.[30] The Convention on Climate Change also leaves to further negotiations several crucial matters (limits and dates of measures to be adopted were not specified).

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29 For a complete list of precedents see : Paolo Contini and Peter H. Sand : "Methods to Expedite Environment Protection : International Ecostandards", *AJIL*, vol. 66, N° 1, 1972, p. 41.

30 See Handl : "Environmental Security ...", p. 6.

(b) From formality to flexibility

Continuous changes in the environmental reality and scientific knowledge call for rules easily adjustable to those changes. While environmental treaties and their amendments will come into force only after the long process of ratification has been completed in a number of States, protocols and annexes to them containing technical and scientific regulations are subject to periodic review and amended or supplemented by simplified procedures.

The non-objection or tacit consent procedure used by some international institutions to adopt binding decisions is also applied to amend protocols and annexes to treaties.[31] States are thus dispensed from actively expressing their consent and the frequently long and complicated process to amend treaties is thus avoided. This procedure also avoids the dangers of the "lowest common denominator" level resulting from consensus adoption.[32]

A variation of the non-objection procedure is provided by the 1973 MARPOL Convention. Amendments to an Appendix to an Annex to the Convention adopted by the appropriate body of IMO shall be deemed to have been accepted at the end of a given period, unless an objection is communicated to the Organization by not less than one third of the parties (art. 16).

The possibility for State parties to object to a protocol or decision setting forth specific regulations in separate instruments and to opt out from the regime, has been seen as a factor that undermines the effectiveness

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31 Examples of this procedure are found, *inter alia*, in the London Convention on Prevention of Marine Pollution by Dumping of Wastes with respect to the amendments of annexes to the Convention ; The Convention for the Prevention of Pollution from Ships (MARPOL) with respect to its protocols ; the Basel Convention with respect to the adoption and entry into force of additional annexes to the Convention or to any of its protocols, and to the adoption and entry into force of the amendments to such annexes or protocols (art. 18) ; The Paris Convention on the Protection of the Marine Environment from Land-Based Sources, with respect to the amendments of its annexes ; the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, with respect to the amendments to some of its appendices (art. XV) ; the Vienna Convention with respect to the adoption of annexes to the Convention or to any of its protocols, and to amendments to the annexes (art. 10, para. 2) ; and several conventions regulating fisheries.

32 Lee Kimball : "International Law and Institutions : The Oceans and Beyond", in *Ocean Development and International Law*, 1989.

of treaties. While this has been confirmed in some cases,[33] it is also true that such possibility facilitates — and sometimes is the condition for — the acceptance by States of the general rules contained in the treaty.

A further step towards the flexibility of environmental instruments was taken by the Montreal Protocol. According to it, amendments to the levels of reduction for the production or consumption of controlled substances adopted by a combined majority of developed and developing States, are binding to all Parties, including those who voted against their adoption (art. 2,9).[34]

The incorporation of specific rules in instruments that can be expeditiously amended and put into force, together with their reviewing on a permanent basis, ensure the adaptability of conventional environmental law to changing circumstances. As Handl as put it :

> "International legislation under this guise is no longer a single well-defined product carried by expectations of stability for a foreseeable future. It is rather a fragile, temporary legal sign-post in an institutionalized process in which legal positions are subject to constant review and susceptible to frequent and speedy alteration".[35]

(c) From decentralization to institutionalization

As results from the foregoing, environmental treaties of the last generation create their own independent institutional mechanisms with different degrees of authority and entrust them with a variety of functions that go from providing scientific advise to regulation and supervision.

International environmental institutions have proven to be useful fora (i) for the promotion of environmental law development in a broad sense, including soft law ; (ii) for the supervision of its implementation and enforcement and (iii) for the settling of environmental conflicts through negotiation and compromise.

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33 The 1973 Convention on Trade in Endangered Species (CITES) and the International Convention for the Regulation of Whaling are mentioned by Birnie and Boyle (*op. cit.*, p. 14) as cases where the "objection procedures" have weakened the effectiveness of the treaties.

34 The AIEA offers an example of amendments to the basic agreement (the Statute) that come into force for all members when they have been approved by the General Conference by a two-thirds majority of present and voting and accepted by two-thirds of all the members in accordance with their respective constitutional processes (Article XVIII, C).

35 Handl, "Environmental Security ...", p. 7.

(i) Institutions have proven to be an essential element to promote the development of international environmental law. Treaties provide sometimes for the establishment of bodies vested with regulatory powers. Even in cases where their powers are limited, those bodies provide an apposite forum for the parties to meet and continue to co-operate and develop more detailed rules. Even when decisions take the form of recommendations or other non-binding acts, their contribution to the development of environmental law cannot be underestimated. The fact that these bodies perform their activities on a permanent basis allows them to respond more adequately to the renewed challenges and the evolving nature of environmental problems. Continuity, specialization and access to technological and scientific information put them in a better position than *ad hoc* diplomatic conferences and meetings to react quickly to changes in the environmental context and to keep under review and up-date regulations and standards.

(ii) In the pre-Stockholm era implementation of environmental treaties was left exclusively to each State concerned. The system was based on the assumption that the automatic respect of the rule of law results from the application of the principles of State responsibility and reciprocity. Regional fishery agreements are typical examples of this approach : Member States are responsible for implementing management measures recommended by the respective commission through their national authorities, and in case of infringement have to take appropriate measures within their jurisdiction that may include sanctions such as ban on trade and confiscation. They are usually required to furnish information on measures adopted to discharge these responsibilities.[36]

In some cases States agreed on supplementing national enforcement systems with some form of international cooperation among themselves consisting of joint inspection and monitoring schemes such as those adopted in several regional fishery bodies[37] and in the 1982 Memorandum of

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36 Jean Carroz : "The Management of Living Resources in the Baltic Sea and the Belts", *Ocean Development and International Law Journal*, vol. 4 N° 3, 1977, p. 227.

37 In the area of conservation of fisheries some agreements establishing bodies with limited membership have set out a joint control system according to which duly authorized officials of any member country may on the high seas search and seize vessels of other member country acting in violation of the treaty or of the regulatory measures adopted under it. Only authorities of the flag State may conduct prosecutions and impose penalties. Fishery organizations with larger membership such as those operating in the Atlantic Ocean allow officials of any member to search and inspect vessels of other members, but they cannot seize the vessels ; they limit themselves to reporting infringements (J. E. Carroz : "The Management of Living Resources in the Baltic Sea and the Belts", *Ocean Development and International Law Jouranl*, vol. 4, N° 3, 1977, p. 227.

Understanding on Port State Control of vessel-source pollution concluded by coastal States of the EEC plus other European coastal States.[38]

However, it has been recognized that national enforcement systems by themselves cannot ensure the effective application of international environmental law. Environmental law requires other, more centralized methods to ensure compliance. Institutional implementation and enforcement mechanisms seem to be indispensable in a legal system where the common interest should prevail over the interests of individual States.

Although the traditional approach that leaves implementation responsibilities to States themselves subsists, the establishment of institutions entrusted with the task of supervising the implementation of environmental treaties has become the general rule. The regular meetings of the parties, a commission or any other permanent organ established by the treaty or a permanent secretariat are in charge of promoting, supervising and evaluating the implementation of the treaty. Reporting by States on measures taken or activities performed ; exchange of information ; monitoring, inspection and periodic review and evaluation of State performance are the supervisory techniques more frequently used.

In some cases subsidiary organs have been established, such as the Implementation Committee set up under the Montreal Protocol, to assist countries in adopting measures to implement their obligations. Other treaties, such as the Convention on Climate Change and the Convention on Biological Diversity provide for the future creation of subsidiary bodies for implementation. The Convention on Climate Change not only foresees the establishment of an organ to assist the Conference of the Parties in assessing and reviewing the effective implementation of the Convention, but also directs the Conference to consider, at its first session, the "establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention" (art. 13). The Northeast Atlantic Marine Convention provides for the establishment of a commission "to decide upon and call for steps to bring about full compliance with the Convention" (art. 22).

International institutions with implementation functions exercise a form of collective supervision that allows them to hold each member State accountable to other member States. Insofar the reports and the review of State performance are public, such accountability may be extended to non-governmental organizations (NGOs) and the world opinion. NGOs, in effect, enjoy observer status in many environmental bodies and play an

38 Jurrell and Kingsbury, *op. cit.*, p. 13.

increasingly influential role in the monitoring of the implementation of treaty obligations by putting pressure on States, international organizations and other agents, disseminating information and mobilizing public opinion.

The existence of institutional implementation procedures by itself does not guarantee compliance ; experience shows that very often State Parties negligently comply or do not comply even with the most basic duties such as reporting to the competent organization. Nevertheless, on the basis of recent surveys[39], it may be safely concluded that the degree of compliance with environmental obligations is higher when supervisory and enforcement functions have been entrusted by treaties to international institutions than in cases where implementation is left solely in the hands of States.[40]

(iii) Few environmental treaties oblige State parties to resort to binding third-party procedures for the settlement of their disputes.[41] A number of them contain standard dispute settlement provisions encouraging the parties to resort first to direct negotiations, and if these fail, to the usual settlement procedures.

The compulsory jurisdiction of the International Court of Justice (ICJ) has been sometimes established in separate protocols that the parties to the main convention may or may not accept, or, as in the case of the Vienna Convention, the Convention on Climate Change and the Convention on Biological Diversity, may be accepted by each party in a separate declaration ; in only one case, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, has the obligation of the parties to resort to the ICJ been established in the main agreement.[42]

In the absence of compulsory procedures for the settlement of disputes, environmental bodies performing implementation functions may play an additional role : they provide a forum to discuss and negotiate controversial matters and to promote the conciliation of opposed interests of State Parties.[43] IMO and the London Dumping Convention Consultative Meeting are examples.

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39 See Peter H. Sand, ed., "The Effectiveness ..." cited in note 21.

40 This conclusion is confirmed when one compares implementation systems such as those provided by the LDC or Marpol, that include institutional procedures, to the experience of the regional schemes for the control of land-based sources of pollution or UNEP's sponsored regional seas programme (Birnie and Boyle, *op. cit.*, p. 311 and 331).

41 Hurrell and Kingsbury, *loc. cit.*, p. 22.

42 Lawrence, *op. cit.*, p. 48.

43 Birnie and Boyle, *op. cit.*, p. 298.

Some treaties provide for procedures according to which any party may inform the secretariat when it believes that another party is violating its obligations under the treaty ; the information is then circulated to all the parties. In the European Union individual and non-governmental groups may initiate a complaint procedure before the Commission in the case of non-implementation of directives. When CITES Secretariat has reason to believe that the provisions of the Convention are not being effectively implemented, it shall inform the Party concerned. The party must inform the Secretariat of any relevant fact and propose remedial action or carry out an inquiry ; the Conference of the Parties may make recommendations (art. XIII).

The most elaborated example of an environmental organization serving as a forum for the resolution of conflicts is provided by the agreements establishing the system for the protection of the ozone layer. Special procedures approved at the first Meeting of the Parties to the Montreal Protocol include the establishment of the Implementation Committee composed of ten parties elected in a Meeting of Member States. A State party that believes that another Party is not complying with its obligations under the Protocol, may submit a communication to the Implementation Committee, which will examine the communication as well as the reply of the State party concerned, will seek to settle the dispute and may present recommendations to the Meeting of the Parties. The Meeting of the Parties may adopt a decision and request that measures be adopted to ensure compliance with the Protocol.

Institutional procedures aimed at ensuring compliance of environmental rules contribute to the prevention and resolution of disputes through negotiation and compromise, avoiding confrontation and the recourse to judicial procedures for settlement of conflicts. In this way, international environmental institutions have become fora where an equitable balance of interests may be achieved under the scrutiny of all State members and sometimes of other interested entities such as non-governmental organizations.

(d) From uniformity to differentiation

Effectiveness of environmental treaties has been hampered by non-compliance or non-participation. Few environmental treaties provide for sanctions in case of non-compliance. When they do sanctions are in most cases, according to some authors, no more than "polite if vigourous disapprobation".[44] Political sanctions such as suspension or termination of

44 Hurrell land Kingsbury, *loc. cit.*, p. 22.

membership runs counter the objective of the treaty to have the widest support.

Some treaties provide for sanctions of economic nature, such as in the cases of the South Pacific Forum Fisheries Agency (blacklisting of vessels to which the right to conduct fishing activities in the area is denied) ; the 1989 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (prohibition of landing and processing of driftnet catches ; restriction of access to ports and port servicing facilities for driftnet fishing vessels) and the EEC Memorandum of Understanding on Port State Control that allows the denial of entry into EEC ports to ships that do not comply with the applicable standards. Under the non-compliance procedure of the Montreal Protocol, the Meeting of the Parties may adopt measures that include the suspension of specific rights and privileges, such as access to financial resources and transfer of technology.[45]

The application or the threat to apply sanctions in case of non-compliance does not necessarily ensure a better performance. Experience shows that some of the most successful environmental treaties provide for affirmative, non-punitive ways to induce support and compliance.

In many cases what undermines the effectiveness of treaties is not the low level of compliance but the small number of States that have ratified them[46], or the fact that States that have ratified them are not those most closely concerned with the activities regulated by the treaties. A case in point is CITES, the effectiveness of which has been thwarted by the fact that the territory of States that are not parties to the Convention are used to channel illegal traffic in endangered species.[47] Although formally in force, treaties may in fact be ineffective if they have not captured the support of a large number of countries or the support of the countries most concerned with the issue in question. Moreover, treaties on environmental questions that are global in character (climate change, the ozone layer, biological diversity) require the support and participation of all or most of the States to be effective.

The question of the limited participation of, or limited compliance by States has been confronted in some environmental treaties by the

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45 Philippe Sands : "Enforcing Environmental Security", in *Greening International Law*, Philippe Sands, ed., p. 61.

46 The Bonn Convention is an example (37 Parties).

47 C. A. Petsonk : "The role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law", *American University Journal of International Law and Policy*, vol. 5, 1990, p. 387.

establishment of restrictions that operate as incentives for non-party States to adhere. Indirect incentives such as restrictions on trade in species, substances or goods that are the object of regulation are the most common way to apply pressure on non-party States. This technique is used in several agreements such as the Montreal Protocol (prohibition of trading in controlled substances with non-parties, arts. 4 and 10 as amended in 1990), and the Basel Convention (prohibition of trading hazardous wastes and other wastes with non-parties, art. 4, para. 5). Some fisheries agreements prohibit the transfer of vessels to non-members or trading with them in fish or products regulated by the agreement.[48] According to CITES, trade with non-parties in endangered species listed on appendixes to the Convention is not permitted unless documentation similar to that required by the Convention is issued by the State concerned.[49]

Recently the tendency has been to use positive measures that directly induce States to participate in or comply with treaties, such as economic incentives and differential treatment.

(i) Economic incentives.[50] Costs of complying with measures for the preservation of the environment or the conservation of certain resources may be too expensive to be shouldered by some States. Very often developing countries, generally lacking the appropriate human, financial and technological resources and the required efficient domestic institutions, are not in a position to absorb by themselves the financial consequences deriving from the application of conservation measures prescribed in treaties and therefore are reluctant to abide by their rules and even to become parties to them. It has been recognized by the Rio Declaration (Principle 11) that environmental standards applied by some States "may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries".

Moreover, for countries confronted with acute economic and social problems, the avoidance of the consequences of environmental deterioration, sometimes distant and uncertain, may not represent a priority issue.

A way to encourage States, in particular developing States, to accept environmental obligations is to provide for incentives through which they

48 Birnie and Boyle, *op. cit.*, p. 501.

49 Birnie and Boyle, *op. cit.*, p. 458.

50 "Economic incentives" is used in this paper to mean "legal mechanisms which seek to channel economically motivated behaviour ... into environmentally sound activity" (Carol Annette Petsonk : "The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law", *American University Journal of International Law and Policy*, 5, 1990, p. 353, note 8.

may obtain a lateral benefit or compensation for expenditures incurred in complying with them. There is an intrinsic justice in it : since in most cases the beneficiary of preservation and conservation measures is the international community as a whole, the costs of implementing such measures should be equitably shared by all States. If the environment is a unity and "belongs to all of us", the responsibility of preserving it should be allocated to all members of the international community.[51]

Thus the general obligation to preserve the environment and its resources becomes a two tiers obligation :

> "Custodial obligations, which refer to the preservation duties of States in which the resource is physically located ; and support obligations, which refer to the duties of other States to contribute to the conduct of custodial obligations".[52]

It is now a widely shared opinion that the provision of economic incentives is one factor that can effectively promote wider participation in environmental treaties and better compliance with their rules. As Stephen Tromans said :

> "The West must therefore accept that if it cannot deny the developing countries the right to economic development, the issues of technological transfer and financial aid are in fact the essential pre-requisites to global solutions".[53]

States have recently given special consideration to economic measures as a way to encourage participation and compliance. The establishment of special funds is one of the ways to provide financial assistance to States that need it. Within the framework of the 1971 Convention on Wetlands of International Importance (the Ramsar Convention) a Wetlands Conservation Fund was established in the 1980s ; the World Heritage Fund established under the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage has been designed to help developing countries to implement the Convention, providing funds, *inter alia*, to ensure participation of experts from the least developed countries in the work of the World Heritage Committee. A Multilateral Fund has also been established in the ozone layer protection

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51 " ... there is a perception that all have an interest in preventing the loss of a species, the destruction of cultural heritage, and the waste of natural resources", Caron : "The Law of the Environment : A Symbolic Step of Modest Value", *Yale Journal of International Law*, 14, 1989, p. 528.

52 Glennon : "Has International Law Failed the Elephant ?", *AJIL*, 84, 1990, p. 35.

53 Stephen Tromans, "International Law and UNCED : Effects on International Business", *Journal of Environmental Law*, vol. 4, 2, 1992, p. 191.

system to meet costs incurred by developing countries in implementing measures agreed and to facilitate their attendance at meetings.

Developed countries parties to the Convention on Climate Change commit themselves to assist developing countries in meeting costs of adaptation to adverse effects of climate change ; the Convention on Biodiversity also provides for the transfer to developing countries of financial resources related to the implementation of their obligations. The Global Environmental Facility was established in 1990 by the World Bank, UNEP and UNDP to finance the protection of the global commons and was identified in Agenda 21 as the interim financial mechanism for the Convention on Climate Change and the Convention on Biodiversity.

The supplying of technical assistance and training, and the transfer of environmental technologies to developing countries are other ways to attract developing countries to join environmental treaties. Art. 5, para. 2 of the Montreal Protocol requires Parties "to facilitate access to environmentally safe alternative substances and technology for Parties that are developing countries and assist them to make more expeditious use of such alternatives". The Convention on Biodiversity precribes measures to facilitate the access to and transfer of relevant technologies to developing countries (art. 16). Transfer of technology is also an important item in the 1982 Convention on the Law of the Sea and the Basel Convention.

(ii) Differential treatment : aother way to promote a wider participation in and compliance with environmental treaties is to assign States different rights and duties on the basis of pre-established criteria. Early environmental conventions usually made no distinction among State parties regarding implementation ; the only way to introduce differential treatment was to allow reservations. A tendency has emerged from more recent treaties and acts of international organizations assigning State Parties different responsibilities on grounds of different circumstances and capabilities.

The criteria on which differential treatment is based are, in the first place the extent to which States have contributed to the global environmental degradation ; in the second place their different technological and financial capacity to adopt and apply remedial measures.

The Rio Declaration endorses the principle of differential treatment in the following terms :

> "... In view of the different contributions to the global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command" (Principle 7).

The principle itself is formulated as follows :

> "... Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries" (Principle 11).

Differential treatment consists basically in allowing derogations from general standards as, for instance, awarding some countries a period of grace to comply with certain obligations, imposing different or more exacting environmental standards upon countries that have played a heavier role in causing the problem that is regulated, setting less stringent standards for States that do not possess sound "cleaner" technologies or cannot afford the incremental costs needed to comply. Developing countries are allowed to apply differently control measures prescribed by the Montreal Protocol (arts. 2 and 5) ; the Convention on Climate Change sets up additional commitments for developed countries, separately from general commitments (art. 4).

The establishment of different environmental standards is seen by some writers as a factor that may undermine the effectiveness of environmental protection systems. According to them differential treatment may pose political problems, causes trade distortions, delays the attainment of adequate level of local environment protection and entails higher administrative costs. This is why, in their opinion, to ensure broad acceptance of environmental rules economic incentives seem preferable than the imposition of differential obligations.[54]

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The conventional system established for the protection of the ozone layer may be a paradigm of the modern tendencies of environmental treaty-making and may become the model for future treaties on the protection of the environment and the conservation of resources. Indeed, the agreements on which the system is based present all the features described in the foregoing section, aimed at widening the participation of States, keeping the regulations and standards up-dated and ensuring compliance.

(i) By imposing for the first time precise quantitative restrictions on the consumption and production of some controlled substances, with indication of percentages and time-limits (art. 2), the Montreal Protocol

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54 Handl, *loc. cit.*, p. 64.65 ; Do Nascimento e Silva : "Pending Problems on International Law of the Environment" in *International Law of the Environment*, The Hague, 1985, p. 224.

exemplifies the kind of environmental agreements characterized by the specificity of their provisions.

(ii) The system includes institutional procedures to keep under review the implementation of the agreements (the Vienna Convention, art. 6 and the Montreal Protocol, art. 11). In performing this function the Conference of the Parties to the Convention and the Meeting of the Parties to the Protocol are assisted by a secretariat to which the Parties must submit information on measures adopted to apply the Convention (art. 5) as well as yearly statistical data on production, imports, and exports, to parties and non-parties, of controlled substances (Protocol, art. 7).[55]

(iii) The Montreal Protocol has established mechanisms and procedures for the continuous adjustment of the prescribed measures through their periodic revision and assessment, and for the expeditious coming into force of the amendments through a decision-making procedure that is a radical departure from the principle of consent (art. 2, para. 9).

(iv) In the Vienna Convention system a variety of direct incentives have been devised to encourage implementation and induce developing countries to ratify the Montreal Protocol. Financial cooperation includes the establishment of the Multilateral Ozone Fund designed to help developing countries, according to criteria yet to be decided on by the Parties, to meet incremental costs of implementing control measures and to promote their participation at meetings. The Protocol acknowledges that improving the capacity of developing countries to fulfil their obligations depends "upon the effective implementation of the financial co-operation as provided by Article 10 and transfer of technology as provided by Article 10A" (art. 5, para. 5).

(v) The Montreal Protocol provides that State Parties shall "take every practicable step" to ensure "that the best available, environmentally safe substitutes and related technologies are expeditiously transferred ... under fair and most favourable conditions" to developing countries operating under art. 5, para. 1 of the Protocol (art. 10).[56] Moreover, parties to the Protocol undertake to facilitate the provision to developing countries of subsidies, aid, credits, guarantees or insurance programmes for the use of such substances and technology (art. 5).

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55 UNEP has been entrusted with the secretariat's functions on an interim basis.

56 Some have interpreted the compromise on technology transfer to mean that the obligations to comply with the Montreal Protocol would be conditional upon the effective transfer of technology to developing countries.

(vi) To induce participation, the 1990 London Amendments to the Montreal Protocol provide for the restriction and even the prohibition of trade in controlled substances by State parties with non-parties (art. 4).

(vii) The Montreal Protocol has also incorporated the technique of differential treatment. Developing countries are allowed to delay by ten years compliance with control measures established in it.

(viii) The Vienna Convention provides for procedures for the settlement of disputes that include the submission of the dispute to the International Court of Justice (art. 11). In addition the parties have approved procedures and institutional mechanisms for determining non-compliance with the Montreal Protocol and for treatment of parties found to be in non-compliance (art. 8 of the Protocol).

The relative success of the Vienna Convention system has been ascribed to the presence of the features described above. To some writers the entering into force of the Montreal Protocol was "a major leap forward towards a new type of international environmental law".

D. Suggested Issues for Recommendations

It is generally accepted that international law-making and enforcement processes have to be reinforced in order to make them more responsive to the seriousness and urgency of the environmental problems. Recognition of, or reference to inadequacies of the existing legal and institutional arrangements for the development and the implementation of environmental law abound in the Rio Declaration and in Agenda 21. The creation of the Commission on Sustainable Development indicates the will of the international community to change the present picture and strengthen the system to ensure effectiveness.

In relation to the creation of environmental rules, it is essential that treaties as well as decisions of international organizations have the widest support of States ; general support obviously improves the prospects of implementation. Experience shows that compliance with environmental rules depends on their contents and the manner how they were negotiated as much as on the mechanisms that may have been established to ensure their implementation. Health and safety standards approved by the IAEA are, in principle, legally non-binding, but this has not prevented them from having effectively guided the conduct of States involved in operations related to research, development or application of atomic energy for peaceful purposes. This effect has been ascribed to the fact that the formulation of those standards has been done in consultation with

governments and technical bodies and therefore, they generally reflect the "technical consensus".[57]

This is why international conferences and organizations should seek consensus — at least for the adoption of principles and general rules — before resorting to vote. Consensus compels States to make concessions, explore alternatives, elaborate and refine texts and, in general, make all possible efforts in order to find compromise solutions and texts acceptable to all. Treaties adopted by consensus have better possibilities to get a higher number of ratifications in shorter time than those supported by some of the participants in the negotiations. Similarly, decisions of international organizations adopted by consensus have better prospects of being implemented.

But the requirement of consensus may put too heavy a burden on international conferences and organizations. Strictly applied, consensus lends itself to abuse since it may be used by one or few States to block the adoption of decisions supported by a majority. Moreover, consensus entails long and complex negotiations and is sometimes reached at the price of compromising too much and reducing the contents of the rule to the "lowest common denominator". This danger can be adverted if consensus is required as a first procedure only; when good faith efforts to reach consensus have failed, other decision-making procedures should be available.

It seems, though, that what it is most needed is to find ways to widen acceptance of, and compliance with existing international rules rather than promoting the production of more agreements and resolutions to accumulate to the already significant amount of instruments that in most cases have had little, if any, impact on the practice of States.[58] Attention has been drawn to what an author calls "treaty congestion" which has produced, in addition to an extensive and incoordinated *corpus juris*, countless *fora* and secretariats, overlappings and inconsistencies.[59] This, in turn, puts a strain on the many countries lacking sufficient human and financial resources to face the increasing demands of the environmental system, therefore reducing their ability to participate in it.

In view of the inflation of the environmental *corpus juris* and the relatively limited impact it has had up to now on States behaviour, the

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57 Birnie and Boyle, *op. cit.*, p. 353.

58 Lawrence Susskind and Connie Ozawa : "Negotiating More Effective International Environmental Agreements" in ... p. 143.

59 Edith Brown Weiss : "New directions in International Environmental Law", paper submitted to the United Nations Congress on Public International Law, New York, March 1995.

Institute, in making recommendations, should, in my opinion, put an emphasis on implementation. This is not to suggest that law-making activity should be sidestepped; there are aspects of the environmental question insufficiently regulated or not regulated at all that require that norms be elaborated. But priority should be given to the adoption of binding instruments providing precisely defined obligations to make existing principles and general rules enforceable, and to the setting of firmer procedures and mechanisms to ensure compliance.

Therefore recommendations of the Institute could refer, *inter alia*, to the following items :

1. Consensus should be required to adopt treaties and general decisions in order to secure the widest possible acceptance and in this way to ensure a high level of implementation. Only after good faith efforts to reach consensus have been made without success, States should resort to voting.

2. For standards, regulations and other instruments containing detailed rules, international organizations and conferences should resort to decision-making procedures that facilitate and expedite their adoption and coming into force, such as the nonobjection or tacit consent procedure, the requirement of a simple majority to adopt decisions, or a qualified majority to adopt decisions binding upon all parties.

3. States should agree on ways to accelerate the coming into force of treaties, such as the lowering of the number of ratifications required for their entry into force[60] or the provisional application of all or some of the treaty provisions on an interim basis.[61] Decisions of international organizations subject to approval by States could also be provisionally applied.[62]

4. Institutions have proven to be an essential element in the development of international environmental law. Even in cases where those institutions have not been vested with extensive powers, they provide a forum appropriate for the parties to meet and continue to co-operate and

60 The 1958 ECE Regulations Concerning Gaseous Pollutant Emissions for Motor Vehicles required only two ratifications, "which has facilitated rapid implementation" (Effectiveness, p. 124). The current membership is 21 States.

61 Example : Signatories to the 1979 Geneva Convention on Long-Range Transboundary Air Pollution agreed on implementing the Convention on an interim basis until its coming into force in 1983.

62 By a decision of the Contracting Parties, amendments to Ramsar Convention were treated as if they were in force until such time as they entered into force. Matters were "greatly facilitated" since then (Effectiveness, p. 74).

develop environmental law.[63] Environmental protection systems should be provided with an appropriate machinery for the promotion of international environmental law and its implementation.

5. Flexibility and adaptability should be one of the main characteristics of environmental law. Treaties and decisions of international organizations should provide for the periodic review of instruments containing obligations and for their amendment through expedite procedures. Institutional mechanisms vested with regulatory powers should be established to introduce adjustments required into the rules.

6. Systems for the protection of the environment should include firmer standards and supervisory machinery to ensure effective implementation of the rules by States. Records show a low level of implementation of environmental treaties if no institutional supervisory machinery has been set up, even when their conceptual framework presents a high degree of elaboration.[64] In the absence of strong enforcement mechanisms, the role that institutions play exercising a collective control over the conduct of the parties and negotiating resolution of conflicts, becomes crucial to secure implementation of the treaty.

7. States should have the obligation to submit periodic reports to international bodies for their public review. Procedures and mechanisms should be established within environmental protection systems to review national reports on implementing measures, to carry out inspection and investigation and to process claims in cases of non-compliance.

8. When domestic legislation or national measures have to be adopted in order to render treaties or decisions of international bodies effective, a time limit should be established within which States should act. States should have the duty to report to the competent international body on the implementing action taken or explain why such action was not taken.

9. Due publicity should be given to implementation procedures, including publication and dissemination of reports submitted by States and reports of organs of international bodies on compliance by States. Implementation activities of international environmental institutions should be open to NGOs.

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63 A case in point is the body of advisers established by the 1979 Geneva Convention, that, although vested with few powers, negotiated protocols to the Convention establishing targets for the reduction of emissions of some pollutants (Birnie and Boyle, *op. cit.*, p. 400).

64 This is the case, *inter alia*, of the 1979 Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention) (Birnie and Boyle, *op. cit.*, p. 450).

10. It may be worth considering the possibility of formulating a recommendation suggesting the establishment of mechanisms and procedures to control the legality of acts of international environmental organizations in order to ensure that norms emanating from those organizations are not contrary to or incompatible with the legal framework governing their activities.

11. Treaties or other instruments prescribing binding conservation measures or any measures that may adversely affect economic or developmental interests of developing countries, should provide for incentives such as financial or other kind of assistance to encourage acceptance and facilitate compliance with the prescribed measures by such countries.[65]

12. Institutionmal procedures to deal with cases of non-compliance may contribute to improve the level of implementation of environmental treaties and decisions. Treaties should contain rules on this matters offering a variety of formal and informal dispute settlement methods.

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65 Article VIII of the 1979 Resolution of the Institute on "The Pollution of Rivers and Lakes and International Law" reads as follows : "In order to assist developing States in the fulfilment of the obligations and in the implementation of the recommendations referred to in this Resolution, it is desirable that developed States and competent international organizations provide such States with technical assistance or any other assistance as may be appropriate in this field".

Replies to the First Draft

Reply by Mr Ibrahim Shihata

26 December 1995

Thank you very much for your report. As you rightly mentioned, environmental rules are numerous, and not all have the same legal significance. As such, environmental rules are distinguished as "hard law" or "soft law". Whatever their binding force is, their effectiveness depends upon their implementation. This topic has been under scrutiny since the late 1980s. New trends in practice have emerged and they are well reflected in your report.

There are a few points I would like to stress which might deserve closer attention. I assume that the resolution which will be adopted, will not be strictly *lex lata* and will include *de lege ferenda* proposals. In the respect, you may want to take into account emerging trends in customary environmental law. A good example is the rule requiring the carrying out of environmental assessment for projects and sectors. Another one is the obligation to notify other States of activities which might have significant transboundary environmental effect. These trends could be reflected in your report, especially as they have recently been addressed before the International Court of Justice (see New Zealand's request for an examination of the situation in accordance with paragraph 63 of the Court's 1974 judgment in the Nuclear Test Cases (New Zealand v. France)).

Treaties are an important source of international environmental law. They also play a role in the custom-making process and this should be highlighted. Treaties are crucial in the building-regime process. In this respect, it could be noted that non-conventional acts may also have a role to play in the consolidation of a regime, as for example the decisions of the Conferences of Parties to a treaty. All this shows that there are important interplays between the various sources of international environmental law, as is the case indeed for international law generally.

Some mechanisms and institutions may deserve more attention with respect to their role in the implementation process, especially where the promotion of respect for environmental law is concerned. In this respect, reference to the Global Environmental Facility (GEF) could be enlarged.

I have sent you, under separate cover, information which will be relevant in this respect. The relationship of the GEF with respectively the Climate Change Convention and the Biodiversity Convention could be elaborated on as the GEF should not be viewed simply as an economic incentive for developing countries to comply with the conventions. It is part of a global approach based on the principles of cooperation in a spirit of global partnership and of common but differentiated responsibilities (Rio Declaration, Principle 7). It offers new institutional perspectives for promoting the respect of environmental rules. The eligibility criteria for GEF funding show the close links which prevail between the GEF and the legal and regulatory frameworks as can be seen from Article 9 of the Instrument for the Establishment of the Restructured Global Environment Facility which states that "GEF grants that are made available within the framework of the financial mechanisms of the conventions (...) shall be in conformity with the eligibility criteria decided by the Conference of the parties of each convention (...)".

You may also want to mention the establishment of the World Bank Inspection Panel. This recently established mechanism is very much in line with the recommendations that you formulate in paragraphs 9 and 10 of your report. I have sent you also under separate cover information on this challenging mechanism which is explained in detail in my book "The World Bank Inspection Panel", Oxford University Press, 1994.

Ibrahim F. I. Shihata

Reply by Mr Budislav Vukas

10 January 1996

The enclosed brief remarks mainly repeat the comments I made in Lisbon (August 1995) in respect to the first draft of your Report "Procedure for Adoption and Implementation of Rules in the Field of the Environment".

1. The Draft Report "Procedure (why singular ?) for Adoption and Implementation of Rules in the Field of the Environment" realistically reflects the state of international legislation in this important and relatively new field of international law. As I do agree with the great majority of this analysis and the proposals, my remarks will be limited only to the points where I have a slightly different opinion than the author.

2. Notwithstanding the always growing number of treaties and binding decisions of international bodies, and the simultaneous development of customary international law, the relevance of the general principles of law (Article 38, para. 1(c) of the Statute of the International Court of Justice) should not be neglected. Due to the development of specific international

environmental rules, the role of the general principles of law is not the same as it used to be, but they should not be omitted from the list of the "sources of this *corpus juris* ..." (p. 1). The quoted principle according to which States are obliged not to use or not to allow the use of their territories so as to cause damages to other States is but an example of the use of a general principle of law : *sic utere tuo ut alienum non laedas* (p. 2).

3. The inclusion in the "soft-law" even of "framework" or "umbrella" treaties or treaty provisions not imposing precise obligations is a very dangerous choice (pp. 4 and 9). General duties or treaty promises are also international obligations ; treaty provisions not imposing an obligation are very often in different manners closely linked with other provisions of the same treaty. If treaty provisions are proclaimed "solft-law" how many of the Articles of the United Nations Convention on the Law of the Sea, and particularly of its Part XII (Protection and Preservation of the Marine Environment) would not be included in this category ?

4. In discussing the tendency of environmental treaties to become more specific ("From generality to specificity") several types of main treaties and additional instruments as well as their mutual relations have been identified. It would be useful to test the suggested typology by applying it to the network of treaties adopted under the UNEP Regional Seas Programme.

5. The analysis of the treaties protecting the environment in the Draft Report is restricted to environmental treaties *stricto sensu*. Namely, some categories of treaties undoubtedly protecting the environment, the nature and the human beings have been left out. I have particularly in mind treaties imposing various restrictions in respect to arms of mass destruction (nuclear, chemical, biological). Furthermore, all the instruments adopted by the International Labour Organization dealing with the protection of the working environment are also not included. Both these categories of treaties have many specific features in respect of the issues analysed in other environmental treaties (way of adoption, amendments, monitoring, settlement of disputes, etc.). Some of them, for example treaties dealing with nuclear armament, are paramount for the issues to be discussed by the general rapporteur (*e.g.* the right to healthy environment).

6. In addition to the suggested recommendations (1-12), which I all support, the Commission could envisage also the possibility of proposing to entrust some of the main legislative and/or supervisory competences concerning environmental protection to a more influential United Nations body than the UNEP. The transformation of the Trusteeship Council into such a body could be one of the solutions in order to demonstrate the

United Nations determination to strenghten and co-ordinate the international action for the protection of the Earth.

Budislav Vukas

Réponse de M. Jean Salmon

10 janvier 1996

Laissez-moi tout d'abord vous féliciter de votre rapport qui me semble à la fois très complet et très lucide. Je partage l'ensemble de vos positions, ce qui va me faciliter grandement la tâche. Je me bornerai, après une brève remarque générale, à répondre à vos conclusions et aux propositions précises que vous formulez.

Il est incontestable que l'on assiste pour le moment à une inflation de textes dans le domaine de la protection de l'environnement, sans que pour autant le résultat concret soit, pour chaque Etat pris individuellement, particulièrement enthousiasmant. Les oppositions écologistes dans chaque pays harcèlent les gouvernements de questions parlementaires et les réponses mettent en lumière un constat accablant : peu de traités sont ratifiés ; les résolutions d'organisations ne sont pas suivies ; même de nombreuses directives du Marché commun ne sont pas observées. Les raisons en sont sans doute diverses, mais les principales sont probablement économiques, même dans les pays développés. Il y a donc une pratique contradictoire : acceptation de nombreux textes sous des formes diverses (droit dur ou mou) qui s'apparente à une fuite en avant et une rétractation peu glorieuse s'agissant de la mise en application, voire même s'agissant du consentement à être lié. La contradiction s'explique sans doute par le caractère largement idéologique du premier aspect des choses.

Comment peut-on résoudre la contradiction ? Sans doute plus par des politiques de fond que par des moyens formels. Mais les politiques de fond s'attaquent à des intérêts économiques souvent puissants (que l'on pense à ceux qui sont plus intéressés à exploiter les espèces qu'à les protéger, à ceux qui ne sont pas prêts à modifier leurs modes d'exploitation industriels ou énergétiques pour des raisons de coût ou de concurrence, etc.). Que peut faire l'Institut sur ce point ? Outre le fait que l'Institut peut insister sur le caractère nécessaire de quelques grands principes — ce qui relèvera du rapport de M. Ferrari-Bravo — on peut concevoir dans votre projet l'importance de la discussion et de la négociation qui font comprendre l'existence des intérêts contradictoires et qui favorise la recherche de solutions raisonnables — pourvu qu'elles aboutissent réellement à la protection de l'environnement. C'est dans ce contexte, je pense, que s'inscrivent deux de vos propositions : la proposition 1, relative à la recherche du consensus et la proposition 11 qui contient l'idée —

que j'appuie quant au fond — qu'en cette matière l'entraide internationale et la responsabilité des pays plus développés imposent à ces derniers des devoirs à l'égard des pays les moins avancés. Ces deux propositions me semblent relever d'une optique substantielle de la matière.

Un mot de commentaire cependant sur la proposition 1 : Vos vues sur le rôle du consensus me paraissent pénétrantes et lucides. Mais pourquoi les limiter aux "traités et aux décisions générales". Si la méthode a du mérite pour les décisions générales, pourquoi n'en aurait-elle plus pour les décisions particulières, alors que c'est en général là, dans le concret, que les intérêts s'affrontent le plus ? Si vous situez la proposition 1 dans le "substantiel" et la proposition 2 dans le "formel" il n'y aura pas de contradictions entre les deux.

Ces deux points mis à part, le reste de votre rapport est centré sur les moyens formels d'améliorer les choses. Il y aurait peut-être intérêt à souligner dans un paragraphe introductif que les membres de l'Institut ne sont pas dupes ; qu'ils savent que ce n'est pas par des moyens formels que l'on améliorera les choses ; que seule une volonté politique peut le faire. Mais, si une telle volonté existe, alors les moyens formels qui suivent seraient de nature à améliorer l'efficacité du *corpus juris* environnemental.

J'en viens maintenant à vos diverses propositions que je qualifie de formelles.

Elles pourraient être précédées d'un paragraphe liminaire aux termes duquel les Etats qui souhaitent améliorer l'efficacité du droit de l'environnement sont invités à envisager les formules suivantes :

2. D'accord.

3. Dissocier l'application provisoire — qui doit en effet s'appliquer aussi bien aux traités qu'aux autres sources formelles — et la question du nombre des ratifications. Pour ce dernier point, il s'agit d'une question d'espèce. Ceci peut se justifier chaque fois qu'il s'agit de protéger des espèces en danger.

4. D'accord.

5. D'accord.

6. D'accord.

7. D'accord.

8. D'accord.

9. D'accord. Toutefois la question du rôle des ONG, si vous l'aborder ici, devrait aussi être envisagée ailleurs. Le rôle des ONG est considérable

dans ce domaine et mériterait un traitement plus vaste, peut-être dans un article distinct.

10. Je ne suis pas sûr de bien percevoir ce que vous visez ici. Etant donné la variété des organisations internationales, le contenu de cette résolution peut prendre des significations très diverses. Si l'idée est de rappeler que les organisations internationales doivent elles aussi respecter les grands principes relatifs à l'environnement dans l'exercice de leurs compétences, ce principe général trouverait peut-être mieux sa place dans le texte de M. Ferrari-Bravo.

11. Voir ci-dessus.

12. D'accord.

On peut se demander si l'on ne pourrait pas proposer de manière générale aux Etats de faire un rapport public et régulier (pour leur propre opinion publique) sur les traités et autres textes auxquels ils ont donné leur approbation et de donner connaissance si le consentement à être lié à bien été donné et où en est l'exécution de ces textes. Une telle proposition pourrait s'intercaler entre le point 2 et le point 3.

Jean Salmon

Réponse de M. Luzius Wildhaber

11 January 1996

At the outset, I wish to say that I agree with the general thrust of your recommendations at page 26. In fact, I have written in the same spirit in 1987 (*"Rechtsfragen des internationalen Umweltschutzes", Herbert-Miehsler-Gedächtnisvorlesungen and der Universität Salzburg Nr. 1*). More specifically, I find very pertinent your proposals of a periodic stocktaking (N°5) of monitoring by way of institutional supervisory machinery (N° 6) and of access of NGOs to implementation activities of international environmental institutions (N° 9).

At page 2, the role of customary law is perhaps too much reduced. I would prefer a wording where you would say that "customary law will play a role in the development of the law of the environment mainly where general principles must be elaborated or consolidated".

At page 4, I would leave the expression "soft law".

At page 10, I must say that the prospect of seeing States prepared to accept a supranational source of authority seems remote not only with respect to environmental matters, but quite generally.

At page 15, I would suggest a wording according to which "environmental law requires other, more centralized and unbiased methods to ensure compliance".

At pages 15-16, I think that the role of NGOs is perhaps even more important. They have an influential role to play not only in the monitoring of the implementation of treaty obligations, but already in the drafting of such obligations, especially in helping third world countries to adjust their domestic law so as to take into account the treaty obligations, in keeping track of recent developments and in coming up with new and creative proposals.

Luzius Wildhaber

Réponse de M. Hugo Caminos

31 January 1996

This excellent report addresses the legal issues associated with the subject of adoption and implementation of international environmental law and their development ; customary law, decisions of intergovernmental agencies — including the different mechanisms for their adoption and the role of soft-law — and treaties. The latter, as the report indicates, "in spite of their shortcomings ... will keep in the near future their place as the centrepiece of international cooperation to manage the environmental crises". In this respect, "environmental agreements differ from many other types of agreement because they respond to scientific evidence of a problem ... negotiations need sufficient data to understand the problem and to formulate effective solutions, but they may have to act quickly to prevent the problem from worsening or becoming irreversible" (*Harvard Law Review,* Developments in the Law. International Environmental Law (1991), vol. 104, 1419, p. 1529).

Thus, "the importance of scientific research and cooperation in this field among scientists of different States. Once scientific and technical consensus is achieved solutions become more accessible" (*id.* p. 1533).

The procedure to tackle the question of the constant change of environmental problems due to the rapid advancement of science and technology are the treaty-protocol approach or the regulatory action through international bodies or conferences. The reports analyzes the pros and cons of these two mechanisms.

I agree that treaty implementation requires some form of monitoring and enforcement. "Without monitoring, enforcement becomes impossible" (*id.* p. 1553). However, caution should be exercised in creating inefficient bureaucratic supervisory and enforcement machinery. In this regard, the

monitoring agency should have "scientific legitimacy and expertise" (*id.* p. 1560). Science can serve to legitimate environmental decisions.

Under the title "From uniformity to differenciation", the report deals with the problem of non-compliance or non-participation. I concur with the view that "the application or the threat to apply sanctions ... does not necessarily ensure a better performance". A better way to defy non-compliance and limited participation is to create incentives to a correct behavior. As the Harvard Law Review study states : "reformers should abandon their search for a single entity with coercive enforcement power and instead devote their efforts to the decisions" (p. 1593). The Committee may give further consideration to this question. In this respect, several options for encouraging compliance have been proposed in the referred study :

1. "Recommended standards. Although a State that objects to recommended standards does not have to obey them, the force of world opinion often alters the political decision making process within a potentially dissenting State and thereby encourages its eventual aquiescence. In fact, absent the coercive power of a supranational authority, recommended standards may in some cases be more effective than binding ones" (p. 1605, footnote ommitted).

"2. Audit Compliance. Although the mere publication of standards supported by a significant number of States and a respected Secretariat may be quite persuasive, the further step of auditing compliance increases their effectiveness", (*id*, p. 1606, footnotes ommitted).

"3. Investigate complaints. By far the most severe form of "jawboning" is the investigation of complaints charging non-compliance with recommended standards. Unlike recommended standards and audits of voluntarily submitted reports, investigation often entails an adversary inquiry" (p. 1607).

"4. Set Standards Subject to Plurality Rejection. Although States often delegate decisions on technical questions to International Governmental Organizations, they rarely do so for significant issues. Nevertheless, States do occasionally agree in advance to be bound by IGO standards adopted without unanimity, subject to potential annulment should a plurality of States object. A prominent example is the Marine Environment Protection Committee of the IMO, which can act in a quasi-legislative manner". (p. 1607, footnote omitted).

"5. Set Binding Standards Subject to Opting Out. Unlike the plurality rejection procedure, opt out procedures maintain the rule in force on all member States that do not publicly join the plurality rejecting it. Because they bring world pressure to bear on individual States, opt out procedures raise the political cost of non-conformity and shift the burden of justifying

it to a greater extent than the procedures discussed above. This second form of tacit acceptance procedure has been used for many years by IGOs with widely varying competences, including the International Whaling Commission" (p. 1608, footnotes omitted).

The opinion that the need that treaties and decisions of international organizations have the widest support of States for the purposes of implementation is entirely correct. One of the main factors to attain this goal is the growth of scientific certainty and economic effects. It seems also true that we need to promote acceptance and compliance with existing norms without producing more international conventions which have "little, if any, impact in the practice of States". The expression "treaty congestion" or "inflation of the *corpus juris*", clearly reflect the state of environmental law today. The emphasis, as the report says, should be put in implementation. Priority should be placed in self-enforcing mechanisms.

The suggested items for the recommendations of the Institute are consistent with the report. Participation of non-State actors deserves consideration. The Harvard Study recommends that international agencies should attempt to allow the maximum NGOs access. As stated by an author, "because international environmental law ultimately seeks to regulate non-State actors — whether NGOs, businesses or individuals — the involvement of these actors in the rule formation would increase the legitimacy of the international legal regime" (P. Sand, quoted in the Harvard Study, p. 1601).

The goal of environmental agreements should be to build up a legal as well as true communal association of States.

Hugo Caminos

Questionnaire

February 1996

1. Do you agree that, for the purpose of the work of the Commission, "rules in the field of the environment" should include those emanating from treaties, custom and general principles of law (art. 38 (1) of the Statute of the ICJ) as well as binding decisions of international organizations ?

2. Do you agree that the so-called rules of "soft law" should be taken into account as an important element that contributes to the development of international environmental law ?

3. During the informal discussions on the first draft report, some Members of the Commission suggested that it would be difficult for the Institute to adopt a resolution containing recommendations on both the adoption and the implementation of environmental rules. Do you agree with this opinion ? Should the Resolution to be proposed by the Commission deal :

(i) exclusively or primarily with problems relevant to the adoption of environmental rules ?

(ii) exclusively or primarily with problems relevant to their implementation ?

(iii) with both sets of problems ?

4. It is the prevailing view among scholars that at present what is most needed is to find ways to ensure the acceptance and implementation of existing international environmental rules rather than creating new ones. Do you agree with this view ?

5. Should "implementation" be understood in a restricted sense, as the action taken by a legally bound subject to comply with its obligations, as different from "enforcement" (measures a subject has the right to take to ensure the fulfilment of an international legal obligation by other subjects or to obtain a decision by an appropriate body that the obligation is not being fulfilled) ?

6. (a) Do you think that States should resort to special methods or procedures for the making of environmental treaties in order to :

(i) accelerate their adoption and ratification ?

(ii) to ensure their wider acceptance and implementation ?

(iii) to make them more flexible and adaptable to changing circumstances ?

(b) If the answer is affirmative, what methods or procedures do you suggest to utilize ?

7. Same questions with regard to the adoption of binding decisions by international organizations.

8. Do you think that the requirement of consensus to adopt decisions on environmental matters by international organizations improves the prospects of their being implemented ?

9. (a) Do you think that institutional supervisory techniques such as reporting to international bodies, establishment of implementation commissions and periodic review and evaluation of State performance contribute to a better compliance with environmental obligations by States ?

(b) Can you suggest other techniques that should be used for the same purpose ?

10. Experience shows that more frequently than not States bound by treaties or international acts to adopt domestic policies or measures to implement international commitments do not comply with their obligations.

(a) Do you think that the Commission should include in its proposal recommendations relating to the need to ensure or facilitate the translation of international commitments into national policies and measures ?

(b) If so, what specific measures do you suggest to recommend ?

(c) Should the resolution include a recommendation in the sense that when no specific date-line has been established in a treaty or a binding act of an international organization for the adoption of domestic policies or measures to implement environmental obligations, States bound by the treaty or the binding act that do not adopt such policies or measures within a reasonable time will be considered in breach thereof ?

11. Numerous non-binding resolutions and other acts of international organizations containing environmental rules have been adopted by consensus or ample majority of the members of the organization. Do you think that is correct to state that since those resolutions and acts reflect the opinion of the international community States are expected to behave in conformity with them ?

12. Is it correct to say that States that have contributed with their votes or their consent to the adoption of non-binding resolutions containing

rules on the environment should refrain from acts incompatible with them on the basis of the principle of good faith ?

13. Should the Commission recommend the resort to the regional approach for the development of environmental law in view of the proven appropriateness of such approach in some areas of the environment ? If so :

(i) to what areas of the environmental law should it be applied ?

(ii) to which stages of the legislative process ? Adoption of rules ? Implementation of rules ? Establishment of institutions ?

14. What role should individuals and private entities play in the adoption and implementation of environmental rules by States ?

15. Do you think that compliance with international environmental obligations can be enhanced if sanctions for non-compliance are provided for in treaties and international resolutions ?

16. (a) In your opinion, are "indirect incentives", such as restrictions on trade, effective means to promote implementation of international environmental obligations by States ?

(b) Same question with regard to economic incentives such as those provided for in the ozone protection and climate change systems.

(c) What other kind of incentives may encourage compliance with international environmental rules ?

17. Do you think that acceptance of and compliance with international environmental obligations can be promoted assigning different responsibilities to States ? If the answer is affirmative, on the basis of which criteria should those different responsibilities be assigned ?

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Réponses au Questionnaire

Réponse de M. Budislav Vukas

1. Yes.

2. Yes (in using the term "soft law" I do not have in mind any treaty provision).

3. The resolution should primarily deal with the adoption of environmental rules. We do not have neither the means, nor the time to suggest conclusion concerning the substantive implementation of environmental rules. Your analysis of the implementation should be undertaken in order to :

(a) make more sound the conclusions concerning the adoption of environmental rules ;

(b) suggest the most appropriate methods (mechanisms) for the control of implementation.

4. Yes.

5. "Implementation" should include "enforcement" ; otherwise implementation has a very limited effect. See also *supra* N° 3.

6. Special methods or procedures for making environmental treaties should serve the purpose of accelerating the adoption and ratification (acceptance), as well as ensuring their implementation. However, international practice has shown that such methods can accelerate the acceptance only of additional, technical treaty rules, amendments, annexes, etc., and not the acceptance of initial, basic treaty rules.

7. The ultimate goal of the international community should be the adoption of binding decisions on environmental issues by the United Nations (as specialised UN body), by competent specialised agencies of the United Nations and by specialized regional organizations. The methods of adoption of such decisions are less important than the incentives for their implementation, control mechanisms, responsibility and liability for their obligations.

8. Theoretically, consensus has some merits. In reality a consensus decision only prevents States from using a formal excuse for non-compliance.

9. (a) Yes.

(b) Settlement of disputes procedures, particularly those the use of which is obligatory and which entail obligatory decisions.

10. (a) Only in cases where the adoption of domestic policies or measures is not State's expressly stated obligation, and it nevertheless could contribute to the implementation of international environmental rules.

(b) Specific measures depend upon the contents of the respective international commitment.

(c) Yes, notwithstanding the vagueness of the term "reasonable time".

11. Yes, although a distinction between international "commitments" and "obligations" should be used in this respect.

12. Yes.

13. Yes, but mainly not only to a regional approach.

(i) In particular to :

(a) protection and preservation of the marine environment ;

(b) protection of lakes and rivers ;

(c) protection of endangered species.

(ii) To all the stages.

14. Competent individuals, private entities and NGOs should be consulted in the process of adoption of environmental rules. All those responsible for the violation of environmental law should be liable : States, as well as individuals, and private entities.

15. By providing sanctions for non-compliance with international environmental obligations, compliance can be enhanced, but States' willingness to adopt international environmental obligations may be affected.

16. (a) Yes, to a certain degree.

(b) Yes.

17. Yes : level of development, population, tonnage of the fleet, responsibility for the specific existing environmental damage, etc.

Budislav Vukas

Reply by Mr Ibrahim Shihata

15 April 1996

1. Do you agree that, for the purpose of the work of the Commission, "rules in the field of the environment" should include those emanating from treaties, custom and general principles of law (art. 38(1) of the Statute of the ICJ) as well as binding decisions of international organizations ?

"Rules in the field of the environment" should include those emanating from treaties, custom and general principles of law as referred to in article 38 (1) of the Statute of the ICJ, as well as any binding decisions of international organizations. This would allow us to take into consideration the important interplay among the various sources of international environmental law, as is the case for international law generally.

2. Do you agree that the so-called rules of "soft law" should be taken into account as an important element that contributes to the development of international environmental law ?

As an element in the process of evolution of international environmental law, the so-called rules of "soft law" play an important role. However, a clear distinction has to be drawn between "hard law" and "soft law" when addressing the law-making process, as the latter does not produce any binding legal effect. When negotiating and adopting "soft law" rules, States are not bound by any mandatory commitment (unless they express their wish to be so bound). States should not be induced to adopt soft law, only to be told upon its adoption that its universal acceptance makes it "instant customary law". For the latter to be established, the *opinio juris* has to be proven beyond doubt.

3. During the informal discussions on the first draft report, some Mmbers of the Commission suggested that it would be difficult for the Institute to adopt a resolution containing recommendations on both the adoption and the implementation of environmental rules. Do you agree with this opinion ?

As stated in the terms of reference, the resolution should deal with the procedures for both the adoption and the implementation of rules in the field of environment. There is, however, a clear need for more attention to the issue of implementation, so as to improve compliance with international environmental commitments. In addition, it does not appear that the adoption of rules in the field of environment raises specific problems peculiar to that field.

4. It is the prevailing view among scholars that at present what is most needed is to find ways to ensure the acceptance and implementation

of existing international environmental rules rather than creating new ones. Do you agree with this view ?

In general, I agree with the view that there is a need to find ways to ensure the acceptance and implementation of existing international environmental rules. Where there is a need for new rules, their adoption should not be delayed. The protection of environment is to be effectively promoted, both by creating additional rules when needed, and ensuring respect for the existing ones.

5. Should "implementation" be understood in a restricted sense, as the action taken by a legally bound subject to comply with its obligations, as different from "enforcement" (measures a subject has the right to take to ensure the fulfilment of an international legal obligation by other subjects or to obtain a decision by an appropriate body that the obligation is not being fulfilled) ?

I question the distinction which is made between implementation and enforcement. To me, "implementation", which is a broad notion, should be understood as encompassing all the actions designed to put international commitments into application. "Enforcement" refers to the measures resorted to in order to ensure the respect for international rules by States that do not apply them voluntarily. In this respect, enforcement is part of the overall implementation process.

6. Do you think that States should resort to special methods or procedures for the making of environmental treaties ? If the answer is affirmative, what methods or procedures do you suggest to utilize ?

There are many ways for ensuring wide acceptance and implementation of environmental treaties, such as : (i) real participation in rule-making, (ii) promotion of information and knowledge of the new instruments, (iii) economic incentives, and (iv) eventually sanctions. However, crucial efforts should be placed on promoting the social acceptance of these instruments. This process would bring States to become parties to the agreements and to effectively implement them. In this respect, dissemination of information and exchange of knowledge are important tools.

7. Same question with regard to the adoption of binding decisions by international organizations.

It is not clear which "binding decisions" the question refers to. Are we speaking of Security Council decisions under Chapter VII ? In any event, consideration has to be given to disseminating information and paving the way to the general acceptability of the decisions.

8. Do you think that the requirement of consensus to adopt decisions on environmental matters by international organizations improves the prospects of their being implemented ?

There is no straightforward answer to this question as the decisions vary in their nature and content, *e.g.*, they may be rule-oriented, action-oriented, or simply setting an agenda or a program. Additionally, consensus in this context should be understood to mean that there is a general accord among the member States on the decision to be taken, not necessarily an express unanimous agreement.

9. Do you think that institutional supervisory techniques such as reporting to international bodies, establishment of implementation commissions and periodic review and evaluation of State performance contribute to a better compliance with environmental obligations by States ? Can you suggest other techniques that should be used for the same purpose ?

Institutional supervisory techniques certainly contribute to a better compliance with environmental law. One of their main purposes should be to promote exchange of information, and a better understanding of the purpose and the content of environmental treaties so as to ensure better acceptability of the instruments. Additionally, consideration should also be given to public participation in order to promote respect for international environmental law.

10. Experience shows that more frequently than not States bound by treaties or international acts to adopt domestic policies or measures to implement international commitments do not comply with their obligations. Do you think that the Commission should include in its proposal recommendations relating to the need to ensure or facilitate the translation of international commitments into national policies and measures ? If so, what specific measures do you suggest to recommend ? Should the resolution include a recommendation in the sense that when no specific date-line has been established in a treaty or a binding act of an international organization for the adoption of domestic policies or measures to implement environmental obligations, States bound by the treaty or the binding act that do no adopt such policies or measures within a reasonable time will be considered in breach thereof ?

Yes, the Commission should recommend the incorporation of internionál commitments into domestic law. It should also mention the jurisdiction of national courts over environmental obligations originating in binding international instruments.

Informative campaigns targeting officials as well as other sectors of the population (local communities, for example) should be organized. Also, positive incentives as well as negative incentives should be put in

place by governments, NGOs and international organizations so as to induce compliance with environmental requirements.

It may be useful to recommend that States adopt domestic policies and measures within a reasonable time when no specific date-line has been established in a treaty or a binding decision. The implication is that failure to comply within this reasonable time would constitute a breach of the obligation to implement international commitments at the domestic level.

11. Numerous non-binding resolutions and other acts of international organizations containing environmental rules have been adopted by consensus or ample majority of the members of the organization. Do you think that is correct to state that since those resolutions and acts reflect the opinion of the international community States are expected to behave in conformity with them ?

No, the readiness of States to adopt non-binding decisions should not be assimilated to an acceptance of a legally binding commitment, *i.e.*, to the *opinio juris* needed for the establishment of international customary rules. As previously said under question (2), "soft law" rules and "hard law" rules should be distinguished in their legal effects.

12. Is it correct to say that States that have contributed with their votes or their consent to the adoption of non-binding resolutions containing rules on the environment should refrain from acts incompatible with them on the basis of the principle of good faith ?

When assessing the legality of the conduct of a State, the distinction between "soft law" and "hard law" rules should be kept in mind. In this framework the good faith principle, being a principle of international law, would be applied without entailing a legal commitment to actually follow non-binding rules. It may require however reasonable effort to follow-on their adoption.

13. Should the Commission recommend resort to the regional approach for the development of environmental law in view of the proven appropriateness of such approach in some areas of the environment ?

Resort to regional actions for the development of environmental law has proven to be useful. The Commission could recommend it and specify that depending on the circumstances, it could encompass various actions such as standard-setting activities, adoption of supervisory procedures, and in particular, the establishment of institutions (which may be easier to create at the regional level).

14. What role should individuals and private entities play in the adoption and implementation of environmental rules by States ?

Consultation and public participation should be understood as ways of raising concern for the adoption of, and compliance with international environmental rules. These processes play an important role in promoting the social acceptance of environmental standards and instruments. Access to remedies given to individuals as well as to private parties at the local level, and when agreed upon, to international facilities, should be considered.

15. Do you think that compliance with international environmental obligations can be enhanced if sanctions for non-compliance are provided for in treaties and international resolutions ?

Effective sanctions for non-compliance in international treaties should be recommended. In addition to their deterrent function, such conventionally agreed schemes allow for legal predictability and fairness. Provisions on sanctions must always be coupled with practical means to enforce them lest they should be counter-productive.

16. In your opinion, are "indirect incentives", such as restrictions on trade, effective means to promote implementation of international environmental obligations by States ? Same questions with regard to economic incentives such as those provided for in the ozone protection and climate change systems. What other kind of incentives may encourage compliance with international environmental rules ?

Incentives prove to be useful in promoting implementation of international environmental obligations, be they trade restriction measures or financial and technical assistance tools. These incentives may serve various functions and different time requirements, but in a long term perspective, *i.e.*, the time-frame required to build effective regimes, they are designed to serve a common agreed-upon environmental purpose and their effectiveness should be assessed against this framework. The role of the Global Environment Facility could be highlighted in this context.

17. Do you think that acceptance of and compliance with international environmental obligations can be promoted assigning different responsibilities to States ? If the answer is affirmative, on the basis of which criteria should those different responsibilities be assigned ?

In the course of the last decennia, the emerging principle of common but differentiated responsibilities has received a wide recognition. As is the case with the principle of intergenerational equity, it should be seen as one of the basic principles underlying international environmental law. As such, these principles should guide environmental negotiations on the sharing of tasks and obligations among industrialised and developing countries.

Ibrahim Shihata

Reply by Mr Sompong Sucharitkul

19 April 1996

1. Yes, I agree.

2. Yes, I also agree.

3. The resolution to be proposed should deal with both sets of problems, *i.e.*, the adoption of environmental rules as well as their implementation.

4. This is not the question of our essential need, rather one of priority. Existing rules should first be accepted and ways established of how best to ensure their implementation. This priority should not preclude the exploration of new rules to be established. I neither agree nor disagree with the view as believed by the Rapporteur to be the prevailing view among scholars. I do not think scholars in the first place should restrict the role of themselves or their fellow professionals by inhibiting growth or shying away from the creation of new rules.

5. "Implementation" in a sense is far wider than sheer enforcement. It could be accomplished with or indeed without any measures of enforcement.

6. (a) Yes, States should leave no stone unturned.

(b) They should establish appropriate competent administrative authorities to regulate and ensure compliance with regulations.

7. Binding decisions by international organizations are at least binding on the organizations themselves and on their members. The decisions should contain ways and means for giving effect to the rulings, findings and wishes of the organizations accepted as binding by their members.

8. Yes, in as much as consensus may be attained.

9. (a) Certainly yes, to a large degree.

(b) There should be a center, global and regional or even sub-regional, to monitor and control as well as collect all relevant data and statistics.

10. It is true that States take time to adopt measures to implement international commitments and even try to hide their failure to comply with international obligations behind the shield of absence of domestic legislative enactment.

(a) Definitely yes, if at all practical.

(b) International commitments should be without reservation, understanding, declaration or unilateral interpretation that tends to defeat

the object and purpose of the international agreement freely entered into by States.

(c) What constitutes a reasonable time needs to be clarified or at least spelled out. To avoid unnecessary controversy, specific time-limits should be set in the Treaty itself. A time frame can be targeted.

11. Yes, they reflect the opinion of the international community sharing a reasonable expectation of how States should behave in the light of overwhelming support for the environmental rules adopted. At the very least, States which act contrary to those rules, or in defiance thereof without any explanation must be held to have acted not in conformity of the rules.

12. Absolutely correct. The principle of good faith obliges States to refrain from actions or omissions incompatible with the implementation of the rules so adopted.

13. Yes, resort to regional approach may be recommended in addition to, and without detracting from, essential recourse to the global approach. In particular,

(i) marine environment, transboundary air pollution, dumping of toxic or nuclear waste and transfrontier pollution of water-courses ;

(ii) to all stages of legislative process, namely, adoption of rules, their implementation and institutionalization.

14. Individuals and private entities, being direct beneficiaries of the rules, should play a significant if not decisive role in ensuring their implementation and in monitoring their infringements or non-compliances by States and other individuals, including private entities. In particular, multinational corporations and their subsidiaries should comply with the stricter environmental requirements in the event of a conflict or variance between the local or territorial requirements and those prevailing in the country of the parent company, whose law should follow the corporations and their subsidiaries even extraterritorially.

15. Sanctions are indeed useful and necessary, but should not be regarded as licenses to commit wrongful acts. They are not primary requisites, but nonetheless constitute an indispensable resort once environmental damage is incurred. Sanctions should operate as a deterrent and not an after-thought redress. Prevention is better than cure, and precautionary principle is to be preferred to the enforcement of *ex post facto* sanction.

16. (a) In my opinion, the so-called "indirect incentives" have given rise to more cases of abuses and misuses than anticipated. Instead of promoting the healthful environment, they have tended to serve as pretexts

for trade restrictions or unilateral imposition of trade barriers and restraints on international trade. Protectionism should not be allowed to undermine or discourage best-effort performance of international obligations by States under environmental regulations to protect and preserve the global environment.

(b) "Economic incentives" offered as a reward as opposed to a sanction could be conducive to the promotion of the ozone protection and climate change systems. However, they should in no case be turned into "economic sanctions or licenses" to allow industrially advanced countries to continue unabated their habitual practice of ozone depletion to the detriment of the rest of the human race. *A contrario*, it is not enough to penalize infringements, they should be stopped, prevented and pre-empted at any cost. For a start, persisting infringements should be controlled, contained, restrained or otherwise compelled to diminish until they reach vanishing points.

(c) In several areas, there are no alternatives to total refrain. Some environmental rules are more unqualified and less flexible than others which admit of little or no derogation. Self-restraint is recommended to attain gradual reduction of pollutants and global warming. The only attractive incentive is the barest necessity to preserve inter-generational equity to ensure the survival of sustainable environment and with it the very existence of mankind, as we know it today.

17. Yes, responsibilities to be assigned to States are to vary from one State to another, having regard to their past performance and taking into account the impact of environmental damage each State has brought to bear upon the existing ecosystem. The principle of equity and environmental justice should prevail regardless of geographical location. No State can remain insensitive to the current environmental conditions which stand in direct need of immediate and progressive improvements.

Sompong Sucharitkul

Reply of Mr Shabtai Rosenne

25 April 1996

I would like to make a general prefatory remark :

We should never forget that the basis of any specialized branch of international law — and many of these are coming into existence — is and must remain the law of treaties together with at all events of the law of international or State responsibility. For the law of treaties the Vienna Convention of 1969 is an adequate guide. For the law of international or State responsibility, the position is more complicated. I

think that we can certainly take Part One, articles 1-35 (except article 19), of the draft of the International Law Commission as a working basis for a statement of the fundamental elements of the responsibility, and for matters of attribution and imputability. Article 19 is excepted because of its highly controversial character, and because, notwithstanding its reference to the environment, it does not really affect our topic.

I attach importance to recalling this basic element. In many respects, specific provisions regarding the environment assume, in my eyes, the character of administrative arrangements, not basic law. They derive their legal characteristics from the treaty of which they are an emanation. That is why in my view, the basic international legal elements are to be found in the law of treaties. That includes breach of treaty which in turn leads to the law of international responsibility, via article 63 of the Vienna Convention on the Law of Treaties and Part One, article 1, of the ILC's draft articles on State Responsibility.

I feel that if our Commission is careful to situate its recommendations squarely in that context its recommendations will become the more acceptable.

As far as internal law is concerned, the major problem is to ensure that internationally agreed standards and recommendations are incorporated in an appropriate fashion in the internal law of States. This includes where necessary the internal criminal law. In this respect I continue to think that much guidance can be found in Part XII (articles 192 to 237) of the United Nations Convention on the Law of the Sea of 1982. To the best of my knowledge, that is the most comprehensive diplomatic instrument which, because it deals with the protection of the marine environment and the prevention of its pollution (a positive and a negative aspect) — the marine environment covering 70 per cent of the surface of our planet — should serve as guidance in all discussion of these joint issues.

One further general remark. We will only have a few working days for our topic at Strasbourg, and I am sure that whatever we propose will be controversial. It is the general understanding that the Strasbourg Session is to be the Environmental Session of the Institute. We have to produce a statement that gathers together all the most fundamental international law issues in as few well-structured phrases as is possible ; to avoid detail and all irrelevancies. It is no good for us to produce something twenty pages long. I would like to see our proposal composed altogether in two or three pages, else, I am afraid, we will not succeed in achieving our task and the Session will not be able to complete its programme as planned.

Against that background, allow me to reply almost telegraphically to your questionnaire.

1. Yes.

2. I do not know what "soft law" is.

3. I think that the answer can be derived from my initial remarks.

4. We should look more to the prevailing view among States. I suspect that it would be similar to your suggestion.

5. Again, my introductory remarks enable you to find an adequate answer.

6. On the whole I would answer your question in the negative. I do not think that the Institute should be too closely involved in those questions. They will know what is required in a given matter, and how to set about achieving it. Again I feel that the law of treaties and the law of international responsibility will supply an adequate basis for the answers.

7. How far decisions of international organizations — I assume that international intergovernmental organizations is what is in mind — are "binding" depends on the constituent instruments of the different international organizations.

8. The answer depends always on the constituent instrument of the international intergovernmental organization.

9. Probably yes.

10. (a) Yes.

10. (c) No. This should be specifically stipulated in the treaty. I do not think that it would be wise to provide in a resolution of the Institute for an implied breach of treaty.

11. The constituent instrument of the international intergovernmental organization concerned is determining.

12. No. Same answer. The Institute cannot give a different standing to a resolution of an intergovernmental organization than is given by the constituent instrument of that organization itself.

13. Yes. It is not for the Institute to go into details, as everything will depend on the circumstances and the character of the regional or sub-regional organization concerned. I think that law of the sea provisions regarding the protection of living resources might provide a useful guide in this respect.

14. Is this not a matter for the internal law of each State ?

15. I do not think that this is given to generalization.

16 (a) Experience seems to suggest a positive answer, but this is really an empiric matter.

17. I regret that I do not fully understand this question.

Shabtai Rosenne

Reply of Mr G. do Nascimento e Silva

27 April 1996

Congratulation on the various papers submitted regarding procedure for adoption and implementation of rules in the field of the environment. Your questionnaire of 6 February has the merit of clarifying many of the issues we have to face.

To begin with, I would like to repeat what I said in my letter of 15 March 1992 to Professor Luigi Ferrari Bravo, namely that "It is my firm belief that the task of the Institute is to say what international law should be ; it is not up to us to say what it is, since the task of codification lies with the International Law Commission". At the same time we must be careful not to overstep, or to use the words of our Rapporteur "circumspection in the formulation of recommendations relating to the procedures applied by international environmental organizations in the performance of their functions".

With reference to your questionnaire, I would like to make the observations that follow :

1. The decisions of intergovernmental organizations, and I am not limiting myself to their binding decisions, can supply us with important material in the formulation of our resolution.

2. The so-called "soft law" has played an important role in the development of international law in environmental issues and has been fundamental in the formulation of some of the rules of customary international law.

3. I am among those that feel that we must not be over-ambitious and that we should limit our efforts, at this stage, to the adoption of environmental rules, taking up at a later stage those linked to implementation.

4. I agree up to a point with the idea that we should limit ourselves to the implementation of existing environmental rules rather than creating new ones.

But at the same time, we cannot ignore the fact that we are dealing with issues that spring up over-night and that may have been ignored up to a given moment. The damage to the ozone layer is typical.

One cannot adopt an over-all solution in this respect, since regional necessities are not all the same.

14. Yes. Once again, the NGOs can play an important role here.

15. The inclusion of sanctions in treaties in the case of non-compliance can have positive results ; but States are reluctant to adopt clauses on these lines. And the question always remains, what steps can be taken, especially vis-à-vis the major powers, in the case of non-compliance ?

Another issue that must be raised in this respect is the practice of some States to concentrate their efforts on issues in which they are not involved, more often than not in order to distract attention from issues in which they are major pollutants, as in the case of pollution of the atmosphere and pollution of the sea.

16 (a) In theory, yes ; but in practice the use of "indirect incentives" camouflages, more often than not, commercial interests, usually aimed at the developing countries.

(b) On the same lines. In the case of protection of the ozone and climatic change, the results, to put it mildly, are discouraging.

(c) The implementation of the financial and technical cooperation clauses in *Agenda 21* and in various treaties would certainly encourage compliance by the developing countries. In the case of the industrial powers, public opinion has had a strong influence, especially in the preservation of the ozone layer.

17. Once again, I feel that the adoption of treaties assigning different responsibilities is not likely to receive support, since there will be a tendency of States to pick and choose, putting emphasis on issues that do not affect them.

G. de Nascimento e Silva

Reply by Mr Francisco Orrego Vicuña

29 April 1996

Many thanks for your questionnaire on the procedure for the adoption and implementation of rules in the field of the environment of last 6 February. The reply to some of your important questions and issues follows.

1. Rules in the field of the environment ought certainly to include the various sources of international law mentioned in Article 38, paragraph 1 of the Statute of the International Court of Justice and binding decisions of international organizations. However, other aspects having an incidence on the question of sources ought not to be ruled out or listed as a matter that should only be "taken into account". This is particularly the case of unilateral State acts, so influential in the outcome of the Nuclear Test Cases and as a consequence on the environmental issues raised in the recent Nuclear Test Case II ; and above all is the case of the "soft law" instruments mentioned next.

2. I fully agree that rules of soft law are an important element ; as mentioned above not only should they be taken into account but I think they have a much more powerful influence. In point of fact, in most negotiations the substance of the matter is agreed to first and only at the final stage a decision is taken on whether it should become a treaty or a soft law resolution, thus revealing that the form of the instrument is not necessarily linked to the substantive commitments of the parties.

3. The Resolution should preferably deal with both adoption and implementation of environmental rules, at least from the point of view of expressing general directions.

4. Implementation of environmental rules is indeed important but there are many areas in which the rules of international environmental law are insufficient and should hopefully be further developed.

5. Implementation should be understood in a broad sense to include enforcement. A State may implement international obligations by enacting relevant domestic legislation but if this is not enforced the end result will be meaningless to the environment. The end result is what counts whether relating to implementation and/or enforcement.

6. (a) Many measures can be taken to accelerate adoption and ratification and also to ensure wider acceptance and implementation. As to flexibility and adaptability it is possible to provide for some measures but a more cautious attitude might be appropriate as not to by-pass the role of States ; if this is the result then implementation will become more difficult.

6. (b) Adoption and ratification might be accelerated if the preparatory work leading to the treaty involves relevant sectors of opinion, including experts, government officials, concerned institutions and businessmen. A greater participation by experts from developing countries is essential to this end. Wider acceptance and implementation are also related to this enhanced participation of relevant actors. Positive incentives might also be helpful. Flexibility and adaptability can be achieved by resorting to the technique of annexes to the basic treaty in some aspects.

7. The above mentioned elements are also relevant to a large extent to the adoption of binding decisions by international organizations. In this alternative, substantive participation of other views beyond the organization in question might be very meaningful. Business organizations and major scientific institutions should be considered again in this context.

8. Consensus is essential to improve the implementation of decisions of international organizations. Imposed decisions by majority are not a guarantee of better solutions nor conducive to appropriate implementation as shown by important experiences (Law of the Sea and Antarctic issues for example).

9. (a) Institutional supervisory techniques may contribute to better compliance with environmental obligations, but this assumes that the appropriate expertise will be developed at the domestic level since otherwise many countries would be subject to a kind of environmental dictum from abroad in which they have little or no participation. Furthermore this assumes that governments must not be overwhelmed by reporting and paper work, particularly where public officials are few.

9. (b) A new and promising technique used at the national level is "environment contracting", under which both government and business or other relevant sectors agree in a negotiated scheme of environmental improvement, goals, dates and other aspects mutually acceptable. There is no imposition from governments thus resulting in much higher levels of compliance and avoidance of evasion of measures. At the international level this approach offers interesting prospects.

10. (a) Recommendations as to the need of national implementation of obligations is appropriate although by the nature of the problem probably it would be better to suggest general guidelines or objectives and not specific policies or measures.

10. (b) The review of domestic implementation by qualified experts could be helpful if conceived in a positive sense, that is, to help overcoming problems and not as a preliminary step to sanctions or negative implications.

10. (c) Presumption of breach is totally uncalled for. If the treaty fails to include approporiate date-lines it is not a problem that ought to be blamed on governments. In any event, the observance of agreed date-lines can be encouraged.

11. Resolutions reflect the opinion of the international community in a rather imperfect manner in most cases. While general behavior in conformity with such instruments may be required, it is difficult to translate this requirement into specific obligations. If so, resolutions would be still more difficult to negociate and compromise language would not be enough

to overcome existing differences of opinion. The end result would be worse for the development of environmental standards and concerns.

12. States voting in favor of given resolutions may be held to be bound by the principle of good faith in order to abstain from acts incompatible with their content, but again this can only be so in terms of general behavior and not of specific obligations since otherwise it would encourage abstentions or negative votes.

13. Regional approaches should be encouraged within the broad guidelines established under international law. The marine environment and the protection of wildlife are two examples of areas that could best be developed through regional arrangements. The implementation of rules is probably the most appropriate field for regional action.

14. As indicated above, individuals, private entities and business have a decisive role to play in the adoption and implementation of rules, a process that should heavily rely on consultations and negotiations. Environmental contracting is particularly meaningful in this connection.

15. Sanctions as such should be entirely ruled out since they normally encourage disguised non-compliance and provide negative signals. Only positive incentives should be considered separately by the Commission.

16. (a) If indirect incentives are of a positive kind they should be encouraged. Restrictions, particularly in the trade arrangements, are most inappropriate.

16. (b) Economic incentives can be helpful but the trend to rely on financial assistance in environmental conventions is utterly unrealistic.

16. (c) One promising development at the domestic level is the availability of market incentives and other mechanisms. This has been done internationally only to a limited extent and should be explored with particular attention.

17. The principle of common but differentiated responsibility in connection with environmental obligations has become part of the standard language of international negotiations. There is no doubt an element of merit in this approach, but its implications have not been thoroughly discussed. So far the differences in economic development have been the main criterion taken into account to this effect. To the extent that the Polluter-Pays Principle if developed it will provide a different criterion since the costs of pollution will be borne by the producer and hence there will be an in-built economic differentiation.

Hoping that the above might be helpful to your interesting report and recommendation.

Francisco Orrego Vicuña

Reply by Mr Louis B. Sohn

11 June 1996

Your May 1996 draft of the paper on the "Procedure for Adoption and Implementation of Rules in the Field of the Environment", is clearly written and comprehensive. I agree with all your suggestions in Parts I and II, and have only a few comments to make on Part III relating to implementation.

1. There is only a mention of the need to coordinate the activities of the various implementation procedures, and I have not noticed any mention of the Commission on Sustainable Development established in 1992 to implement Agenda 21 which, in addition to regular annual meetings, held a high-level ministerial meeting in 1995, with a parallel NGO meeting. While it has been concentrating on financial issues, and the need to coordinate the many institutions in the field of environment, it also considers in each year in depth some sectorial environmental issues (*e.g.*, in 1995, management, conservation and sustainable development of all types of forests).

The Commission, with the help of the Global Environmental Facility, also initiated an assessment of global freshwater, with special attention to some African water basins.

The UN Secretariat established a parallel High-level Advisory Board on Sustainable Development to provide independent advice to the Secretary-General on environment and development matters, which *e.g.*, in 1994, dealt with sustainable food security for growing populations, and the need for mutual reinforcement between international trade and environment policies.

There is also the new Inter-Agency Committee on Sustainable Development of the Administrative Committee on Coordination that meets twice a year in order to bring together all the concerned United Nations agencies and to enable them to act in coordinated and cooperative manner.

Sustainable development is clearly a rapidly growing area of activities of the UN family of organizations and there is a need to evaluate its influence on the work of UNEP and to suggest how the work of all the agencies can be better coordinated.

2. Your section on dispute settlement might be reorganized, dealing separately with the role played by various methods, and the increasing rivalry among various institutions. On this particular subject, the Vienna Convention / Montreal Protocol arrangements have been overrelated ; they are limited at present to asking the Secretariat for help and provide only for a possible reference to the overburdened Implementation Committee.

I agree, however, that in general these two related instruments and the Law of the Sea Convention (which deals with more than two-thirds of the world's environment) show the way to some similar global arrangements.

3. As far as voting is concerned, you may wish to consider the system established, after a difficult negotiation, for the Global Environmental Facility which requires a triple majority of (a) all States participating in it, (b) the contributing States (weighted in accordance with their contributions), and (c) the beneficiary States. Once that system was established, it is not being used, as all important decisions are being reached by consensus.

4. I enclose a copy of your paper with some minor corrections.

I hope that you are working on a draft resolution that would take into account your various conclusions which are now scattered throughout the paper.

Louis B. Sohn

Réponse de M. Jean Salmon

11 juin 1996

Laissez-moi tout d'abord vous dire que votre rapport de mai 1996 ne suscite de ma part que l'admiration. J'ai apprécié, en tous points, vos analyses équilibrées et lucides et je partage dans l'ensemble vos conclusions. Sous réserve des observations générales contenues dans ma lettre. Je me bornerai donc à répondre à votre questionnaire.

1. Oui.

2. Oui.

3. Sauf si l'on devait aboutir à des développements trop longs, les deux sujets (adoption des règles et exécution de celles-ci) me semblent, à première vue, devoir être envisagés.

4. Il est vrai qu'on a souvent le sentiment que les Etats adoptent parfois des textes plus dans le souci de calmer une opinion publique de plus en plus alertée par les problèmes d'environnement que dans l'intention de régler réellement les problèmes. En ce sens l'adoption de textes présente un caractère idéologique évident. Il est aussi vrai qu'une inflation de règles non exécutées risque d'avoir pour effet d'éroder la valeur juridique de ces règles. Faut-il néanmoins se passer de cet hommage que le vice rend à la vertu ? Je ne le crois pas. D'autant plus que dans certains milieux ou dans certaines aires géographiques l'inflation des règles renforce le sentiment d'une nécessité d'agir. Je préférerais ne pas avoir à faire le

choix entre ces deux voies et les poursuivre toutes les deux à la fois. Je partage néanmoins votre suggestion de donner la priorité à tout ce qui peut renforcer l'efficacité et la rationalisation des normes déjà adoptées.

5. L'intitulé en langue française du 2e groupe de l'Institut relatif à l'environnement est "Processus d'adoption et de *mise en oeuvre* des règles dans le domaine de l'environnement". En français cette terminologie est assez large pour recouvrir divers concepts plus précis comme "exécution", "mise en application" ou "mise en vigueur". C'est, me semble-t-il, l'esprit dans lequel le groupe devrait rester orienté.

6. *et seq.* D'une manière générale, je pense que ce qui fait avancer les choses, c'est une volonté politique positive, suivie d'une bonne foi dans la mise en oeuvre — compte tenu des difficultés réelles que peuvent rencontrer les Etats à ce dernier égard. Les procédures que l'on peut imaginer n'amélioreront pas vraiment les choses sans cette volonté politique et le dépassement des contradictions économiques et sociales qui sont à la base de cette volonté. Ceci étant, si les conditions d'infrastructure sont réunies, il est certain que certaines procédures sont plus efficaces que d'autres. Aussi, pourrait-on envisager que l'Institut, s'adressant aux Etats qui souhaitent améliorer la situation, appelle leur attention sur diverses techniques qui peuvent se recommander à cette fin. En conséquence mes réponses à la question sont les suivantes :

(a) (i) Oui

(ii) Non

(iii) Oui

(b) Je me range aux suggestions présentées dans votre rapport.

7. Même réponse. L'aptitude des organisations internationales àrecourir à des méthodes plus efficaces dépend beaucoup de leur structure et des pouvoirs qui leur sont conférés par les actes constitutifs. Dans l'ensemble, les Communautés européennes, par exemple, possèdent des moyens juridiques efficaces qui ne sont pas exportables partout.

8. Oui, mais pas si ce procédé aboutit à émasculer complètement le contenu normatif du texte.

9. (a) Certainement.

9. (b) La seule chose qui me vient à l'esprit, est, comme je vous l'écrivait dans ma lettre du 10 janvier 1996, la suivante : ne pourrait-on pas proposer de manière générale aux Etats de faire un rapport public et régulier (pour leur propre opinion publique) sur les traités et autres textes auquels ils ont donné leur approbation et de donner connaissance si le consentement à être lié à bien été donné et où en est l'exécution de ces textes. La raison de cette proposition est la suivante. Pour certains Etats

le véritable moteur politique tant pour le consentement à être lié par des textes que pour leur mise en oeuvre, est leur propre opinion publique. Or celle-ci est le plus souvent parfaitement ignorante de ce que fait exactement l'exécutif à cet égard.

10. (a) Oui.

10. (b) Je ne sais que dire. La Belgique, pourtant en général bonne élève en matière européenne, a été condamnée fréquemment par la Cour de Justice des Communautés européennes pour non-application, à l'expiration du délai prescrit, de directives en matière d'environnement. Quelques années plus tard, la Belgique a été condamnée à nouveau par la Cour pour non-exécution de l'arrêt qui lui enjoignait de se conformer aux dites directives ! On ne résout pas certaines difficultés d'infrastructure par des moyens techniques relevant de la superstructure.

10. (c) Oui.

11. Cette question risque de soulever le vieux conflit sur le caractère obligatoire des déclarations d'organisations internationales qui n'ont pas un pouvoir législatif. Votre question est libellée en prenant pour acquis que ces résolutions ne lient pas ("non-binding resolutions") — alors que votre rapport est plus nuancé sur ce point —ce qui devrait conduire à une réponse négative.

Toutefois, parce que je crois que ces résolutions *lient les Etats* qui les ont votées (ou qui ont participé au consensus par lequel elles ont été adoptées), pourvu que leur texte soit clairement libellé en termes d'obligations juridiques (utilisation du présent ou du futur, absence de conditionnel ou de termes échappatoires), je serais enclin à répondre par l'affirmative à une question demandant si ces Etats sont liés dans ces conditions. Que l'on considère que ce soit juridiquement (soit par la voie du droit coutumier, soit par la voie de l'expression du consentement non formalisé), ou que l'on y voie un simple engagement politique, ces Etats sont liés. Une formule de compromis est à envisager.

12. Voir réponse à la question 11. Réponse positive dans le cas où la résolution ne lie que politiquement. Position insuffisante si à mes yeux elle lie juridiquement.

13. Oui.

13(i) Pour toutes les matières, même si la pollution transfrontière contre laquelle il s'agit de se protéger, n'affecte pas directement l'aire géographique de l'organisation régionale. Les obligations de préservation de l'environnement s'étendent au-delà des frontières.

13(ii) Pour ces trois aspects.

14. Uniquement le rôle institutionnel prévu par les conventions. Le rôle comme groupe de pression (*Greenpeace, etc.*) étant par ailleurs un élément essentiel de l'infrastructure.

15. Cela peut être envisagé dans les cas spécifiques que vous donnez dans votre rapport, interdiction d'importations d'espèces protégées ou de produits obtenus par des méthodes destructrices de l'environnement. Avec les difficultés que vous mentionnez vous-même de danger d'abus sous prétexte de protection de l'environnement.

16. (a) Oui, sous la même réserve que 15.

16. (b) Oui.

16. (c) Pas d'opinion.

17. Oui pour des raisons de différences de développement, sauf àprise en charge par les Etats développés du coût du respect par les pays les moins avancés de leurs obligations.

Jean Salmon

Reply by Mr Finn Seyersted

21 June 1996

The draft report provides a thorough and comprehensive, although general, picture of issues related to the adoption and implementation of environmental conventions. The report describes the problems and complexities inherent in this field. The descriptions and analyses seem to be adequate and corrrect. As a description of the present status, the draft report is good and very useful.

The report is, however, very cautious when it comes to conclusions and recommendations. Generally speaking, these are kept well within the present status of international law. The main conclusion — as I understand it — is that the implementation mechanisms of the regime to protect the ozone layer (the Vienna Convention and the Montreal and London Protocols) could serve as a model for future international environmental law.

This raises the question of what the objective of the work by the Institute of International Law in this field really is. If it is primarily to describe the present status of international environmental law, the report serves the purpose. If, however, the objective is to contribute to a more fundamental development in order to strengthen international environmental law in the longer term — which everybody agrees is highly needed — the conclusions in the report are rather disappointing.

One basic issue is, of course, the question of State sovereignty and the present principle of consensus. A stronger recommendation should be given to introduce mechanisms of adoption and amendments of international regulations without general consent. The very principle of such a development was approved by a number of heads of State in the Hague Declaration of 1989, and has generally been adopted within the European Union. The mechanisms of the Montreal Protocol is only a step in the right direction. For various other existing mechanisms, see Annex III in the 1991 World Federalist Movement's proposal ("The Norwegian Commission").

A second problem — clearly described in the report — is the great, and increasing, number of different international instruments in the field of environment, with different concepts, principles, adoption rules, mechanisms of implementation, etc. The idea of developing a general "umbrella" Covenant for environmental rights and obligations of States seems to have been shelved for the time being. But the need for more general and uniform principles, and stronger, more centralized, implementation and enforcement institutions is becoming stronger all the time. The Institute should not leave this issue by the wayside, but take it up as a long term challenge in international environmental law.

The issue of enforcement mechanisms should also be dealt with in a more offensive way. In addition to stronger enforcement institutions along the lines indicated in the report, one should consider mechanisms to make this field more transparent and accessible for other actors than the States themselves and the international secretariats, for example by developing mechanisms whereby NGOs and even individual citizens can play a direct role. The practical mechanisms of this sort established in the European Commission is an illustration. The idea of developing the right to a good environment as an international human right is gaining support. This could be one important element in the strenghthening of international enforcement of conventions (see also the discussion on sanctions and other related issues in the proposal form of the "Norwegian Commission").

Finally, the whole field of State responsibility and liability for transfrontier environmental damage seems to have been left out of the report. This is a complex issue, but it is an important part of the implementation and enforcement issue. One problem is that the substantive law is very unclear in this area. There is a strong need to elaborate and make more precise the content of Principle 21 of the Stockholm Declaration

(Principle 2 of the Rio Declaration) in order to make this general principle of international law more operational and enforceable.

...

Finn Seyersted

Suggestions made by Mr Giorgio Gaja

28 June 1996

1. Given the frequent need for prompt action in response to technical evidence in order to prevent and abate pollution, environmental treaties should establish procedures for adjusting standards as approriate. For this purpose, environmental treaties should be framework treaties providing for a decision making process that may require substantial majorities but does not involve ratification by States parties. Moreover, implementation at the national level of binding international standards should be ensured promptly.

2. With regard to most environmental issues, it is imperative that all or nearly all States are bound by minimum rules — either uniform or differentiated according to the state of development. The possibility of opting out should be limited with regard to those rules. Free riders should be discouraged by adopting measures that penalize States which do not conform to rules set on the basis of quasi-universal treaties, whether those States are parties to the treaty or not.

3. The role of an international agency is essential for ensuring the effective monitoring of States' compliance with binding standards set on the basis of environmental treaties other than bilateral treaties on transboundary pollution. A single environmental agency within the UN system could be entrusted with monitoring the implementation of a variety of treaties, and also, whenever appropriate, of recommended standards. The agency should be given all the powers necessary to accomplish its tasks, including powers of access. The agency should also have the power to recommend the adoption of new environmental standards.

4. The fact that an international agency exists for the purpose of monitoring compliance of environmental treaties is not exclusive of any use that a State party to a treaty may wish to make of national means of verification or of procedures for the peaceful settlement of disputes.

Giorgio Gaja

Réponse de M. M. Diez de Velasco Vallejo

23 juin 1996

I. "Nouvelles" techniques d'élaboration de normes dans le domaine de l'environnement

L'environnement, en tant que "nouveau" domaine du Droit international public, a besoin de nouvelles techniques juridiques de formation des normes. Celles-ci doivent, par ailleurs, être capables de prendre en compte les possibilités d'évolution soit de situations données, soit de nos connaissances.

Une procédure de création des règles dans le domaine de l'environnement qui me semble bien adaptée à ces exigences est celle des traités-cadres, puisqu'il s'agit d'une procédure permettant d'accélérer l'adoption et ratification des textes conventionnels, élargir leur acceptation et, en même temps, elle se montre suffisamment souple pour s'adapter au caractère évolutif des phénomènes propres au droit de l'environnement.

Comme il a été souligné d'emblée par la doctrine, les traités-cadres sont des instruments conventionnels qui énoncent les principes devant servir de fondement à la coopération entre les Etats parties dans un domaine déterminé, tout en leur laissant le soin de définir, par des accords séparés, les modalités et les détails de la coopération, en prévoyant, s'il y a lieu, une ou des institutions adéquates à cet effet (A. Kiss).

Ces systèmes conventionnels prévoient l'existence, d'une part d'une convention principale, d'autre part de protocoles ou autres accords complémentaires qui s'y rattachent tout en gardant une certaine autonomie. Ces systèmes permettent le décalage possible entre obligations résultant de la convention principale et obligations découlant des accords complémentaires, ils rendent possibles la diversité dans l'identité des parties contractantes aux deux textes. Ainsi, ne peuvent devenir parties aux accords additionnels que les Etats parties à l'instrument principal, mais tous les participants àcelui-ci ne doivent pas nécessairement devenir parties aux accords additionnels.

Les traités cadres vont énoncer des principes dont la portée ne sera, en règle générale, suffisamment précisé pour qu'ils puissent être mis en oeuvre tels quels en tant qu'engagements dans le cadre de la coopération entre Etats. En d'autres termes, ils fixent aux Etats parties des objectifs à atteindre, mais leur laisse entière liberté quant à la manière de les atteindre, tout en maintenant une obligation de résultat.

Une des caractéristiques des traités-cadre qui les rendent très utiles pour le droit de l'environnement c'est que les détails juridiquement plus contraignant sont définis dans d'autres textes conventionnels (accords,

protocoles) qui leur sont reliés. Ces derniers peuvent être négociés séparément et n'engageront pas nécessairement tous les Etats parties à la convention principale.

Les caractéristiques susmentionnées ont eu pour effet, d'une part d'encourager la participation des Etats aux dits traités, ainsi on trouve des accords largement ratifiés par une partie considérable des Etats, et d'autre part la prolifération des traités cadres concernant le droit de l'environnement (il existerait actuellement plus d'une vingtaine dans des domaines comme la protection des "mers régionales" (par ex. la Convention de Barcelone pour la protection de la Méditerranée contre la pollution de 1976), d'autres concernent la protection d'espèces migratrices appartenant à la faune sauvage (par ex. Convention de Bonn de 1979), la pollution atmosphérique transfrontières à longue distance (par ex. la Convention de Genève de 1979) la protection de la couche d'ozone (par ex. la Convention de Vienne de 1985, l'assistance en cas d'accident nucléaire (par ex. la Convention de Vienne, 1986, ou, enfin, la prévention des changements climatiques (Rio de Janeiro, 1992).

Ainsi, les conventions principales peuvent prévoir explicitement la conclusion de protocoles additionnels qui ont pour but de préciser la portée des principes énoncés dans la convention principale, ils peuvent également signaler que les principes doivent être mis en oeuvre par des accords de différente portée, par exemple ne réunissant qu'une partie des contractants, voir simplement des accords bilatéraux. En définitive, les Etats contractants expriment dans l'instrument principal l'intention d'accepter des obligations plus précises.

En outre, étant donné que ces accords complémentaires et ces protocoles ont besoin d'être périodiquement négociés, on se trouve, en général, dans les traités-cadre, avec des dispositions prévoyant des structures, plus ou moins perfectionnées, institutionnelles. L'avantage de cette technique est, en plus de suivre l'évolution en la matière (pratique des Etats, progrès technologiques ...), celle de permettre d'écouter des acteurs non étatiques particulièrement intéressés, par ex. les milieux économiques et des ONG, de familiariser les opinions publiques, de mieux suivre le développement du système.

Le fonctionnement des systèmes conventionnels si complexes tels que ceux qui viennent d'être décrits, basés sur la technique de la négociation permanente exige des efforts très considérables de coordination pour qu'ils puissent réussir.

En règle générale les annexes et accords complémentaires auront un caractère très technique nécessitant des révisions périodiques, par conséquent les procédures permettant une modification seront plus faciles que celles établies pour l'instrument principal.

Il me semble donc que les traités-cadre constituent des techniques adaptées au droit de l'environnement. Ainsi, un texte contenant les principes relatifs aux obligations et aux droits généraux des Etats en ce qui concerne l'environnement (global ou bien dans un domaine sectoriel) devrait figurer dans un accord de caractère non obligatoire ("soft law") mais inscrit, d'une part dans la perspective d'une contribution ultérieure au droit international coutumier et, d'autre part, dans la possibilité que les Etats partie puissent préciser son contenu conventionnel ("hard law") dans des accords complémentaires.

Une autre technique qui a permis la définition d'un certain nombre de règles dans le droit de l'environnement a été développé, àtravers des instruments souples, dans un cadre institutionnel. Il s'agit, évidemment, des résolutions et recommandations génératrices de "soft law" que, par cette nature, favorisent le ralliement des nombreux pays à une coopération à l'échelle globale face à des problèmes également globaux de l'environnement humain dans la perspective planétaire d'un partenariat global (l'adoption par voie de consensus va permettre une plus large application). A ce sujet, je considère que, dans le domaine du droit de l'environnement, le réalisme impose la technique d'élaboration des résolutions non obligatoires juridiquement, en réservant les décisions contraignantes pour les organisations régionales d'intégration (voir par ex. les règlements, directives et décisions communautaires) où il existe un degré important de solidarité.

En conséquence, je suis d'accord pour inclure dans la future résolution sur le processus d'adoption et de mise en oeuvre des règles dans le domaine de l'environnement, non seulement les normes qui découlent des sources traditionnelles du Droit international (traités, coutume, principes généraux et décisions des organisations internationales), mais également les règles de "soft law" (normes programmatiques contenues dans les traités cadres, résolutions des organisations internationales etc.) en tant qu'éléments qui interviennent activement dans la formation par étapes d'un droit international de l'environnement.

II. Les institutions

Les institutions jouent un rôle considérable dans la formation actuelle du droit international. En ce qui concerne plus particulièrement l'environnement — et sans négliger la transcendantale contribution du PNUE (bien qu'en partie handicapée par le problème de coordination entre les différentes institutions intervenantes) — , il faudrait créer des institutions plus adaptées, peut-être dans la ligne d'une "Autorité mondiale" inspirée dans "l'Autorité des Fonds marins et océaniques" chargée de l'analyse et la surveillance de l'état de l'environnement ainsi que de la promotion du droit international de l'environnement.

La prolifération des structures institutionnelles (fruit du développement des traités-cadres) pose, par ailleurs, un problème particulièrement grave, celui de la coordination inter institutionnelle, il faudrait donc améliorer la coopération au niveau universel, régional, national et non-gouvernemental.

En outre, les textes (résolutions, déclarations, décisions) qui sont adoptés, dans le domaine de l'environnement, dans les conférences, par les institutions et par les organes des organisations internationales sont, en règle générale, de caractère non contraignant, mais ils sont susceptibles de faire autorité, du moment où ils rassemblent un ensemble de recommandations sur lesquelles un large accord existe, et du moment que dans les travaux ont participé un nombre considérable de pays. Ces textes qui ont très souvent un caractère incitatif peuvent servir de base à un futur texte conventionnel "juridiquement obligatoire".

Il serait donc correct d'affirmer que lesdites résolutions et déclarations (universelles), bien que non obligatoires juridiquement peuvent traduire l'opinion de la communauté internationale et doivent être, par conséquent, respectées par les Etats.

Par ailleurs, les Etats qui ont contribué par leurs votes àl'adoption de ces résolutions doivent s'abstenir, en vertu du principe de la bonne foi, d'actes qui les priveraient de leurs objets et de leurs buts.

L'appareil institutionnel mis en place dans les constructions conventionnelles à plusieurs vitesses (traités cadres) (P. M. Dupuy) où sont énoncées les normes du droit de l'environnement va permettre le contrôle de l'application des obligations conventionnelles (par ex. rapports périodiques présentés par les Etats aux organes de "suivi" institués par les conventions).

Le contrôle de l'application du droit de l'environnement constitue, à mon avis, le défi majeur de ce nouveau droit. Problème, par ailleurs, très lié à celui de la formation de ce droit. Il me semble donc que la Résolution devrait examiner ensemble les deux questions : adoption et mise en oeuvre des règles dans le domaine traité.

III. L'élaboration du droit international de l'environnement par étapes

Malgré son caractère, relativement, récent le droit de l'environnement a connu un développement remarquable, ainsi depuis 1972 on assiste à la multiplication des normes conventionnelles, institutionnelles et coutumières. Toutes ces normes actant en interaction. Ainsi, par ex., l'existence de plus de 300 instruments conventionaux, par l'effet d'accumulation tend à se substituer à la condition de répétition des actes dans le temps qui est l'un des éléments caractéristiques de la coutume internationale. Par ailleurs, la multiplication de discussions internationales

dans le cadre des Conférences et au sein des organisations internationales favorisent la formation de l'*opinio juris*. Ces deux facteurs oeuvrent en faveur de la naissance des normes coutumières. Et à l'inverse, plusieurs principes qui sont devenus fondamentaux dans le droit coutumier de l'environnement ont trouvé leurs consécration dans des textes écrits conventionaux et institutionaux (par ex., la Déclaration de Rio, quand elle confirme le devoir de tout Etat de notifier immédiatement aux autres Etats tout accident majeur et toute situation d'urgence qui risquent d'avoir des effets néfastes imprévus sur l'environnement de ces derniers).

IV. La dimension transnationale du Droit de l'environnement

Il convient, également de souligner la portée transnationale des questions environnementales et par conséquent la nécessité d'établir des procédures de formation et de mise en oeuvres de normes qui tiennent compte de cette circonstance. A cet égard, l'élaboration du droit dans le cadre des conférences et organismes internationaux ouverts à la participation directe ou indirecte (statut consultatif) des forces transnationales constitue une procédure privilégiée dans le domaine de l'environnement, puisqu'elle permet de mobiliser l'opinion publique et d'associer les secteurs privés intéressés : les réseaux d'ON, le secteur des affaires et de l'industrie, les syndicats, les organisations de femmes, de jeunes, d'indigènes, les associations religieuses ou spirituelles, etc.(voir par ex. la conférence parallèle à la Conférence de Rio).

A cet égard, il convient de rappeler l'importance de l'opinion publique internationale comme garant de l'exécution des objectifs proclamés dans les traités-cadres et dans différentes résolutions des organisations internationales concernant l'environnement. Il convient, également, de souligner que la doctrine s'accorde à souligner la place croissante faite aux organisations non gouvernementales dans les procédures de mise en oeuvre des obligations conventionnelles en matière de protection de l'environnement.

A mon avis, les entités privées jouent un rôle central dans l'application et la mise en oeuvre du droit de l'environnement.

Par ailleurs, l'environnement constitue une matière dans laquelle on assiste à la multiplication des réunions, séminaires, et colloques scientifiques, notamment juridiques, qui permet d'exprimer les diverses convictions concernant des questions liées à la formation et mise en oeuvre des normes du droit de l'environnement. Toutes ces réunions facilitent la recherche d'un large consensus sur des questions qui sont également examinées en parallèle par des sujets internationaux dans le cadre de conférences et au sein des organisations internationales.

La portée transnationale des problèmes juridiques de l'environnement se fait tout à fait évidente, par ex. dans la question de la réparation d'un dommage. En effet, je suis d'accord avec Monsieur le Rapporteur Ferrari-Bravo quand il signale, en matière de responsabilité, la nécessité d'atteindre, en cas d'accident, les vrais sujets impliqués qui ne sont pas toujours des personnes de droit public et même la possibilité d'arriver aux assureurs des responsables.

L'application des normes dans le domaine de l'environnement constitue un problème très grave et sa résolution est prioritaire à la propre création de nouvelles normes. La participation des forces transnationales dans la procédure de contrôle et de suivi de l'observance du droit de l'environnement constitue un élément, à mon avis, d'une grande importance. Il me semble donc que la commission devrait étudier prioritairement la question de l'application des normes du droit de l'environnement.

V. Environnement et développement

Il existe un lien nécessaire entre développement et environnement, son articulation conditionne la préservation de l'environnement mondial qui est affecté par des risques globaux (changement climatique, disparition de la bio-diversité, dépérissement des forêts) dans lequel le sous-développement endémique d'une partie de la planète jour un rôle décisif, de la même manière qu'il existe également une responsabilité particulière des pays du Nord dans la dégradation et pollution mondiale (disparition de la couche d'ozone).

Les objectifs dans ce domaine ont été clairement dessinés tout au long de la Conférence de Rio : identifier les moyens de fournir aux pays en développement des ressources financières nouvelles et additionnelles en vue d'assurer le développement durable ; rechercher des mécanismes de financement volontaire, notamment par le biais d'un fonds international spécial, afin de réaliser le transfert de technologies ; quantifier ces ressources.

Les textes sortis de la Conférence de Rio, bien que affirmant le besoin du renouvellement des rapports internationaux sur une base équitable en vue de fonder un véritable "partenariat mondial" et l'interdépendance de tous sur la terre, néanmoins confirment, une fois de plus, l'importance du respect de la souveraineté des Etats comme principe du droit de l'environnement.

L'élaboration des normes dans ce domaine doit tenir compte de ce principe, ainsi, l'articulation environnement-développement doit reconnaître la souveraineté des Etats sur l'exploitation de leurs ressources naturelles et la détermination de leurs politiques de développement (principe 2 de la Déclaration de Rio). Bien que le respect de ce principe ne doit signifier

une absence absolue de contrôle et des responsabilités des pays non développés.

De plus, s'il est vrai que les normes internationales doivent permettre la mise en place d'un véritable "partenariat mondial", il convient également, à mon avis, que ces normes reconnaissent une responsabilité commune mais différenciée, selon le niveau de développement des pays concernés. Ainsi la Convention sur les changements climatiques insiste, tout au long de son texte, sur la coopération internationale nécessaire, sur la base du principe de souveraineté des Etats, dont la mise en oeuvre doit conduire à la fois au droit souverain des Etats d'exploiter leurs ressources naturelles selon leur propre politique de développement, notamment en adoptant des législations efficaces en matière d'environnement, et à la reconnaissance d'une "responsabilité commune mais différenciée". Egalement, la conservation de la diversité biologique doit être assurée par les Etats conformément à leur droit souverain d'exploiter leurs propres ressources selon leur politique d'environnement (art. 3 de la Convention sur la diversité biologique).

En ce qui concerne les pays développés, les incentives économiques, mieux que les sanctions économiques, constitueraient un moyen très approprié pour encourager le respect des obligations concernant la protection de l'environnement.

Le principe des "responsabilités communes mais différenciées", prend place, dans le droit conventionnel de l'environnement, dans des traités "inégaux", puisqu'il déroge aux principes traditionnels d'égalité et de réciprocité qui sont à la base des normes conventionnelles.

L'attribution des responsabilités différenciées aux Etats dans le domaine de l'environnement, selon les critères susmentionnés favoriseraient, à mon avis, l'application des normes internationales du droit de l'environnement.

...

La fin de ce commentaire concerne les problèmes de responsabilité (Travaux de M. Orrego Vicuña, p. 313).

Revised suggestions for a draft resolution[1]

"Procedure for the Adoption and Implementation of Rules in the Field of the Environment"

27 August 1996

The Institute of International Law,

Noting that during the last decades international environmental law has evolved into a vast *corpus juris* composed of a considerable number and variety of general principles, customary and conventional rules and acts of international organizations ;

Convinced that such *corpus juris* is an essential element for the management of the environmental crisis ;

Conscious that the effective protection of the environment requires rapid and continuous legislative action, ample participation of States and other agents in the creation and implementation of the law, flexible legal instruments and effective means to ensure compliance ;

Realizing that there are not prospects for the prompt establishment of a supranational source of authority of global scope to regulate environmental matters ; therefore treaties and collective decisions adopted by international organizations appear to be the most practical instruments to promote the development of the international law of the environment ;

Convinced that techniques of the regulatory processes for the creation of international environmental rules and mechanisms to ensure their compliance require adjustments in order to make them more responsive to the seriousness and urgency of the environmental crisis and to ensure wider acceptance of and compliance with environmental rules by States ;

Adopts the following resolution :

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2 (a) Bold denotes change ;

(b) "—" denotes deletion ;

(c) Numbers in brackets indicate the numbers of corresponding paragraphs in the first version.

I

1 [I,1]International environmental rule-setting should be directed mainly towards the adoption of — instruments containing **binding rules and appropriate measures with respect to their monitoring and implementation. Such instruments should take full account of the requirements of paragraph 5 below.**

The idea behind the original text of para. 1 was to emphasize the need to adopt detailed rules containing concrete obligations as opposed to general principles and declarations, of which there are, at present, more than enough. As it stands now, amended as suggested in Geneva, the purpose of this recommendation is not clear to me. May I suggest to go back to the original idea under the following new formula :

"1. International environmental rule-setting should be directed mainly towards the adoption of binding **rules defining and concretizing general principles and rules accepted as environmental law in force, and of appropriate mechanisms with respect to their monitoring and implementation".**

Otherwise I suggest to delete para. 1. After all, it does not deal strictly with a procedural matter, but one of substance.

2 [I,2]**Multilateral environmental treaties and other international instruments setting forth general legal frameworks should be supplemented by separated instruments** containing detailed rules, regulations and standards, and subject to expeditious procedures for their adoption, review and amendment, **so as to ensure their continuous updating and rapid coming into force.**

3 [I,5]**In negotiating and adopting multilateral environmental treaties and decisions of international organizations, the widest participation of States, in particular those with specific interests in the matter being regulated, should be sought in order to enhance the prospects for their general acceptance and implementation.**

4 [I,6]Technical and financial assistance, including assistance in building up expertise in international environmental law, should be made available to developing countries to ensure their effective participation in environmental law-making processes.

5 [I, 10 and I,11]

In negotiating multilateral environmental treaties and other international instruments prescribing the adoption of measures for the protection of the environment, **States and international organizations should take into account** the differences in the financial and technological

capabilities of States and their different contribution to the environmental problem, and, **on the basis of such differences**, should provide for economic incentives, **technical assistance, transfer of environmental technologies** and differentiated treatment, **where appropriate.**[2]

6 [I,8]To **achieve** the widest possible acceptance of international environmental **rules** and ensure **their effective** implementation, **all efforts should be made to reach consensus for their** adoption before resorting to voting. **Efforts to reach consensus should not result in the weakening of the contents of the rule.**

II

7 [II,1]Declarations, resolutions and other non-binding acts of global international organizations and conferences containing rules for the protection of the environment and adopted by consensus or without negative vote, **may** constitute evidence of general principles of law or of international custom[3], or reflect the views of the international community on what the rule of law should be[4]. **The conduct of States in conformity to such rules is presumed to be in accordance with the law.**

8 [II,2]States that have **voted in favor of, or have acquiesced to**, the adoption — of a non-binding instrument containing clear and precise rules on the protection of the environment, **are expected to act**, on the basis of the principle of good faith, **in conformity** with those rules.

9 [II,7]**Environmental protection systems should include the duty by participating States** to submit periodically to the competent international organization, reports on implementation of international environmental rules for their public review.

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2 Article VIII of the 1979 resolution of the Institute on "The Pollution of Rivers and Lakes and International Law" reads as follows : "In order to assist developing States in the fulfilment of the obligations and in the implementation of the recommendations referred to in this Resolution, it is desirable that developed States and competent international organizations provide such States with technical assistance or any other assistance as may be appropriate in this field".

3 At the Cairo session (1987), the Institute adopted a resolution on "The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective". Conclusions 19 and 20 of that resolution state that under certain circumstances a resolution (of the General Assembly) may constitute evidence of general principles of law or of customary law.

4 *Ibid*, conclusion 13 : "A law-declaring resolution, [of the General Assembly] adopted without negative vote or abstention, creates a presumption taht the resolution contains a correct statement of law. Conclusion 16 states : "The authority of a resolution is enhanced when it is adopted by consensus".

10 [II,6]**Multilateral environmental** treaties and acts of international organizations establishing environmental obligations should provide for mechanisms to :

(a) adopt, review and amend, through expedite procedures, rules, regulations and standards to implement such obligations ;

(b) **review and assess reports submitted by States on implementation of such obligations** ;

(c) supervise the implementation of, and compliance with, international environmental rules. **Implementation and compliance mechanisms should include reporting, fact finding and inspection.**

11 [I,9]International environmental organizations endowed with regulatory powers **should be provided** with mechanisms and procedures to ensure **that environmental rules adopted by them are consistent with the legal framework governing the activities of such organizations.**[5]

12 [II,14]**Multilateral environmental treaties and acts of international organizations establishing** systems for the protection of the environment, **should provide for** informal, **non-confrontational** procedures, **open to States and, when appropriate, to private entities**, to deal with cases of non-compliance.

13 [II,15]In order to ensure enforcement of international environmental obligations within the domestic legal systems, States should make available to all subjects, including natural and juridical persons, judicial and non-judicial proceedings to settle disputes arising from violations of environmental obligations.

14 [II,3]Environmental treaties and binding acts of international organizations prescribing the enactment of domestic legislation or the adoption of other implementation measures by State Parties to the treaties or Member States of the international organizations, should establish time-limits within which States must take the prescribed action.

15 [II,4]States bound to enact domestic legislation or to adopt other measures to implement environmental obligations contained in a treaty to which they are parties or in an act of an international organization to which they are members, shall adopt such measures within a reasonable

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5 At the Amsterdam Session (1957) the Institute adopted a resolution on "Judicial Redress Against Decisions of International Organs". Section I of that resolution states that : " ... the establishment of this control, the means of redress which it implies and the effects which would follow therefrom do not appear realizable in the present state of affairs, except through the conclusion of treaties or other instruments particularly suited to each organ or organization".

period of time when no specific time-limit has been established in the treaty or in the act of the international organization.

16 [II,5]When a State bound by a treaty or an act of an international organization to enact domestic legislation or to adopt other measures to implement environmental obligations has not done so within the established time-limit or, in case no time-limit has been established, within a reasonable period of time, the State should report to the competent international authorities or to the other parties to the treaty or members of the international organization the reasons why it has not taken the prescribed action.

17 [II,11]**In order to encourage public awareness and enable all citizens to participate in the discussion of environmental issues**[6], States **should** disseminate and make available **within their territories** information as complete as possible on environmental problems and issues and on national and international rules related to them.

18 [II,13]States shall **designate** appropriate competent — authorities to ensure implementation of international environmental rules and supervise compliance **within their territories.**[7]

19 [II,12]Due publicity should be given to implementation procedures, including publication and dissemination of reports submitted by States and reports of organs of international organizations on compliance by States. Implementation activities of international environmental organizations should be open, as appropriate, to non-governmental organizations.

20 [II,10]Secretariats and other organs established by environmental treaties, international conferences or acts of international organizations should keep governments, **concerned** non-governmental organizations — and public opinion in general, — permanently informed on their activities and programmes.

21 [I,7]**States and international organizations should provide interested non-governmental organizations opportunities to contribute effectively to the development and implementation of international and environmental law through, *inter alia*, the appropriate participation in the law-making process, the provision of technical advice to States and international organizations, the raising of public awareness of environmental problems and public support for regulation, and the**

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6 Rio Declaration, Principle 10.

7 At the Cairo Session the Institute adopted a resolution on "Transboundary air pollution". Article 4 of the resolution prescribes the "adoption of efficient and adequate administrative and technical measures and judicial procedures for the enforcement of [...] laws and regulations".

monitoring of compliance by States and non-State actors with environmental obligations.

22 [I,7]**States and international organizations should also allow the scientific community, the industry and labour sectors and other non State entities to participate, as appropriate, in the legal process of creating international rules to regulate environmental issues. (9)**

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Comments made by Mr Luzius Wildhaber

1st October 1996

...

Upon reading through the draft Resolution, I found that I agreed with your new formula for paragraph 1. Indeed the formulation which resulted from the deliberations in Geneva has a somewhat helpless appearance.

In paragraph 19, I find that the words "as appropriate" have an effect too restrictive. Paragraphs 20 and 21 describe where it is appropriate to open the implementation activities to non-governmental organizations. If one adds the proposed words in paragraph 19, in addition to paragraphs 20 and 21, the overall effect is to make it rather discretionary for States and international environmental organizations whether they want to include non-governmental organizations. Their contribution and know-how, however, is often invaluable, so that access for them should be handled as liberally as possible.

Since I have not been able to attend the meeting in Geneva and am therefore not familiar with the discussions that were led there, it is probably inappropriate for me to make a multitude of suggestions. I therefore restrict my remarks to the two points which strike my attention in particular.

Luzius Wildhaber

Comments made by Mr Ibrahim Shihata

19 November 1996

...

Thank you very much for sending me the revised text of the draft Resolution on Procedure for the Adoption and Implementation of Rules in the Field of Environment. My comments are few and mainly editorial. They include the following :

1. I agree with your preferred text for item 1 (article I, 1) but would say at the end "implementation and monitoring", rather than "monitoring and implementation", just to follow the logical order.

2. The word "separated" in item 2 (I, 2) should read "separate".

3. In item 3 (I, 5), I suggest that reference be made also to broad consultation prior to the preparation of the draft rules.

4. In item 6 (I, 8), the last sentence may be deleted and instead, the following words could be added at the end of the previous sentence : "without attempting to reach the lowest common denominator".

5. I propose deletion of item 7 (II, 1). I believe II, 2 sufficiently serves the purpose.

6. In item 10 (II, 6 (c)), the words "in particular" may be inserted after the words "should include".

7. I propose the addition of the following sentence at the end of item 16, II, 5 : "To the extent practical, such reports shall be submitted to the conference of the contracting parties for consideration".

8. In items 17 and 18 (II, 11 and II, 13) the phrase "within their territories" may read "in territories under their jurisdiction".

9. In item 21 (I, 7) the definitive article "the" may be deleted in each of the phrases following the words *"inter alia"*.

10. Reference to "implementation and monitoring" may also be made in item 22 (I, 7).

Ibrahim Shihata

Final Report

I. Sources of environmental law

Following the 1972 Stockholm Conference an extraordinary development of the international law of the environment has been taking place. Environmental problems were, of course, the object of concern before 1972 : several treaties and other instruments relating to the protection of the environment were concluded, and the subject was not absent from the agenda of international organizations. But in the pre-Stockholm era the approach to environmental problems was piecemeal and lacked coherence : agreements had, in general, a very limited geographical or material scope and did not deal with the environment as a whole[1] ; and international bodies acted separately and without any co-ordination. Several conventional and customary rules indirectly protective of the environment were adopted in that period, as it was the case with the law of war and armed conflicts, but those rules intended to protect individuals and their property ; the protection of the environment was not in itself the main objective.[2]

During the last 25 years, national and international legislative activity in the field of the protection of the environment increased in a scale unpredictable at the aftermath of the Stockholm Conference. At present there is a growing international *corpus juris* composed of a considerable number and variety of principles, rules, regulations and standards embodied in a vast array of instruments of different nature and with different degrees of legal value.

Sources of this *corpus juris* are the same as those from which rules of general international law are drawn : general principles of law, custom, treaties and, to a lesser degree, binding decisions of international bodies. Unilateral acts regarding the protection of the environment may also be capable of producing international obligations and at least in one

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1 Pierre-Marie Dupuy : "Le droit international de l'environnement et la souveraineté des états" in *L'avenir du droit international de l'environnement*, Colloque, La Haye, 1984, p. 31.

2 Philippe Sands : "Principles of international environmental law", vol. I, p. 234.

case submitted to the International Court of Justice and relating to the environment, an unilateral declaration by a State (France's declaration concerning the conduct of nuclear tests) was recognized by the Court as a source of law.[3]

1. General principles of law

General principles of law, understood as basic rules that are commonly found in domestic legal systems, are applicable, and indeed have been applied, to environmental matters. Those basic rules relate mainly to procedure, evidence and jurisdiction as, for instance, the rule that no one can be judge in his own cause, the principle of estoppel or acquiescence, and *res judicata*. Some substantive principles of law, such as general principles of responsibility and reparation (any breach of a legal obligation entails the duty to make reparation), the principle of good faith and the abuse of rights doctrine have also been invoked before international tribunals dealing with environmental issues.[4]

The recourse to general principles of law gives international tribunals a limited creative role by allowing them to fill gaps resulting from the insufficient development of customary and conventional law[5], but international tribunals have been very cautious in the use of this source and have invoked them mainly to confirm conclusions based on rules from other sources.

2. Customary law

Due to the novelty of the environmental problems, there has not been much time for States to develop consistent practice providing for the material element of customary law. Of course, in modern international law, customary rules are not required to be based on a practice observed from time immemorial or to have been accepted by all and each State to be recognized as such. But even accepting that the maturity of a customary rule may occur within a relatively short period of time — always assuming the existence of the *opinio juris* —the state of permanent change that characterizes the environmental context makes the formation of customary law in this domain rather difficult.

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3 Nuclear Tests Case, New Zealand v. France, *ICJ Reports*, 1974, pp. 270-272. The ICJ has also taken into account the Truman Declaration on the Continental Shelf (North Sea Continental Shelf Case, *ICJ Reports*, 1969, pp. 32, 47.

4 Philippe Sands, *op. cit.*, p. 123.

5 Eduardo Jiménez de Aréchaga, "Derecho Internacional Público", tome I, p. 171.

In spite of this, some of the most important principles of environmental law are customary in character, such as the rule according to which States are obliged not to use or not to allow the use of their territories so as to cause damages to other States (*Sic utere tuo ut alienum non laedas*) applied in the Trail Smelter arbitration[6] and to some extent embodied in Principle 21 of the Stockholm Declaration and Principles 2 and 19 of the Rio Declaration.

New ideas that have recently emerged in the environmental field, such as the principles of common but differentiated responsibility, intergenerational equity and the precautionary principle, are considered by some to be principles of environmental law that have evolved through practice and have become customary law, or are, at least, in the process to become customary law. However, the status of each of those principles is at present a matter of controversy because it is difficult to ascertain the moment in which those ideas crystallize into binding customary rules.[7]

Many customary rules in the field of the environment are negative in character ; they establish the obligation to refrain from doing something. Those with a positive content, such as the duty to co-operate, the duty to have due regard for the rights of other States in case of utilization of shared resources and the obligation to inform and to enter in consultations with States in case of projects or activities that might have significant transboundary environmental effects[8], are frequently too general

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6 *RSA*, vol. III, 1965.

7 For instance : Although the precautionary principle appeared in environmental law in the mid 80s, its content was precisely described (in the Bergen Declaration : "Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation"), and it was incorporated in many treaties and other international instruments including the Rio Declaration (Principle 15), many authors refuse to recognize it as a binding customary rule. Similarly, it is doubtful whether the "polluter-pays" principle has achieved the status of a general principle applicable as a rule of customary law. The opposition of some countries to this principle is reflected in the restricted way in which it was formulated in the Rio Declaration :

> "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taken into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." (Principle 16).

8 "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith" (Principle 19 of the Rio Declaration).

and do not provide precise standards against which compliance by States could be measured.

The reciprocal influence between customary law and conventional and institutional law has been amply highlighted and examined by contemporary jurisprudence and doctrine. In the realm of environmental law that mutual influence is particularly intense due to the extraordinary multiplication of treaties and acts of international organizations during the last decades, and to the fact that States must react constantly against environmental challenges, in turn generating practices on the basis of which customary rules are generated.

Thus, on the one side treaties or decisions of international organizations may become the vehicle for the ascertainment of pre-existing customary rules or for the crystallization of rules *in status nascendi*. On the other side, State practice leading to the formation of a legal custom has often had as a point of departure *a lege ferenda* provision contained in a treaty or in an act of an international organization.[9]

3. Treaties

Treaties are the most important source of international environmental law. According to UNEP's register the number of multilateral treaties dealing with environmental issues exceeds 150, of which 102 have been concluded during the last 20 years.[10]

UNEP is considered to be "the predominant sponsor" of international environmental treaties although this was not a task specifically assigned to it by its charter.[11] The production of UNEP is outstanding ; its law-setting activities increased after the UNEP's Governing Council approved the 1981 Montevideo Programme for the "Development and Periodic Review of Environmental Law", its main tool for the development of environmental law in the last decade.

Many of the most important multilateral legal instruments adopted in recent times have been elaborated under Programmes, such as the

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9 Eduardo Jimenez de Arechaga : "International Law in the Past Third of a Century", Académie de droit international, *Recueil des Cours*, vol. I, 1978, p. 12.

10 Edith Brown Weiss reports the existence of "over 900 legal instruments ... fully concerned with environmental protection or [containing] environmental provisions" ("New Directions in International Environmental Law", paper presented at the United Nations Congress on Public International Law, New York, March 1995).

11 General Assembly Resolution 2997/XXVII (1972).

Regional Seas Conventions, the Vienna Convention for the Protection of the Ozone Layer (the Vienna Convention), the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention), and the Convention on Biological Diversity.

Environmental treaties have been concluded and adopted as a response to specific problems and therefore they are based on a sectorial approach. A result of this is that conventional environmental law has developed in a piecemeal fashion. There are contradictions and overlappings and some areas of the environment have been insufficiently regulated or have not been regulated at all. This flaw affecting the conventional regulation of the environmental question has become more noticeable since the emergency of a set of new environmental problems of global scope (climate change, the protection of the biodiversity, the protection of the ozone layer) demanding a global or very general response. At present environmental problems transcend the limits of transboundary areas and issues of global dimensions have become the most important items of the environmental agenda. These circumstances have led some to advocate for the conclusion of a comprehensive general treaty that would be to the environment what the World Trade Organization agreements are to international trade.

Regional approach : Around 50 per cent of multilateral environmental treaties are regional or subregional in scope.[12] The regional approach, either by itself or as a supplement to global action, has been praised as offering the best prospects to face most environmental problems. In some cases the very nature of the issues and the scope of the problems, limited to a precise geographical area — for instance, some forms of pollution such as the pollution of rivers, or the conservation of some particular resources — impose a regional treatment. Political consensus and the functioning of regulatory and supervisory mechanisms are facilitated if they take place within a regional context.

It has been said that one of the keys to the success of the legal regime governing dumping at the sea lies in the fact that the global framework provided for in the 1972 London Convention has been complemented by regional agreements. The conclusion of regional agreements is also encouraged in the Basel Convention, provided that such agreements do not set standards less stringent than those established in

12 UNCED, "The Effectiveness of International Environmental Agreements", Peter H. Sand, ed. 1992, p. 9.

the global treaties. The numerous references in the 1982 Convention on the Law of the Sea (UNCLOS) to regional arrangements, rules and cooperation indicate that the regional approach plays a fundamental role in the preservation of the marine environment, an area of the environment that, at first sight, seems to call for global treatment only.

The most eloquent example of effectiveness of the regional approach applied to environmental matters is, perhaps, the European Union. The EU has significantly contributed, particularly after the adoption in 1986 of the Single European Act, to the development of environmental law through the adoption of regulations and directives. Not only have the organs of the EU the power to adopt decisions binding upon all its members, but they can also resort to implementation and enforcement procedures that include a judicial instance before the European Court of Justice.[13]

However, regionalism is not always, according to some opinions, the best approach to deal with some specific problems. There are cases where general environmental interests would be better protected if regional systems allowed some extra-regional intrusion such as the participation or membership of outsider States. The relative lack of effectiveness of some fisheries commissions, the members of which are exclusively States that participate in the exploitation of the resources in the respective area, has been attributed to their restricted composition ; instead of rationally managing the resources the commissions have furthered the economic interests of their members without regard to the general interest in conservation.[14] This is why the inclusion in the membership of regional bodies of "a constituency of outside States able to speak for the environmental interests of a wider community" has been advocated.[15]

The obvious conclusion that may be derived from the preceding comments is that the general interest to protect the environment is best served by the "interplay of global and regional rules and institutions".[16]

Generality of treaty provisions : Provisions of environmental treaties establishing objectives or prescribing rights and duties are frequently drafted in very broad and general terms. Although many principles and rules have

13 Birnie and Boyle, *op. cit.*, p. 65.

14 A.W. Koers : "International Regulation of Marine Fisheries : A Study of Regional Fisheries Organisations", London, 1973, p. 126.

15 Alan Boyle : "Saving the world ? Implementation and Enforcement of International Environmental Law Through International Institutions", *Journal of Environmental Law*, vol. 3, N° 2, p. 243.

16 Patricia Birnie and Alan Boyle, "International Environmental Law", Oxford, 1991, p. 331.

acquired concrete contents through regulation and elaboration, it is still a common feature of most environmental conventional law the abstract and sometimes ambiguous character of their provisions. In some cases such an ambiguity has been deliberate so as not to impose direct and clear obligations upon States. Environmental treaties are studded with "should's" and expressions such as "to the extent possible", "will make an effort" and "when appropriate". Some authors consider these treaties as a form of soft law.[17]

Even the definition or the elaboration of key concepts that are essential to determine the scope and the nature of the obligations deriving from the treaty is often left to further instances. The Basel Convention is an illustration of this indetermination : rules and procedures on "liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes" will be adopted in a protocol "as soon as possible" ; technical guidelines for the "environmentally sound management of hazardous wastes or other wastes" was also left for further regulations.[18] The Convention on Climate Change leaves to subsequent negotiations the formulation of programmes containing measures to mitigate climate change.

This technique is a consequence of the reluctance shown by States to be bound by specific treaty obligations in the field of environmental protection ; yet they are willing to accept less constraining rules that would allow them to exercise some discretion in interpreting and applying them. Rather than accepting treaty prescriptions as obligations to comply with, States prefer to accept them as targets they are "free to implement (or not) at whatever pace they see fit".[19] Consequently most multilateral treaties regulating environmental questions do not contain measurable objectives (quantitative restrictions, standards) ; they only provide a general legal framework and institutional procedures through which States Parties are expected to adopt further regulatory action to provide for more precise

17 "A Hard Look at Soft Law", remarks by Gunther Handl, *Proceedings of the American Society of International Law*, 1988, p. 372.

18 Art. 12 of the Convention and Resolution 8 of the Final Act. See : Handl, "Environmental Security and Global Change : The Challenge to International Law", *Yearbook of International Environmental Law*, vol. 1, 1990, p. 6.

19 Hurrell and Kingsbury : "The International Politics of the Environment : An Introduction", in *The International Politics of the Environment*, Hurrell and Kingsbury, eds., p. 22.

rules, by concluding additional treaties or protocols[20] or adopting decisions, annexes or other instruments subsidiary to the parent treaty.

Thus the tendency now prevailing in environmental treaty-making is to separate the general legal framework from texts containing more specific commitments and detailed regulations on concrete issues. While the former are embodied in treaties negotiated, ratified and revised in accordance with traditional diplomatic procedures, the latter can be incorporated either in protocols (generally open only to parties to the parent agreement) or in other, less formal instruments such as annexes to the main treaties, the coming into force of which does not require ratification : they are negotiated, adopted, put into force and amended in accordance with more expeditious decision-making processes established in the main agreement.[21]

An example of the first technique (treaty supplemented by protocols) is the Vienna Convention that prescribes that State Parties shall adopt measures for the protection of the ozone layer, without specifying what kind of measures. This compromise led to the conclusion of the Montreal Protocol that sets precise quantitative restrictions on consumption and production of controlled substances and provides for subsequent amendments and adjustments. Other examples of the technique to negotiate, through institutional procedures, supplementary protocols to the main treaty are the 1979 Geneva Convention on Long Range Transboundary Air Pollution and UNEP's Regional Seas Conventions.

The second technique (using additional instruments adopted by simpler procedures) is illustrated, inter alia, by the Whaling Convention, whose main organ, the International Whaling Commission, adopts and amends regulations on matters such as protection of species, opening and closing of waters, etc. The Montreal Protocol has established mechanisms and procedures for the continuous adjustment of the prescribed measures through their periodic revision and assessment, and for the expeditious

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20 The Antarctic system is a good illustration of a treaty supplemented by subsequent instruments of similar legal nature. Parties to the 1959 Antarctic Treaty have met periodically and have adopted, *inter alia*, the 1972 Convention for the Conservation of the Antarctic Seals, the 1980 Convention for the Conservation of Antarctic Marine Living Resources and the 1988 Convention for the Regulation of Antarctic Mineral Resource Activities.

21 This technique is not new ; in the field of the environment protection it was adopted in the earliest marine conservation regulations. For a complete list of precedents see : Paolo Contini and Peter H. Sand : "Methods to Expedite Environment Protection : International Ecostandards", *AJIL*, vol. 66, N° 1, 1972, p. 41.

coming into force of the amendments through a decision-making procedure that is a departure from the principle of consent (art. 2, para. 9). Other examples are the 1973/78 MARPOL Convention, the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Basel Convention.

The method of detaching the "diplomatic part" from the "technical part" of environmental obligations[22] has, in fact, facilitated the acceptance of some treaties by States : the rapid entering into force of the Convention on Climate Change, for instance, has been attributed to its framework character.[23] Another advantage : environmental matters are in a state of permanent change ; technological progress and the expansion of scientific knowledge occur at an accelerated pace. These changes may not affect the essence of general principles and rules as they are embodied in conventions and treaties, but they affect specific rules, in particular those of a technical nature, that may become quickly obsolete unless they are periodically reviewed and adjusted to the new circumstances. While the review of treaty provisions is difficult and cumbersome, and their amendment will come into force only after the long process of ratification has been completed, technical and scientific regulations may be easily reviewed and amended or supplemented by simplified procedures if they have been incorporated in annexes, appendices or similar instruments added to the main treaty.

Expeditious procedures to amend and put into force specific rules together with their reviewing on a permanent basis, ensure the adaptability of conventional environmental law to changing circumstances. This process of continuing adjustment alters in a subtle way the nature of the outcome of the international legislative activity. As Handl says, international legislation :

> " ... is no longer a single well-defined product carried by expectations of stability for a foreseeable future. It is rather a fragile, temporary legal sign-post in an institutionalized process in which legal positions are subject to constant review and susceptible to frequent and speedy alteration".[24]

22 P. Contini and P. H. Sand, *ibid.*

23 Hermann E. Ott : "Elements of a Supervisory Procedure for the Climate Regime", *Heidelberg Journal of International Law*, N° 3, 1966.

24 Handl, "Environmental Security ...", p. 7.

4. Decisions of international organizations

The adoption by international organizations of decisions binding upon their State members has become a new technique for the development of international law. But only exceptionally decisions of international organizations or conferences dealing with environmental matters are a source of obligations.

The European Union is one of the few cases of an international organization that has been empowered to adopt binding decisions on environmental matters. In the European Union, under the new rules of the Maastricht Treaty, the Council of Ministers has, as a general rule, the power to adopt environmental legislation by a qualified majority. The adoption of environmental decisions on some specific areas requires unanimity ; however, even for these decisions the Council, acting unanimously, may agree to change the decision-making procedure to qualified majority (art. 130S).[25]

The system for the protection of the ozone layer provides an interesting and unique example of decisions adopted within a global context by majority that bind all parties. According to the Montreal Protocol, amendments to the levels of reduction for the production or consumption of controlled substances adopted by a two-third majority of the Parties present and voting that includes a combined majority of developed and developing States, are binding to all Parties, including those who voted against.[26]

In some cases decisions adopted by international organizations become binding after they have been approved by member States in accordance with their constitutional procedures. In these cases, they are comparable to treaties adopted by a simplified procedure, "the difference being a formal one, that the binding text is approved orally at a meeting (by resolution), rather than embodied in an instrument signed by all parties (treaty)".[27] One example is provided by the Organization for Economic Cooperation and Development (OECD). Art. 6 of the Convention of 14 December 1960 states that " ... decisions shall be taken and recommendations shall be made by mutual agreement of all the Members" and that they are not binding on any Member "until it has complied with the requirements of its own constitutional procedures". Some binding

25 See David Freestone and Diane Ryland : "EC Environmental Law after Maastricht", *Northern Ireland Legal Quarterly*, vol. 45, N° 2, 1994, p. 159.

26 Art. 2, para. 9 (c), as amended.

27 *Cf.* "Proposals by a Commission of Norwegian Experts", document provided to the members of 8th Commission by Mr. Finn Seyersted, p. 43.

decisions adopted by the OECD following this procedure deal with environmental matters.[28]

A way to facilitate the adoption of binding decisions by international organizations is the "non-objection procedure" according to which decisions adopted by a qualified majority become binding on any member who does not object to them within a prescribed period. States are thus dispensed from actively expressing their consent.

This technique has become characteristic of international fishery bodies. Most of them perform only limited advisory or recommendatory functions and their recommendations require subsequent national endorsement before they take any effect. But some fishery commissions, including the International Whaling Commission and several commissions operating in the Atlantic Ocean area, such as the North-East Atlantic Fisheries Commission, the International Commission for the Southeast Atlantic Fisheries and the International Baltic Sea Fishery Commission, have the power to adopt by majority regulations embodying management measures that become binding to all those members that do not oppose them.

The non-objection or tacit consent procedure is also used by several international bodies to amend annexes and other instruments subsidiary to treaties. Examples of this procedure are found, *inter alia*, in the London Convention on Prevention of Marine Pollution by Dumping of Wastes, with respect to the amendments of Annexes to the Convention ; the Basel Convention, with respect to the adoption and entry into force of additional annexes to the Convention or to any of its protocols, and to the adoption and entry into force of the amendments to such annexes or protocols ; the Paris Convention on the Protection of the Marine Environment from Land-Based Sources, with respect to the amendments of its annexes ; CITES, with respect to the amendments to some of its appendices ; the Vienna Convention with respect to the adoption of annexes to the Convention or to any of its protocols and to amendments to the annexes.

A variation of the non-objection procedure is provided by the 1973 MARPOL Convention. Amendments to an Appendix to an Annex to the Convention adopted by the appropriate body of IMO (the Marine Environment Protection Committee) shall be deemed to have been accepted at the end of a given period, unless an objection is communicated to the Organization by not less than one third of the Parties.

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28 See, for instance, decision of 22 July 1977 on consultation and monitoring of immersion of radioactive wastes in the sea, and decision of 1 February 1984 on control of transboundary movements of dangerous wastes.

The possibility for a member State to opt out of "the secondary law" created by an international body, in other words, the possibility for a member State to elude obligations accepted by other members of the organization by simply opposing them, has been seen as a factor that undermines the effectiveness of the protection system. While this may have been the truth in some cases[29], it is also true that such possibility facilitates — and sometimes is the condition for — the acceptance by States of the general rules contained in the treaty.

5. Soft law[30]

Rules of "soft law" are not properly a source of law, but their impact on the generation of environmental international rules is such that they must be included in a study of sources, at least as an important factor contributing to the development of the law. Rules of "soft law", although not formally binding, are generally observed by States or, at the very least, generate a strong expectation that States will conform their conduct to them and, in the long term, will adhere to them.

Soft law rules result from the need to overcome deadlocks in the negotiation of matters on which States want to introduce some order and predictability without tying themselves too much. Unwilling to be too rigidly bound, States voluntarily accept to introduce limits to their freedom if they are prescribed in a less compelling way by rules of soft law.

They are contained in declarations, recommendations, standards, codes of conduct, guidelines and other non-binding instruments adopted by international organizations or conferences, or included in binding instruments — a "framework" or "umbrella" treaty — but formulated in a manner that can not be interpreted as imposing obligations.[31] The fact that they are contained in a non-binding instrument, or, if in a binding

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29 CITES and the International Convention for the Regulation of Whaling are mentioned by Birnie and Boyle (*op. cit.*, p. 14) as cases where the "objection procedures" have weakened the effectiveness of the protection systems.

30 Although the expression "soft law" — widely used in legal writings — is not of the liking of some of the members of the 8th Commission, I decided to retain it because it is a short and convenient way to name the rules referred to in this section that stresses their *lege ferenda* nature and indicates their potential to become "hard law". (See Birnie and Boyle, *op. cit.*, pp. 16 and 17). To some jurists, the use of the expression "soft law" - contradictory in itself because law is hard or it is not law - implies the acceptance of a gradation of international normativity that would blur the difference between what is law and what it is not.

31 Paul C. Szasz, "International norm-making" in *Environmental Change and International Law*, Edith Brown Weiss, ed., p. 70 ; "A Hard Look ...", remarks by P-M. Dupuy, p. 386.

instrument, they are too general and vague to create an enforceable obligation, facilitates their acceptance by States. They have a sort of "legitimating effect" : States cannot contest the conduct of other States that is in conformity with a rule of soft law, in particular if the rule is contained in a non-binding act of an international organization that has been supported by the international community in general, such as a declaration adopted by the U.N. General Assembly by consensus.

It is perhaps appropriate to draw a parallel between the situation of States that have voted for or have consented to a non-binding resolution of an international organization and States signatories of a treaty : in both cases States should refrain from acting in a manner incompatible with the provisions of the treaty or the resolution. This is not to equal "soft law" to "hard law". The provisions in question are not legally binding and their violation does not entail responsibility. But those States that having had the opportunity to express their opposition have instead supported the resolution with their votes, should be at least bound to refrain from a conduct contrary to it on the basis of consistency and the principles of good faith and estoppel.

The reiteration and confirmation, through time, of principles and rules in soft law instruments exert a firm pressure that very often induces States to abide by them. The best proof that rules of soft law have, in the long run, actual legal effects is the fact that States are extremely careful in negotiating such rules and in some occasions they have even felt necessary to make reservations to non-binding instruments containing them.[32]

Doubtless, rules of soft law do have a formative influence on the development of "hard" law ; it has been recognized that non-binding acts of international organizations may give shape and substance to emerging environmental law and orient its development. They may even have stronger legal effects when efficient follow-up mechanisms are provided for, as it is the case with some human rights instruments.[33]

Such an influence operates in at least two ways : First, rules of soft law may be the starting point of a process that often culminates in the adoption of agreements or other binding instruments. Several environmental agreements have incorporated previously elaborated rules of soft law. A recent example is the "Protocol on Environmental Protection to the Antarctic Treaty" that "transforms a broad body of 'soft law',

32 "A Hard Look ...", remarks by Pierre-Marie Dupuy, p. 386.
33 "A Hard Look ...", remarks by Bruno Simma, p. 377.

developed since the 1960s, into a modern treaty arrangement".[34] Soft law instruments operate, then, "as catalysts in the evolution of international environmental law proper".[35]

Second, non-binding decisions adopted by international organizations and conferences — in particular those that have been accepted by all or most of the members of a global international organization — contribute to the formation of customary rules. Some of the principles contained in the Stockholm Declaration, incorporated in subsequent non-binding instruments such as General Assembly resolution 2997 (XXVII), the 1982 World Charter for Nature and the 1992 Rio Declaration, are currently considered to be a part of customary law.[36] The duty to undertake environmental impact assessments for certain proposed activities, programmes and policies, — invoked by New Zealand in its 1995 Request before the International Court of Justice — has been seen as a customary rule of recent formation, originated in requirements established in several non-binding and binding international instruments.[37]

Some codes and standards adopted by IMO, although non-binding, are widely observed and implemented, and considered to be, in the view of many commentators, the "applicable international rules and standards" referred to in several articles of Part XII of UNCLOS. UNEP's principles of Conduct Concerning Natural Resources Shared by Two or More States and the Montreal Guidelines for the Prevention of Pollution from Land-based Sources are also examples of non-binding instruments that have influenced State practice and the development of customary environmental law.

Soft law rules have proliferated in all areas of environmental law and it is safe to predict that their importance will increase in coming years. Their mixed nature, halfway between command and advice, makes them more palatable to States. The subtle pressure that results from hortatory injunctions providing normative standards of behaviour seems to

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34 Francisco Orrego Vicuña : "The Protocol on Environmental Protection to the Antarctic Treaty : Questions of effectiveness", *Georgetown International Environmental Law Review*, vol. VII, Fall 1994, p. 1.

35 Handl, *op. cit.*, p. 8.

36 Louis B. Sohn, "The Stockholm Declaration on the Human Environment" 4 *Harvard International Law Journal*, 1973, pp. 423-515.

37 Principle 17 of the Rio Declaration and Principle 5 of the UNEP draft Principles of Conduct ; the 1985 EC Directive on Environmental Impact Assessment, the 1991 Protocol on Environmental Protection to the Antarctic Treaty and the 1989 World Bank Operational Directive, as well as an increasing number of national legislation. See : Philippe Sands, *op. cit.* p. 579.

adjust better to environmental problems than the rigid constraints of interdictory rules.[38]

This is why an author has called rules of soft law "le laboratoire du droit de demain" characterized by

> " ... la fertilité evidente mais aux contours souvent imprécis, dont le mode d'expression est plus volontiers le conditionnel que le present de l'indicatif, designant des finalités plus que des engagements immediats, des programmes mieux que des certitudes".[39]

II. Improving environmental law-making

The approach to environmental rule-setting based on the voluntarist model characteristic of classic international law, that relies mainly on the formative processes of customary and conventional law, may not be entirely appropriate to effectively cope with the present environmental crisis. Effective protection of the environment commands quick legislative action of a preventive nature, ample participation of States and other agents in the creation and implementation of the law, legal instruments flexible enough to keep pace with scientific and technological changes and effective means to ensure compliance.

Customary law is frequently difficult to prove ; it lacks flexibility and the capability to react quickly to changes that incessantly occur in the social, economic and scientific contexts where environmental problems arise. For these reasons, although many principles and rules governing environmental matters are customary in character, the role custom plays in the development of the modern international law of the environment has been overshadowed by conventional law.

Conventional rules are easy to ascertain ; they primarily have — as decisions of international organizations do — a preventive character : they emphasize prevention and conservation rather than responsibility and compensation ; they embody positive rules of management rather than negative rules of prohibition.[40] Moreover, environmental treaties frequently provide for supervisory and enforcement mechanisms as well as for mechanisms to enact regulations and keep them up to date through simplified procedures.

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38 A. Ch. Kiss : "L'état du droit international de l'environnement en 1981", *JDI*, 1981, p. 536.

39 P.-M. Dupuy, "Le droit international de l'environnement ...", pp. 34 et 35.

40 José Juste Ruiz : "Problemas internacionales del medio ambiente", Universidad de Barcelona, 1984, p. 21.

Treaties, however, are not free from shortcomings : their elaboration, ratification and amendment require long and complex processes and therefore their degree of adaptability to changes is also low. As pointed out *supra*, environmental treaties are frequently too general and ambiguous ; they do not lay down clear and specific obligations, thus making difficult to evaluate their implementation.

Moreover, many environmental treaties do not come into force for lack of the necessary ratifications ; when they do come into force, the political and economic context within which they were adopted may have changed ; technical and scientific factors valid at the time negotiations commenced may have become obsolete at their conclusion or when the agreement entered into force.[41]

International institutions vested with regulatory functions have contributed substantially to the development of international environmental law, even when their powers are limited and their decisions take the form of recommendations or of other non-binding acts.

However, as legal tools to effectively deal with environmental problems, decisions of international organizations share with treaties some of their flaws : The process of negotiation and adoption may be too long and they are often too general or ambiguous. Moreover, in most cases they are not binding, or they are binding only upon the few member States that have voted for them.

Doubtless, international environmental law-making should be reinforced in order to make it more responsive to the seriousness and urgency of the environmental crisis. But being the international community organized on the basis of the principle of voluntarism, it is not realistic to expect States to accept, in the near future, to be bound by rules imposed from above, emerging from processes over which they do not have full control. The prospects for a supranational source of authority for the regulation of environmental matters seem to be very remote. Only rules that reflect the compromises through which each participant conciliates its interests with the interests of the others may invite widespread adherence.

In spite of their shortcomings, treaties have shown a considerable degree of malleability that makes them susceptible of adaptation to the changing needs and perceptions of the environmental crisis. Indeed, since the Stockholm Conference environmental treaties have undergone a process

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41 There are, nevertheless, some examples of rapid action such as the adoption and ratification of the Vienna Convention and the Montreal Protocol, that entered into force shortly after their signature.

of change that has affected their form and contents and the procedures for their adoption. Conventional environmental law has become more sophisticated and complex, and tends to be more specific and flexible.

Therefore it appears that the conclusion of treaties and the adoption of collective decisions through international organizations remain, for the time being, the only possible ways to impose limits to the autonomy of States.

In the absence of a legislative authority with the power to enact the law and impose it upon States, the strengthening of environmental law-making should be achieved through the introduction of some techniques into the existing law-making procedures and mechanisms — or the improvement of existing ones —aimed at ensuring more expeditious and effective elaboration of acceptable rules. Some of those techniques are the following :

1. There is no doubt, for instance, that the formulation of technical standards and regulations in instruments separated from the main treaty — reserved for general principles and the establishment of institutions — facilitates the adhesion of States to the latter and allows for an easier and more rapid adoption, entry into force and amendment of the former.

2. Likewise, the establishment of permanent institutional mechanisms — or the use of existing ones — endowed with the power to adopt, review, and amend environmental regulations and standards through expeditious procedures, has proven to be an effective way to promote the development and up-dating of environmental law. The fact that international bodies perform their activities on a permanent basis allows them to respond more adequately to the renewed challenges and the evolving nature of environmental problems. Continuity, specialization and access to technological and scientific information put them in a better position than *ad hoc* diplomatic conferences and meetings to react quickly to changes taking place in the environmental context and to keep under review and up-date regulations and standards.

3. The lowering of the number of ratifications necessary to put into force a treaty can be considered as a way to accelerate its implementation. The practice varies from a minimum of two ratifications (ILO conventions on the working environment ; ECE Regulations Concerning Gaseous Pollutant Emissions from Motor Vehicles) to a high number (UNCLOS came into force after the 60th ratification was deposited). But while this measure may increase the possibilities of a more rapid implementation of treaties, on the other side it creates the risk of their coming into force among a small group of States, from which those specially affected by the issue could be absent (see *infra*, N° 9).

4. Examples of provisional application of all or some of the treaty provisions can also be found in environmental treaties, but they are exceptions.[42] This method that would permit governments to circumvent constitutional requirements to bind States internationally is not generally accepted by States.

5. Another mechanism that could be considered is the application to States that have signed an environmental treaty of a procedure similar to the procedure applied to ILO conventions. Member States of ILO are obliged to submit, within a period of one year, to the national competent authorities, "for the enactment of legislation or other action", conventions adopted by the General Conference, and to report to the Organization on measures taken to meet that obligation (art. 19, para. 5 of the Constitution).

6. With respect to acts of international organizations, for the reasons explained above it does not seem advisable to recommend vesting their organs with the power to adopt by a majority vote decisions binding all members, including those that had opposed them. The granting of such a power may in all probability have a daunting effect on States, in particular on the States most affected, precisely those to which the decisions are addressed. The Montreal Protocol offers an isolated example of decisions adopted by qualified majorities that bind all State parties. But this was possible in exchange for considerably weakening the contents of the decisions. The "opt out" system offers an alternative way that to some extent contributes to the coming into force of decisions that are not supported by all members of an international organization. But the "opt out" alternative should be restricted to a limited categories of rules since, as suggested above, it may lead to uncertainty and the diversity of legal regimes.

7. Consensus appears to be the decision-making procedure that better ensures that the interests of all those concerned have been taken into account. Consensus compels States to make concessions, explore alternatives, elaborate and refine texts and, in general, make all possible efforts in order to find compromise solutions and texts acceptable to all. Treaties adopted by consensus have better possibilities to get a higher

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42 One example is the 1979 Geneva Convention on Long-Range Transboundary Air Pollution (that required a minimum of 24 ratifications to enter into force) the signatories to which agreed by special resolution to implement the Convention on an interim basis until its coming into force. The Convention came into force in 1983. Another example : By a decision of the Contracting Parties, amendments to the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (the Ramsar Convention) were treated as if they were in force until such time as they entered into force. Matters were "greatly facilitated" since then (UNCED, "The Effectiveness ...", p. 74).

number of ratifications in shorter time than those supported only by some of the participants in the negotiations. Similarly, decisions of international organizations adopted by consensus have better prospects of being implemented.[43]

However the requirement of consensus may put too heavy a burden on international conferences and organizations. Strictly applied, consensus lends itself to abuse since it may be used by one or few States to block the adoption of decisions supported by a large majority. Moreover, consensus entails long and complex negotiations and is sometimes reached at the price of compromising too much and reducing the contents of the rule to the "lowest common denominator"[44] ; consequently it may result in the weakest standard of environmental protection.[45] This danger can be adverted if consensus is required as a first procedure ; only when good faith efforts to reach consensus have failed, other decision-making procedures should be available.[46]

8. In too many cases the lack of effectiveness of treaties and decisions of international bodies has been attributed to the high degree of abstraction in which the general principles and fundamental obligations have been formulated. Priority should be given, then, to the adoption of binding instruments providing precisely defined obligations to make existing principles and general rules enforceable, and to the setting of firmer procedures and mechanisms to ensure compliance.

9. An important factor that undermines the effectiveness of treaties is the small number of States that have participated in their negotiation or have ratified them, or the fact that State parties to them are not those most closely involved in the issues regulated by the treaty.[119] Although

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43 In some international bodies the pursuit of consensus has become a common exercise previous to the taking of a vote, even when it is not required by their constitution, as, for instance, in the International Whaling Commission (Birnie and Boyle, *op. cit.*, p. 37)

44 Paul C. Szasz (*op. cit.*, p. 57) rightly points out that the right expression to refer to decisions reached by consensus after extensive negotiations and compromise, is not the frequently used "lowest common denominator" but "the highest common denominator" (that usually is not really very high).

45 Patricia Birnie and Alan Boyle, *op. cit.* p. 139.

46 At the Third United Nations Conference on the Law of the Sea negotiations were conducted aiming at adopting the Convention on the Law of the Sea by consensus. When all efforts to reach consensus failed, the Convention was put to a vote.

47 The 1971 Ramsar Convention on Wetlands of International Importance (60 parties), the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (37 parties) and the Basel Convention (18 parties) are some examples.

formally in force, treaties may in fact be ineffective if they have not captured the support of a large number of States or the support of the States most concerned with the issue in question.[48]

Compliance with environmental rules depends as much on their contents as on the manner how they were negotiated. The prospects of compliance improve if environmental rules are the result of a process of negotiation whereby a balance of interests is achieved among all those States concerned.[49] Treaties and decisions of international organizations negotiated and adopted with wide participation and support of States have better chances to receive more ratifications or to be accepted and implemented in a shorter time. Only rules taking into account the main interests of the parties involved may invite widespread adherence.

In this respect, it has been observed (and this concern was also reflected in the recommendations for action formulated in Agenda 21)[50] that many treaties in the field of environment have been negotiated and concluded without the adequate participation of developing countries and therefore their interests may not have been sufficiently taken into account. In negotiating recent environmental treaties and resolutions, States have resorted to various ways to encourage and facilitate participation of developing countries, that are examined below (Section III).

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48 Even in cases of broad membership the effectiveness of protection system may be hindered if the number of non members is important enough. A case in point is CITES, that as of January 1992 had 112 Parties. CITES was often circumvented by dealers who use the territory of States not parties to the Convention to channel illegal traffic in endangered species. See C.A. Petsonk, "The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law", *American University Journal of International Law and Policy*, vol. 5, 1990, p. 387.

49 Health and safety standards approved by the IAEA are, in principle, legally non-binding, but this has not prevented them from having effectively guided the conduct of States involved in operations related to research, development or application of atomic energy for peaceful purposes. This effect has been ascribed to the fact that the formulation of those standards has been done in consultation with governments and technical bodies and therefore, they generally reflect the "technical consensus" (Birnie and Boyle, *op. cit.*, p. 353).

50 "Many of the existing international legal instruments and agreements in the field of environment have been developed without the adequate participation and contribution of developing countries, and thus may require review in order to reflect the concerns and interests of developing countries and to ensure a balanced governance of such instruments and agreements" (Agenda 21, Section IV, para. 39.1 (c)). See also para 39.3 (c).

10. A factor that has been mentioned as influencing the effectiveness of environmental law relates to the degree of seriousness with which States take their international commitments concerning the environment.[51] It has been pointed out that in this matter States tend to behave with duplicity, publicly supporting rules that they do not intend to implement. Environmental obligations are often accepted as the result of international pressure or the need to protect the image of the country, without considering to what extent governments are willing, or able, to effectively comply with them. This may explain the low level of compliance with treaties or decisions of international organizations that have been adopted by consensus or large majorities. A way to discourage State "frivolity" in negotiating and accepting environmental obligations — as well as in consenting in the adoption of "soft law" rules — could be to give, as indicated above (Section I, N° 5), some political or legal weight to the consent or vote in favor of a treaty or a decision of an international organization on the basis of the principle of good faith.

11. Another important question related to the adoption of environmental rules is the participation of non-States actors (non-governmental organizations (NGOs), scientific institutions, business organizations, the civil sector, and other concerned entities) in rule-making processes within the framework of both the negotiation of treaties and the activities of international organizations. There is a general agreement on the need to ensure the appropriate participation of those actors in such processes as a way to "increase the legitimacy of the international legal regime".[52]

The role of NGOs in the negotiation, implementation and monitoring of environmental rules has expanded notoriously during the last years. They are present and participate actively in diplomatic conferences and in the activities of many international organizations and they even have been admitted into the institutional structure of the latter, such as is the case of the Convention Concerning the Protection of the World Cultural and Natural Heritage Convention and CITES.[53] Agenda 21 has recognized the importance of the work of NGOs by including the reception and analysis of relevant input from competent non-governmental organizations

51 Ibrahim F.I. Shihata : "Implementation, Enforcement and Compliance with International Environmental Agreements - Views from the World Bank", paper based on an oral presentation made in Washington, D.C., May 20-21, 1996.

52 P. Sand, quoted by H. Caminos, "Brief Comments [on this report]".

53 Edith Brown Weiss, "New Directions in International Environmental Law", paper submitted to the United Nations Congress on Public International Law, New York, March 1995, p. 3.

among the main functions to be undertaken within the framework of the General Assembly and the Economic and Social Council and any other intergovernmental mechanism to be established (Chapter 38.13 (d)). The General Assembly confirmed that importance in resolution 47/191 that requests the Commission on Sustainable Development "to provide for non-governmental organizations ... to participate effectively in its work and contribute within their areas of competence to its deliberations".[54]

III. Improving implementation and compliance

It seems, though, that the real problem that afflicts environmental law relates less to the creation of new rules than to the limited effectiveness of the existing ones. The entering into force of environmental treaties or the adoption of binding decisions by international organizations does not warrant by itself their effectiveness. Reports on compliance with environmental rules show a disappointing low level of acceptance or implementation by States of both conventional and institutional environmental law. Frequently States do not observe even the most basic procedural duties, such as reporting.[55]

What is most needed is to find ways to widen acceptance of, and compliance with existing international rules rather than promoting the production of more agreements and resolutions which would add to the already significant amount of instruments that in most cases have had little impact, if any, on the practice of States.[56] Attention has been drawn to what an author calls "treaty congestion" which has produced, in addition to an extensive and uncoordinated *corpus juris*, countless *fora* and secretariats, overlappings and inconsistencies.[57] This, in turn, puts a strain on the many countries lacking sufficient human and financial resources and technical capabilities to face the increasing demands of the environmental system, therefore reducing their ability to participate in it.

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54 NGOs have been granted observer status at the meetings of the Commission and its subsidiary organs (ECOSOC decision 1993/215).

55 "[I]mplementation and enforcement has been the weakest part of international environmental law and related regimes" (Hurrell and Kingsbury, *op. cit.*, p. 28). See also : UNCED, "The Effectiveness ...", p. 12 and United States General Accounting Office, GAO/RCED, 92-43, January, 1992.

56 Lawrence Susskind and Connie Ozawa : "Negotiating More Effective International Environmental Agreements", p. 143.

57 Edith Brown Weiss : "New directions ...", p. 4. "A great deal of effort has been invested in 'getting written agreements'. Far too little attention has been paid to guaranteeing that real environmental improvements are made" (Susskind and Ozawa : *op. cit.*, p. 143).

In view of the inflation of the international environmental *corpus juris* and the relatively limited impact it has had up to now on States behaviour, international law-makers should accord special attention, if not priority, to the question of the implementation with the view to creating new techniques, or refining existing ones, to force or to induce States to effectively carry out environmental obligations. This is not to suggest that law-making activity should be sidestepped ; there are aspects of the environmental question insufficiently regulated or not regulated at all that require the elaboration and development of the law. But Governments should also focus their efforts in trying to find ways to ensure the translation into effective actions of what has been agreed at the international level. Therefore the main legal tasks to be accomplished at present should consist, on the one side, of promoting the adoption of detailed rules and regulations to give concrete contents to general principles and rules already accepted, and on the other side, of setting up procedures and mechanisms to ensure implementation and enforcement of existing environmental law.

Clearly, the causes of the unsatisfactory level of acceptance of, and compliance with, environmental rules by States are multiple, and the resort to only legal devices will not be sufficient to change the picture. Political motivations are paramount in determining the conduct of States vis-à-vis the environment, and therefore the solution to the question of the implementation of environmental law will come mainly through political, not formal avenues. No technical formula can replace the political will of States to accept obligations and to implement them. But the resort to some technical devices may contribute to generate that will. Some of those devices are described in the following paragraphs.

1. Institutional implementation

In the pre-Stockholm era implementation of international obligations relating to the protection of the environment was left exclusively to each State concerned. The system was based on the assumption that the automatic respect of the rule of law would result from the application of the principles of reciprocity and State responsibility. Under this approach implementation by States consisted basically of the adoption of national legislation and measures to ensure the application of internationally agreed rules and their compliance with by all subjects under their jurisdiction.

Regional fishery agreements are typical examples of this approach : Member States are responsible for the implementation, through their national authorities, of management measures recommended by the respective commission. In case of infringement they have to take appropriate measures within their jurisdiction, that may include sanctions, such as ban on trade,

and confiscation. They are usually required to furnish information on measures adopted to discharge these responsibilities.[58]

Decentralization is also the characteristic of more recent implementation regimes, such as the one established by UNCLOS for the protection of the marine environment. States parties to UNCLOS have the duty to adopt laws and regulations and to take other measures consistent with the Convention to implement applicable international rules and standards to prevent, reduce and control pollution of the marine environment from all sources (arts. 194 ; 207 to 212). Enforcement of such laws, regulations and international rules and standards is the responsibility of coastal States, port States or flag States, depending on the source and place of the pollution (arts. 213 to 222). States must ensure the availability of recourse for compensation or other relief in respect of damage caused by pollution of the marine environment by persons under their jurisdiction (art. 235, para. 2).

National enforcement systems by themselves cannot ensure the effective application of international environmental law. States authorities are not always able, or willing, to fulfill their international obligations. Other more centralized methods are required to ensure compliance.

In some cases States have agreed on supplementing national implementation machineries with some form of international cooperation among themselves, consisting of joint inspection and monitoring schemes such as those adopted in several regional fishery bodies[59] and in the 1982 Memorandum of Understanding on Port State Control of Vessel-source Pollution concluded by coastal States of the EU plus other European coastal States.[60]

Environmental treaties of the last generation provide for institutional mechanisms with different degrees of authority, entrusted with a variety of functions, including law implementation and law enforcement functions.

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58 Jean Carroz : "The Management of Living Resources in the Baltic Sea and the Belts", *Ocean Development and International Law Journal*, vol. 4, N° 3, 1977, p. 227.

59 In the area of conservation of fisheries some agreements establishing bodies with limited membership have set out a joint control system according to which duly authorized officials of any member country may on the high seas search and seize vessels of other member country acting in violation of the treaty or of the regulatory measures adopted under it. Only authorities of the flag State may conduct prosecutions and impose penalties. Fishery organizations with larger membership such as those operating in the Atlantic Ocean allow officials of any member to search and inspect vessels of other members, but they cannot seize the vessels; they limit themselves to reporting infringements (J. E. Carroz, ibid.)

60 Hurrell and Kingsbury, *op. cit.*, p. 13.

The bodies performing implementation functions may be the regular meetings of the parties to the treaty, a commission, a permanent secretariat or any other permanent organ established by the treaty. Data collection, exchange and dissemination of information, monitoring, reporting by States on measures taken or activities performed, inspection and periodic public review and evaluation of State performance are the implementation techniques more frequently used.

Gathering and dissemination of information by States and by the established secretariats or organs are of particular importance as elements to induce implementation. The dissemination among governments, the private sectors, non-governmental organizations, the press and public opinion in general, of information on treaties and decisions of international organizations, on their implementation by States and on the functioning of the institutions, has an influence on the decision of governments to join the treaties or to comply with their rules.

Performance reports submitted periodically by States to international organizations to which they are members, and publicly reviewed by their organs, allow international organizations and States Parties to know to what extent obligations established by the treaties or international decisions are being complied with. Information on State performance thus becomes an incentive for governments to comply in order to avoid adverse publicity or to be accused of indifference with regard to environmental problems. Some reporting procedures have been successfully applied, such as those established by the International Whaling Commission, the Montreal Protocol and the ILO Constitution. Unfortunately compliance with the obligation to report has been far from satisfactory in most treaties, even when their conceptual framework presents a high degree of elaboration.[61]

Through the functioning of international institutions with supervisory and monitoring powers, States are in the position to exercise a form of collective control that allows them to hold each party to the treaty accountable to other parties. Since the reports and the review of State performance are public, such accountability is extended to participating non-governmental organizations (NGOs) and the world opinion.[62] NGOs, in effect, enjoy observer status in many environmental bodies and play an increasingly influential role in the monitoring of the implementation of treaty obligations by putting pressure on States, international

61 This seems to be the case of, *inter alia*, the 1979 Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention) (Birnie and Boyle, *op. cit.*, p. 450).

62 Birnie and Boyle, *op. cit.*, p. 161.

organizations and other agents, disseminating information and mobilizing public opinion.

The existence of institutional implementation procedures by itself does not necessarily guarantee compliance. Experience shows that very often State parties negligently comply or do not comply even with the most basic duties such as reporting to the competent organization.[64] Nevertheless, on the basis of recent surveys[64], it may be safely concluded that the degree of compliance with environmental obligations is higher when supervisory and enforcement functions have been entrusted by treaties to international institutions, than in cases where implementation is left solely in the hands of States.[65] Even organs performing very limited functions, such as advisory functions, may become a forum appropriate for the parties to meet and continue to co-operate and to develop environmental law.[66] The role of international institutions in the development and implementation of the law has been recognized in the Agreement on

63 Philippe Sands, "Enforcing Environmental Security", in *Greening International Law*, Ph. Sands ed., p. 53.

64 UNCED, "The Effectiveness ...", p. 11.

65 This conclusion is confirmed when implementation systems including institutional procedures, such as those established by the London Dumping Convention and Marpol, are compared to the experience of the regional schemes for the control of land-based sources of pollution or UNEP's sponsored regional seas programme. The 1972 London Dumping Convention (LDC) regulating dumping at the sea shows a good record of adhesion and compliance. The success of the LDC is reflected in the decrease of dumping of industrial waste that has taken place in the last years in accordance with reports prepared by IMO. The relatively wide acceptance of the Convention (above 70 member States) gives the regime a global dimension (UNCED Prepcom., UN Doc. A/CONF.151/PC/31, 1991 ; UNCED : "The Effectiveness ...", Peter Sand, Ed., 1992, pp. 154, 155. *Cf.* Birnie and Boyle, *op. cit.*, pp. 311 and 331). Tphe UNEP's programme of regional seas shows an unsatisfactory record of implementation, in spite of the fact that the regional approach on which the programme is based should have encouraged co-operation and the implementation of measures by the participating States. In the matter of regulation and cooperation to combat land-based sources of marine pollution, most of the regional seas agreements have not gone beyond the very general rule set forth in the 1982 UNCLOS. Protocols containing rules on land-based pollution are in force in only few regions (the Mediterranean, South East Pacific and Persian Gulf), and the record of compliance in all these cases is low (Birnie and Boyle, *ibid.*, p. 309).

66 A case in point is the body of advisers established by the 1979 Geneva Convention, that, although vested with few powers, negotiated protocols to the Convention establishing targets for the reduction of emissions of some pollutants (Birnie and Boyle, *op. cit.*, p. 400).

straddling fish stocks and highly migratory fish stocks[67], where States are requested to cooperate "to strengthen existing subregional and regional fisheries management organizations and arrangements in order to improve their effectiveness in establishing and implementing conservation and management measures" (art. 13).

2. *Settlement of disputes*

Few environmental treaties oblige State parties to resort to binding third-party procedures for the settlement of their disputes. A number of them contain standard dispute settlement provisions encouraging the parties to resort first to direct negotiations or other diplomatic means, and if these fail, to the usual settlement procedures.[68] No case arising from the interpretation and application of a multilateral environmental treaty has been submitted so far to these traditional procedures.

The jurisdiction of the International Court of Justice (ICJ) has sometimes been established in separate protocols that the parties to the main convention may or may not accept, or, as in the case of the Vienna Convention, the Convention on Climate Change and the Convention on Biological Diversity, may be accepted by each party through filing a separate declaration. In only one case, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, the obligation of the parties to resort to the ICJ was established in the main agreement.

A comprehensive system has been set up by UNCLOS for the settlement of disputes (arts. 186 to 191 ; and 279 to 299), including those concerning the interpretation or application of the Convention provisions on the protection of the marine environment. Any party to the Convention may designate the ICJ, the International Tribunal for the Law of the Sea, an arbitral tribunal (Annex VII) or special arbitral tribunals (Annex VIII) as procedures for the settlement of disputes to which it is a party. In case of pollution of the marine environment from activities in the Area (the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction), the Assembly or the Enterprise of the International Sea-Bed Authority may institute proceedings before the Sea-

67 "Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 Decembre 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks", adopted by the General Assembly on 4 December, 1995.

68 See : Laurence Boisson de Chazournes : "La mise en oeuvre du droit international dans le domaine de la protection de l'environement: Enjeux et défis", *Revue Générale de Droit International Public*, 1995, N° 1, pp. 40-50.

Bed Disputes Chamber of the International Tribunal for the Law of the Sea.

3. Non-judicial procedures in cases of non-compliance

When environmental treaties do not provide for compulsory procedures for the settlement of disputes, environmental bodies performing implementation functions may play an additional role : They provide an arena to examine and settle controversies and to promote the conciliation of opposed interests of State parties.[69] The conferences of the State parties, the plenaries or the secretariats of permanent institutions, the commissions of experts and other bodies become fora where States consult, negotiate and eventually reach an agreement.

Recent practice in environmental treaty-making reveals a tendency to set up non-contentious procedures to prevent and settle disputes related to compliance with treaty obligations. The purpose of these procedures, that allow the resort to political and quasi-judicial means, is not to identify transgressors or adjudicate blame but to help parties, in particular those facing difficulties to conduct in accordance with the treaty, to comply with their obligations. Institutions intervene to promote compliance by identifying the causes of non-compliance, assisting non-complying parties and carrying out negotiations to achieve an equitable balance of interests, avoiding confrontation and the recourse to judicial procedures.[70] Non-compliance procedures (NCP) make transparent the conduct of States with regard to environmental obligations, provide the ocassion to examine and discuss compliance issues and encourage cooperation among States.

The Montreal Protocol provides a quite elaborated example of an operating NCP. Special procedures approved at the Fourth Meeting of the parties include the establishment of the Implementation Committee composed of 10 parties elected in a Meeting of Member States. A State party that has "reservations" concerning another State party's compliance with its obligations under the Protocol may submit, through the Secretariat, a communication to the Implementation Committee, which will examine it together with the observations of the State party alleged to be in violation and with any other information provided by the Secretariat. The Committee may gather information in the territory of the party concerned, at its request, and will seek to obtain an "amicable settlement of the matter on the basis of respect for the provisions of the Protocol". Failing to settle the affair, the Committee may present its recommendations to the Meeting of the parties. Measures that the Meeting of the parties may

69 Birnie and Boyle, *op. cit.* p. 298.

70 *Cf.* Boisson de Chazournes, *loc. cit.*, p. 63.

adopt include appropriate assistance, issuing of cautions and suspension of rights and privileges under the Protocol. The procedure may be also initiated by the non-complying party itself, or by the Secretariat.[71]

Less elaborated NCPs may be found in other environmental conventions. According to the Basel Convention any party that "has reason to believe that another party is acting or has acted in breach of its obligations" under the Convention may inform the Secretariat and the party alleged to be in violation. The information is then circulated to all the parties. When the CITES Secretariat "is satisfied that any species included in Appendices I or II is being affected adversely by trade in specimens of that species, or that the provisions of the Convention are not being effectively implemented" by a State party, it shall inform the party concerned. The party must communicate to the Secretariat any information on relevant facts and propose remedial action or carry out an inquiry ; the Conference of the parties, on the basis of the report of the Secretariat and the information received from the party, may then make recommendations (art. XIII).

NCPs are also being considered within the context of other environmental treaties such as the Climate Change Convention and the ECE Protocol on Sulphur Emissions. The Climate Change Convention provides, in addition to traditional judicial and non judicial procedures, for the establishment of a Subsidiary Body for Implementation "to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention" (art. 10) and of a multilateral consultative process for "the resolution of questions regarding the implementation of the Convention" (art. 13), the nature and scope of which is to be determined.

In a few cases individuals or private entities have access to these procedures. In the European Union, individuals and non-governmental groups may initiate a complaint procedure before the Commission in the case of non-implementation of environmental directives by member States. The Commission may eventually bring the case to the European Court of Justice. ILO has set forth a procedure by which an investigation can be carried out when alleged violations to an ILO convention by a government that is a party to it is reported by an association of employers or workers or any Member. A Commission of Inquiry may be established and the procedure may culminate in the presentation of the case to the

71 Report of the Fourth Meeting of the Parties, November 1992, Annex VII, para. 8. For an account of the activities of the Montreal Protocol Implementation Committee see David G. Victor : "The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure", *IIASA*, May 1996.

International Court of Justice by the State concerned (arts. 25, 26 and 29 of the Constitution of ILO).

An interesting procedure has been established by the World Bank and the International Development Association. The Inspection Panel created by identical IBDR and IDA resolutions (93-10 and 93-6) shall receive requests for inspection submitted by any grouping of individuals contending that "its rights or interests have been or are likely to be directly affected by an action or omission of the Bank" in the design, appraisal and/or implementation of a project financed by the Bank. The report of the Panel, that is composed of three members, is then submitted to the Executive Directors for their consideration, and made publicly available together with the Bank's response thereto. The Panel is competent to investigate environmental issues covered by the Bank's policy, according to which the Bank does not finance "projects that contravene any international environmental agreement" or that "would significantly modify natural areas designated by international conventions as World Heritage Sites or Biosphere Reserves".[72]

Experience, scarce as it may be, indicates that NCPs may contribute to raise the level of compliance, as it seems to be the case with the Implementation Committee of the Montreal Protocol.[73] A step forward in the process of institutionalizing implementation and enforcement procedures would be to confer bodies entrusted with supervisory and review functions some degree of independence from States. Bodies composed of members not representing States, selected on the basis of their competence and expertise would guarantee independence and objectivity.[74] However, concerns have been expressed that States may become too apprehensive if in matters of implementation and compliance of environmental rules they have to confront supervisory bodies the members of which, being experts acting independently from States, may be too strict in the application of legal and technical criteria, without taking into account political and economic considerations.

4. Sanctions

Few environmental treaties provide for sanctions in case of non-implementation or non-compliance. When they do, sanctions are in most

72 See Ibrahim F.I. Shihata, "The World Inspection Panel", 1994, p. 96.
73 David G. Victor, *op. cit.*, pp. ix and 36.
74 Boyle, *op. cit.*, p. 245.

cases, according to some authors, no more than "polite if vigourous disapprobation".[75]

States have resorted to the use of trade instruments that operate as sanctions of economic nature, such as restrictions on trade in species, substances or goods. Economic sanctions operate as "indirect incentives" to induce States to adhere or to comply. Indirect incentives intended to encourage the adhesion of non-parties to the treaty have been stipulated in, *inter alia*, the Montreal Protocol (prohibition and even prohibition of trading in controled substances with non-parties, arts. 4 and 10 as amended in 1990), and the Basel Convention (prohibition of trading hazardous wastes and other wastes with non-parties, art. 4, para. 5). According to CITES, trade with non-parties in endangered species listed in appendixes to the Convention is not permitted unless documentation similar to that required by the Convention is issued by the State concerned.[76]

This technique has also been used to encourage compliance in several fisheries agreements such as the South Pacific Forum Fisheries Agency (blacklisting of vessels to which the right to conduct fishing activities in the area is denied) and the 1989 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (prohibition of landing and processing of driftnet catches ; restriction of access to ports and port servicing facilities for driftnet fishing vessels). The EEC Memorandum of Understanding on Port State Control allows the denial of entry into EEC ports to ships that do not comply with the applicable standards.

It has been observed that "indirect incentives" may be used as "pretexts for trade restrictions or unilateral imposition of trade barriers and restrains on international trade".[77] Principle 12 of the Rio Declaration states : "... Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade". While this danger is real, it is also true that in some cases trade instruments have been effective in promoting acceptance or implementation of environmental treaties. Restrictions on trade applicable to non-parties to CITES seem to have encouraged adhesion to the Convention, that has now 112 parties. The formulation of clear criteria (necessity, proportionality, non discrimination, etc.) will contribute to avoid the application of trade-related environmental measures in an

75 Hurrell and Kingsbury, *op. cit.*, p. 22.

76 Birnie and Boyle, *op. cit.*, p. 458.

77 Answer to the questionnaire by Professor Sompong Sucharitkul.

arbitrary or discriminatory manner. In any event, "the potential for conflict between environment and free trade is great".[78]

The application or the threat to apply sanctions in case of violation of treaty. obligations does not ensure necessarily a better performance. Moreover, political sanctions such as suspension or termination of membership run counter the objective of the treaty to have the widest support. Experience shows that some of the most successful environmental treaties provide for no sanctions, establishing instead other kind of incentives to promote support and compliance.

5. Economic incentives

Some of the most successful environmental treaties have not provided for mechanisms or procedures to punish transgressors, but for affirmative, non-punitive ways to induce support and compliance, among which economic incentives are the most frequently used. Agenda 21 recommends the inclusion of "technical and financial assistance" to promote the participation of all countries concerned, in particular developing countries, in the negotiation and implementation of international agreements (Chapter 39, 3(c)).

Costs of complying with measures prescribed in treaties or decisions of international organizations for the preservation of the environment or the conservation of certain resources may be too expensive to be shouldered by some States. Very often developing countries, generally lacking the appropriate human, financial and technological resources and the required efficient domestic institutions, are not in a position to absorb by themselves the financial consequences resulting from the application of conservation measures and may therefore be inclined to disregard their obligations or to decide not to become parties to the treaties or participate in their negotiation. The Rio Declaration acknowledges that environmental standards applied by some States "may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries" (Principle 11).

Moreover, for countries facing acute economic and social problems, the avoidance of the consequences of environmental deterioration, sometimes distant and uncertain, may not represent a priority issue.

A way to encourage States, in particular developing States, to accept and comply with environmental obligations is to provide for incentives that would allow them to obtain a lateral benefit or compensation for

78 James Cameron, "The GATT and the environment", in *Greening International Law*, Philippe Sands, ed. p. 107.

expenditures incurred in complying. There is an intrinsic justice in it : Since in most cases the beneficiary of preservation and conservation measures is the international community as a whole, the costs of implementing such measures should be equitably shared by all States. If the environment is a unity and "belongs to all of us", the responsibility of preserving it should be allocated to all members of the international community.[79]

Thus the general obligation to preserve the environment and its resources becomes a two tiers obligation :

> "[C]ustodial obligations, which refer to the preservation duties of states in which the resource is physically located ; and support obligations, which refer to the duties of other states to contribute to the conduct of custodial obligations".[80]

It is now a widely shared opinion that economic incentives can effectively promote wider participation in environmental treaties and better compliance with their rules. As Stephen Tromans said :

> "The West must therefore accept that if it cannot deny the developing countries the right to economic development, the issues of technological transfer and financial aid are in fact the essential pre-requisites to global solutions".[81]

The establishment of special funds is one of the ways to provide financial assistance to States that need it. Within the framework of the 1971 Convention on Wetlands of International Importance (the Ramsar Convention), a Wetland Conservation Fund was established to assist developing countries to support wetland conservation. The World Heritage Fund established under the 1972 World Heritage Convention has been designed to help developing countries to implement the Convention and also provides funds to ensure participation of experts from the least developed countries in the work of the World Heritage Committee. A Multilateral Fund has also been established within the ozone layer protection system designed to meet incremental costs incurred by developing countries in implementing agreed control measures and to facilitate their attendance at meetings. The Montreal Protocol acknowledges that improving the

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79 "[T]here is a perception that all have an interest in preventing the loss of a species, the destruction of cultural heritage, and the waste of natural resources", Caron : "The Law of the Environment : A Symbolic Step of Modest Value", *Yale Journal of International Law*, 14, 1989, p. 528.

80 Glennon : "Has International Law Failed the Elephant ?", *AJIL*, 84, 1990, p. 35.

81 Stephen Tromans, "International Law and UNCED : Effects on International Business", *Journal of Environmental Law*, vol. 4, 2, 1992, p. 191.

capacity of developing countries to fulfil their obligations depends "upon the effective implementation of the financial co-operation as provided by Article 10 and transfer of technology as provided by Article 10A" (art. 5, par. 5).

Developed countries parties to the Convention on Climate Change commit themselves to "provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties" in complying with their obligations to supply information related to implementation, and also to provide financial assistance, including transfer of technology, needed by developing countries to meet "the agreed full incremental costs of implementing measures" prescribed in the Convention (art. 4, para. 3). The Convention on Biodiversity also provides for the transfer to developing countries of financial resources related to the implementation of their obligations.

The Global Environmental Facility (GEF), established in 1991 by the World Bank, UNEP and UNDP and restructured in 1994, serves as a mechanism to provide "new and additional grant and concessional funding" to finance the agreed incremental costs of measures in the focal areas of climate change, biological diversity, international waters and ozone layer depletion.[82] As its grants are "in conformity with the eligibility criteria decided by the Conference of the parties of each convention"[83], the GEF contributes to promote the respect of environmental law.[84] And the Agreement on straddling fish stocks and highly migratory fish stocks encourages the establishment of special funds "to assist developing States in the implementation of [the] Agreement, including assisting developing States to meet the costs involved in any proceedings for the settlement of disputes to which they may be parties" (art. 26).

The supplying of technical assistance and training, and the transfer of environmental technologies are other ways to facilitate the implementation of environmental obligations. Developing countries, in particular, face difficulties in complying with their obligations because of lack of expertise. Even compliance with a duty apparently as simple as reporting may pose problems for a country without the required material and technical means. The Montreal Protocol and the Basel Convention,

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82 Paragraph 2 of the "Instrument for the Establishment of the Restructured Global Environmental Facility" includes as eligible for funding agreed incremental costs of activities concerning desertification and deforestation and of other relevant activities under Agenda 21 "insofar as they achieve global environmental benefits by protecting the global environment in the four focal areas".

83 Article 9 of the Instrument for the Establishment of the Restructured Global Environment Facility.

84 *Cf.* Shihata, in comments on the first draft of this report.

among others, provide for technical assistance to be supplied to any Party, in particular developing countries, to facilitate participation in and implementation of the respective treaty.

Recent environmental treaties also make provision for transfer of technology. Part XIV of UNCLOS contains several articles on development and transfer of marine technology. The Montreal Protocol requires parties "to facilitate access to environmentally safe alternative substances and technology for parties that are developing countries and assist them to make more expeditious use of such alternatives". Moreover, parties to the Protocol undertake to facilitate the provision to developing countries of subsidies, aid, credits, guarantees or insurance programmes for the use of such substances and technology (art. 5). The Convention on Biodiversity prescribes measures to facilitate the access to and transfer of relevant technologies to developing countries (art. 16).

5. Differentiated treatment

Early environmental conventions usually made no distinction among State parties regarding implementation; the only way to introduce differentiated treatment was to allow reservations to the treaties. But in the environmental field the use of reservations is very limited, and only accepted not with respect to the basic principles and general rules, but with respect to protocols and annexes listing, for instance, species and substances. The present trend in environmental treaty-making is not to allow reservations in order to avoid the confusion and uncertainty resulting from the multiplication of different regimes within a legal system for the protection of the environment.[85]

A tendency has emerged from more recent treaties and acts of international organizations according to which State parties to a treaty are assigned different responsibilities and rights on grounds of different circumstances and capabilities.

Differentiated treatment consists basically in allowing derogations from general environmental standards, such as awarding some countries or a category of countries a period of grace to comply with their obligations, imposing more exacting duties upon countries that have played a heavier role in causing the problem that is regulated, or setting less stringent rules for States that do not possess sound "cleaner" technologies or cannot afford the incremental costs needed to comply.

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85 Conventions forbidding reservations include the 1982 UNCLOS, the 1985 Vienna Convention and the Montreal Protocol, the 1989 Basel Convention, the Convention on Climate Change and the Convention on Biodiversity.

The criteria on which differentiated treatment may be based are, in the first place, the extent to which States have contributed to the environmental degradation in a particular field, and in the second place, the different technological and financial resources and capabilities to adopt and apply remedial measures.

Some writers are of the opinion that the establishment of different environmental standards is a factor that may undermine the effectiveness of environmental protection systems. According to them, differentiated treatment may pose political problems, cause trade distortions, delay the attainment of adequate level of local environment protection and entail higher administrative costs. This is why, in their opinion, to ensure broad acceptance of environmental rules economic incentives seem preferable to the imposition of differentiated obligations.[86]

But differentiated treatment as it has been defined above, is a manifestation of the "principle of common but differentiated responsibility" widely accepted in recent environmental treaties and other instruments and considered by many jurists to have become one of the basic general principles of international environmental law.[87]

Early formulations of this principle may be found in the 1972 Stockholm Declaration and in the 1974 Charter of Economic Rights and Duties of States. The Rio Declaration endorses the principle in the following terms :

> "... Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries" (Principle 11).

The principle itself is formulated as follows :

> "... In view of the different contributions to the global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command" (Principle 7).

The general principle has been recognized in several environmental conventions such as the World Heritage Convention (articles 4, 5 and 11)

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86 Handl, *loc. cit.*, pp. 64-65 ; Do Nascimento e Silva : "Pending Problems on International Law of the Environment" in *International Law of the Environment*, The Hague, 1985, p. 224.

87 See Philippe Sands, "Principles ...", pp. 183 *et seq.*

and the 1982 UNCLOS ("the economic capacity of developing States and their need for economic development" must be taken into account in the establishment of rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, art. 207). The Climate Change Convention formulates the principle in a direct manner stating that the parties should protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities" (art. 3).

Practical application of the principle may be found in other environmental treaties, *inter alia* the Montreal Protocol (developing countries are allowed to apply differently control measures, arts. 2 and 5) ; the Convention on Climate Change (additional commitments for developed countries are established separately from general commitments, art. 4) and the 1994 Sulphur Protocol to the Convention on Long-Range Transboundary Air Pollution (longer periods to reduce emissions accorded to countries with economies in transition).

Felipe Paolillo

Draft Resolution

February 1997

The Institute of International Law,

Convinced that the development and effective application of environmental international law are essential elements to manage the environmental crisis ;

Noting that during the last decades international environmental law has evolved into a vast *corpus juris* composed of a considerable number and variety of principles and rules with different degrees of legal value ;

Observing that the development of international environmental law has taken place in an uncoordinate manner, producing overlappings, inconsistencies and lacunae and that its implementation has been uneven and in several areas unsatisfactory ;

Realizing that, since there are not prospects for the prompt establishment of a supranational source of authority to regulate environmental matters, treaties and decisions adopted by international organizations appear to be the most practical instruments to promote the development of the international law in the field of the environment ;

Convinced that existing procedures for the creation of international environmental rules and mechanisms to ensure their compliance require adjustments in order to make them more responsive to the seriousness and urgency of the environmental crisis ;

Adopts the following resolution :

I

1. Multilateral environmental treaties and other international instruments setting forth general legal frameworks should provide for expeditious procedures for the adoption of supplementary rules, regulations and standards in separate instruments, and for their review and amendment, in order to ensure their rapid coming into force and continuous up-dating.

2. In negotiating and adopting multilateral environmental treaties and decisions of international organizations, the widest participation of States, in particular those with specific interests or responsibilities in the matter being regulated, should be sought to enhance the prospects of their general acceptance and implementation.

3. Technical and financial assistance, including assistance in building up expertise in international environmental law, should be made available to developing countries to ensure their effective participation in environmental law-making processes.

4. In negotiating and applying multilateral environmental treaties and other international instruments prescribing the adoption of measures for the protection of the environment, States and international organizations should take into account the differences in the financial and technological capabilities of States and their different contribution to the environmental problem and, on the basis of such differences, should provide for economic incentives, technical assistance, transfer of technologies and differentiated treatment where appropriate.[1]

5. To achieve the widest possible acceptance of international environmental rules and ensure their effective implementation, all efforts should be made to reach consensus for their adoption before resorting to voting. However, efforts to reach consensus should not result in the weakening of the contents of the rules.

6. States and international organizations should provide to interested non-governmental organizations opportunities to contribute effectively to the development and implementation of international environmental law through, *inter alia*, appropriate participation in the law-making process, provision of technical advice to States and international organizations, raising of public awareness of environmental problems and public support for regulation, and monitoring of compliance by States and non-State actors with environmental obligations.

7. States and international organizations should also allow the scientific community, the industry and labour sectors and other non-State entities to participate, as appropriate, in the legal process of creating international rules to regulate environmental issues, and in their implementation and monitoring.

II

8. Declarations, resolutions and other non-binding acts of universal international organizations and conferences containing rules for the protection of the environment and adopted by consensus or without negative

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1 Article VIII of the 1979 Resolution of the Institute on "The Pollution of Rivers and Lakes and International Law" reads as follows : "In order to assist developing States in the fulfilment of the obligations and in the implementation of the recommendations referred to in this Resolution, it is desirable that developed States and competent international organizations provide such States with technical assistance or any other assistance as may be appropriate in this field".

vote, may constitute evidence of general principles of law or of international custom[2], or reflect the views of the international community on what the rule of law should be.[3] The conduct of States in conformity to such rules is presumed to be in accordance with the law and would contribute to their recognition as binding rules.

9. States that have voted in favor of, or have acquiesced to, the adoption of a non-binding instrument containing clear and precise rules on the protection of the environment, are expected to act, on the basis of the principle of good faith, in conformity with those rules.

10. Environmental protection systems should include the duty by participating States to submit periodically, to the competent international organization, reports on the implementation of international environmental rules for their public review.

11. Multilateral environmental treaties and decisions of international organizations establishing environmental obligations should provide for procedures to :

(a) adopt, review and amend, through "expedite" procedures, rules, regulations and standards to implement such obligations ;

(b) review and assess reports submitted by States on implementation of such obligations ;

(c) supervise their implementation and compliance. Implementation and compliance mechanisms should include, *inter alia*, reporting, fact-finding and inspection.

12. International environmental organizations endowed with regulatory powers should provide for procedures to ensure that environmental rules

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2 At the Cairo Session (1987), the Institute adopted a Resolution on "The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective". Conclusions 19 and 20 of that Resolution state that under certain circumstances a resolution (of the General Assembly) may constitute evidence of general principles of law or of customary law.

3 *Ibid.* : Conclusion 13 of that Resolution states : "A law-declaring resolution (of the General Assembly), adopted without negative vote or abstention, creates a presumption that the resolution contains a correct statement of law." Conclusion 16 states : "The authority of a resolution is enhanced when it is adopted by consensus".

adopted by them are not contrary to or incompatible with the legal framework governing the activities of such organizations.[4]

13. Multilateral environmental treaties and decisions of international organizations establishing systems for the protection of the environment, should provide for informal, non-confrontational procedures, open to States and, when appropriate, to private entities, to deal with cases of non-compliance.

14. In order to ensure the enforcement of international environmental obligations within domestic legal systems, States should make available to all subjects, natural and juridical, judicial and non-judicial procedures for the settlement of disputes arising from violations of environmental obligations.

15. Multilateral environmental treaties and decisions of international organizations prescribing the enactment of domestic legislation or the adoption of other implementation measures by State Parties to the treaties or Member States of the international organizations, should establish time-limits within which States must take the prescribed action.

16. States bound to enact domestic legislation or to adopt other measures to implement environmental obligations contained in a treaty to which they are parties or in a binding decision of an international organization to which they are members, shall adopt such measures within a reasonable period of time when no specific time-limit has been established in the treaty or in the decision of the international organization.

17. When a State bound by a treaty or a decision of an international organization to enact domestic legislation or to adopt other measures to implement environmental obligations, has not done so within the established time-limit or, in case no time-limit has been established, within a reasonable period of time, the State should report to the conference of the contracting parties, to any other competent international authorities or to the other parties to the treaty or members of the international organization, the reasons why it has not taken the prescribed action.

18. In order to encourage public awareness and enable all citizens to participate in the discussion of environmental issues[5], States should

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4 At the Amsterdam Session (1957) the Institute adopted a Resolution on "Judicial Redress Against Decisions of International Organs". Section I of that Resolution states that : "...the establishment of this control, the means of redress which it implies and the effects which would follow therefrom do not appear realizable in the present state of affairs, except through the conclusion of treaties or other instruments particularly suited to each organ or organization".

5 Rio Declaration, Principle 10.

disseminate and make available in territories under their jurisdiction information as complete as possible on environmental problems and issues and on national and international rules related to them.

19. States shall designate appropriate competent authorities to deal with questions concerning the implementation of international environmental rules within their jurisdiction and to supervise compliance with them.[6]

20. Due publicity should be given to implementation procedures, including publication and dissemination of reports submitted by States and reports of organs of international organizations on compliance by States. Implementation activities of international environmental organizations should be open, as appropriate, to non-governmental organizations.

21. International organizations with competence in environmental matters should keep governments, concerned non-governmental organizations and public opinion in general, permanently informed on their activities and programmes.

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6 At the Cairo Session the Institute adopted a Resolution on "Transboundary air pollution". Article 4 of the Resolution prescribes the "adoption of efficient and adequate administrative and technical measures and judicial procedures for the enforcement of [...] laws and regulations".

IV. Synthèse et projet de résolution de M. Ferrari-Bravo

Rapport final

20 janvier 1997

I

Dans son rapport introductif, ainsi que, suite aux réponses fort intéressantes fournies par les membres de la commission, dans le rapport présenté à la session de Milan (1993), le rapporteur de la Huitième Commission avait indiqué la voie dans laquelle il s'acheminait pour compléter son travail. A Milan, une discussion très riche a eu lieu à la suite de laquelle le rapporteur a eu d'autres éléments à sa disposition.

La discussion qui a eu lieu à Milan a toutefois permis, sur la suggestion du même rapporteur, de décider que, compte tenu de la grande ampleur du domaine de l'environnement, la Commission devait, pour achever son oeuvre, créer au moins deux sous-commissions, chacune munie d'un rapporteur spécial, qui auraient approfondi ces aspects spécifiques du problème de l'environnement, qui se prêtent, mieux que d'autres, à une vision articulée des résultats de l'évolution du droit international en la matière. La suggestion du rapporteur ayant été accueillie par l'Institut, les deux commissions ont vu le jour, pour traiter, l'une de "Responsibility and liability for environmental damage" (rapporteur Francisco Orrego Vicuña), l'autre de "Procedure for the adoption and implementation of rules in the field of environment" (rapporteur Felipe H. Paolillo).

Les travaux des deux sous-commissions se sont poursuivis de bonne haleine lors de deux session conjointes tenues respectivement à Bonn (1995), et à Genève (1996). Suite à celles-ci, les deux rapporteurs spéciaux ont présenté deux projets de résolution reproduits dans le présent *Annuaire*.

Quant à lui, le rapporteur général de la Huitième Commission avait indiqué lors de la réunion de Bonn, qu'il se proposait d'articuler la résolution qu'il allait proposer, sur les points suivants :

(a) Le droit à un environnement sain ;

(b) Environnement et développement ;

(c) Le principe de subsidiarité ;

(d) La prévention, y compris le problème de l'Evaluation des Effets sur l'Environnement (EEE) ;

(e) Le principe du pollueur-payeur ;

(f) *Monitoring* ;

(g) Le principe de la prévention ;

(h) *Fact-finding ;*

(i) Règlement des différends.

Les propos du rapporteur général ayant été approuvés par ses collègues, il a commencé à préparer sa résolution, tout en restant constamment en contact avec les rapporteurs spéciaux, afin d'éviter des contradictions dans les libellés préparés par eux-mêmes. Pour ce faire, les trois rapporteurs se sont aussi rencontrés plusieurs fois. Suite à ces rencontres, le rapporteur général a finalisé la résolution ici annexée, dont il recommande l'adoption par l'Institut. Deux autres résolutions sont présentées par les rapporteurs spéciaux, respectivement.

Les travaux préparatoires, qui font partie intégrante du présent rapport, ont été déjà publiés au volume 66-II de l'*Annuaire* (session de Milan, p. 285 et suiv.). A cette publication, s'ajoute le compte-rendu de la séance tenue à Bergame le 2 septembre 1993 (*Ibidem*, p. 88 et suiv.), ainsi que l'ensemble des documents publiés aux fins de la présente session et qui décrivent le travail accompli entre Milan (1993) et Strasbourg (1997). Au présent rapport est annexée une bibliographie essentielle d'ouvrages et de documents.

Dans l'accomplissement de sa tâche, le rapporteur a essayé de rester fidèle aux propos exposés par l'Institut dans sa *Déclaration sur un programme d'action sur la protection de l'environnement global* adoptée a Bâle le 2 septembre 1991 (*Annuaire*, volume 65-II, p. 408 et suiv.). La pensée de l'Institut a été complétée et mieux articulée àla session de Milan en 1993, ainsi qu'on l'a observé.

La résolution annexée, étant une résolution de base et étant aussi générale, énonce des principes sans préciser trop de détails. Ceci a paru important d'un double point de vue.

D'une part, le présent rapporteur est de l'opinion que, comme le droit international de l'environnement est, dans une large mesure, in statu nascendi, formuler trop de règles créerait un corset trop dur qui ne permettrait pas à la pratique de se développer. Dans cette situation, la

contribution de l'Institut au développement du droit international finirait par être rapidement abandonnée.

La deuxième raison a trait spécifiquement à la matière de la protection de l'environnement. Comme on l'a vu à Rio et pendant la préparation de la Conférence sur l'environnement et le développement, le contraste entre les exigences de la souveraineté nationale et celles de la protection de l'environnement reste très fort, et cette situation s'est reproduite aussi pendant les travaux de l'Institut quand la discussion a eu lieu à Bergame.

Dans ces conditions, une seule solution s'impose : celle consistant à formuler des principes d'un caractère assez général en laissant à des ordres juridiques divers - communautaire, national, régional — le soin d'édicter l'ordonnancement supportable par les individus qui sont couverts par l'ordre juridique en question. Il se peut donc que la discipline concrète soit très différenciée, l'important étant qu'elle soit conforme à certaines données de base. Ce sont justement ces données de base qui sont exposées dans la présente résolution.

A ceci s'ajoute le fait que lorsque l'Institut a considéré que, dans un domaine spécifique, on pouvait aller au-delà de nécessité en empiétant sur d'autres aspects du droit international, le même Institut a alors nommé des rapporteurs spéciaux, comme, dans notre cas, MM. Orrego Vicuña et Paolillo.

La tâche du rapporteur général a, partant, été réduite àl'élaboration des principes généraux. Ainsi, bien entendu, qu'à la coordination avec les autres deux Confrères.

II

Le projet de résolution débute, à l'article 1, par des définitions qui seront d'autant plus nécessaires dans un domaine où même les concepts ne sont pas toujours désignés d'une façon univoque. En l'espèce, la terminologie est dérivée de l'article 2, paragraphe 10 de la *Convention sur la responsabilité civile des dommages résultant d'activités dangereuses pour l'environnement* adoptée à Lugano (Suisse) le 21 juin 1993 sous les auspices du Conseil de l'Europe. Cette convention qui rayonne bien au-delà du Conseil au sein duquel elle a été établie semble, aux yeux du Rapporteur, représenter une base assez sûre pour entamer la discussion.

L'article 2 représente la clef de voûte du raisonnement tout entier. En effet, tant dans les commentaires écrits que dans la discussion orale ainsi que dans la suite des travaux, le rapporteur spécial n'a entendu aucun de ses confrères mettre en doute la validité du principe selon lequel tout individu a le droit de vivre dans un environnement sain. Il est donc proclamé de façon lapidaire.

Mais une chose est de proclamer un principe, autre chose est d'en assurer la "pleine réalisation". Ici, comme l'a montré la Conférence de Rio, le degré de développement des collectivités humaines si radicalement différencié d'un territoire à l'autre et aussi à l'intérieur du même Etat, ne peut que se refléter sur la façon dans laquelle le droit de vivre dans un environnement sain se réalise. Il se peut aussi, fort souvent, qu'au fur et à mesure que le développement progresse, un environnement, qui jadis était sain, se transforme en malsain: qu'il suffise de songer aux zones marécageuses dont la planète abonde. Il faut donc que l'environnement s'adapte au développement et, en même temps, que se réalise l'inverse, à savoir l'adaptation du degré et de la "vitesse" du développement aux exigences de l'environnement.

Cet équilibre très délicat ne doit pas être perdu de vue. Et le droit international, en l'absence d'une autorité universelle (mais serait-elle effective ?) doit tenir compte du fait que ce sont finalement les Etats qui orientent le développement des collectivités humaines. Il doit donc se limiter à intervenir pour assurer la ***coordination*** des pouvoirs étatiques et infra-étatiques, sans prétendre imposer des règles qui ne pourraient pas être respectées.

C'est sur cette base que s'explique la philosophie de l'article 3 qui permet d'interpréter l'article 2 en évitant toute application excessive et, par conséquent, futile.

III

Toute règle du droit international, même si elle semble s'adresser aux superstructures de la vie humaine que sont les Etats, vise en effet des aspects de l'activité des individus. Ceci est d'autant plus évident lorsqu'il s'agit de l'environnement car l'exigence d'une réglementation internationale est née quand on s'est aperçu qu'il fallait coordonner l'activité des collectivités humaines sans quoi le développement scientifique et technologique aurait apporté des désordres en présence d'un environnement physique qui est commun au monde entier.

Il s'agit donc d'intervenir sur la vie des collectivités humaines qui ont leur gouvernement et, surtout, leurs règles. Dans ces conditions, il convient de se servir, en large mesure, du principe de subsidiarité qui implique que la solution des difficultés doit être recherchée, tout d'abord, sur le plan du droit qui est plus proche des individus, à savoir le droit national (mais le cas échéant, en allant même au-dessous jusqu'au niveau, régional ou autre, des petites collectivités) ou, dans certains cas, le droit communautaire (la référence, ici, à l'article 130 R du Traité sur l'Union Européenne s'impose).

C'est donc une pyramide de règles qu'il faut imaginer, où le droit international, qui se situe au sommet, ne fait qu'édicter des "schémas généraux de comportement" qui permettent de vérifier si la législation communautaire, nationale ou infra-nationale, tout étant diversifiée, correspond aux exigences minimales nécessaires au progrès de l'humanité. Une discipline internationale trop détaillée et trop ingérante ne serait, de l'avis du rapporteur, qu'un *flatus vocis* dépourvu de tout impact sur la réalité des choses. Ce n'est que de l'ensemble des règles, internationales et nationales (dans toutes leurs facettes), qu'il faut trouver les critères desquels s'inspirer. Cette situation est reflétée à l'article 4.

Ceci pour ce qui concerne le problème de savoir qui doit édicter des règles pour la protection de l'environnement. Mais ces règles, quant à leur contenu, ne peuvent pas, dans des dangers irréparables, être aveugles. Il y a, à l'heure actuelle, des connaissances techniques sur les effets sur l'environnement, qui doivent être respectées, et ce respect demande une coopération internationale afin de permettre à tous de profiter du progrès scientifique.

Sur le problème que nous venons d'esquisser, il n'y a pas de contrastes. Il est en effet acquis que l'Evaluation des Effets sur l'Environnement (EEE) de tout projet important doit se faire à l'aide de toutes les connaissances scientifiques qui, à cet effet, sont àconsidérer comme un patrimoine de l'humanité. Nous assistons ainsi aux efforts des institutions financières impartiales, comme la Banque Mondiale, qui imposent, à ceux qui demandent le financement d'un projet avec impact sur l'environnement, de respecter l'EEE fourni par la Banque elle-même. On peut donc parler, à ce propos, de quelque chose qui est entré dans la pratique internationale et qui, pour cette raison et compte tenu de son opportunité, peut être répété dans un article de notre résolution, tel qu'il est fait à l'article 5.

IV

La prévention des effets préjudiciables d'une mauvaise administration de l'environnement ne demande pas seulement l'Evaluation des Effets sur l'Environnement (EEE) faite avant d'entamer une politique de l'environnement importante. Egalement essentiel est le développement d'activités - industrielles ou autres -dont le mauvais fonctionnement pourrait avoir des conséquences dévastatrices. Or, si ces activités ont lieu à proximité d'une frontière ou, de toute façon, si elles peuvent avoir des répercussions transfrontalières, il est tout à fait licite à chaque Etat de s'en soucier et de recueillir, **sur son territoire,** toute information appropriée. La surveillance des activités qui se développent en territoire d'autrui pourrait dans ce cas être vue comme une des innombrables manifestations de la souveraineté territoriale de celui qui surveille.

Mais il arrive parfois que la proximité de l'activité dangereuse et les effets catastrophiques, même transfrontaliers, d'un déchaînement de forces naturelles suite à un accident de parcours demandent l'installation, sur le territoire, de systèmes de surveillance continue (***monitoring***). Or, si cela est licite sur la base des principes généraux qui concernent l'administration du territoire, il semble être un résultat du développement des politiques qui visent à modifier, àcause d'exigences supérieures, certains aspects importants de l'environnement des régions de frontière, qu'une coopération puisse s'instaurer entre différents pays pour mieux protéger, dans l'intérêt général, les valeurs environnementales communes. Il est donc possible, de l'avis du rapporteur, d'affirmer, comme le fait l'article 6.3, l'obligation de mettre à la disposition de la Communauté internationale et surtout du pays ou le danger pour l'environnement peut trouver sa source, toutes les données recueillies.

Au-delà de cette affirmation il n'est pas possible toutefois d'aller, sans s'imaginer un droit superétatique qui n'existe pas àl'heure actuelle. Par conséquent la mise en oeuvre pratique du principe énoncé à l'article 6.3 ne peut arriver qu'à travers des accords ***ad hoc***, bilatéraux ou multilatéraux, que l'Institut doit bien souhaiter, mais qu'il ne faut pas imposer.

Si nous traversons maintenant la frontière et nous nous plaçons dans le territoire où des activités ayant des conséquences importantes sur l'environnement ont lieu, la question qui se pose est celle de savoir quelles sont les obligations que la sauvegarde de l'environnement impose à l'Etat auquel le territoire appartient.

A cet Etat on demande essentiellement de prévenir toute conséquence dommageable qui puisse affecter la vie des générations futures. Ceci se comprend très bien lorsque c'est l'Etat lui-même qui gère la politique ayant des conséquences sur l'environnement. Mais l'Etat, on le sait, est maître d'une vaste collectivité d'individus organisée de façon différente. Or pour qu'il s'acquitte de son devoir il faut non seulement qu'il se comporte correctement lorsqu'il agit personnellement, mais il faut qu'il ait aussi une législation appropriée imposable aux particuliers, afin que tout sujet respecte les mêmes ***standards***. Et si, comme il est tout à fait licite, le contrôle de l'environnement appartient aux autorités locales, il faut qu'elles aussi obéissent aux structures communes.

On se trouve, par conséquent, devant un problème qui, dans les rapports interétatiques, est un problème de droit international, mais où le respect par l'Etat du droit international comporte l'existence d'une législation opportune qui puisse s'imposer à ceux dont l'activité est celle qui crée, ou pourrait créer, des dangers inadmissibles. Le projet de résolution (nous sommes maintenant à l'article 7) en donne acte.

Il y a encore un autre aspect à signaler. Si un autre Etat, à tort ou à raison, craint que l'activité conduite ailleurs puisse endommager ses droits souverains sur l'environnement tels que reconnus par le droit international, il aura le ***droit*** de prétendre qu'une enquête soit conduite afin de mettre au clair quelles sont les conséquences ultimes de l'activité en question. Le devoir qu'a l'Etat où l'activité se poursuit de permettre de tels contrôles signifie qu'une requête de ce genre ne pourrait pas être opposée avec l'argument classique de la non ingérence dans le domaine réservé à la souveraineté territoriale. Sans arriver à dire que tout Etat a le droit à une solution équitable du différend, car, de l'avis du rapporteur, on n'est pas encore près d'une telle évolution du droit international, on peut au moins affirmer que, pour les procédures appropriées qui sont parfois articulées au sein d'organisations internationales , on a le droit à ce que les éléments de fait soient établis de façon incontestable au profit de n'importe quelle juridiction compétente, soit-elle interne ou internationale.

V

L'article 8 du projet de résolution occupe, dans le contexte de celle-ci, une position clef. Dans son premier paragraphe il établi que toute personne (état, administration, personne juridique ou physique) dont l'activité, peu importe si licite ou illicite, peut comporter un préjudice à l'environnement capable d'en réduire de façon appréciable la jouissance pour les autres sujets, doit faire de son mieux pour éviter ce préjudice. Si, toutefois, le préjudice survient, elle doit l'indemniser selon les règles des ordres juridiques compétents, cette indemnisation ne pouvant jamais rester en-deçà des normes minimales en vigueur.

Ce paragraphe voit jouer ensemble plusieurs ordres juridiques différents. Il se peut que la relation entre activité et préjudice se situe au niveau du droit international si deux Etats s'opposent, comme il en est le cas dans l'affaire ***Gabcikovo-Nagymaros*** actuellement devant la Cour internationale de Justice. Mais si la relation voit l'opposition entre une compagnie commerciale et les autorités d'un territoire, elles se situe au niveau d'un système interne, quitte à déterminer lequel. Il se peut aussi qu'il y ait une relation située tant sur le plan du droit international que sur celui du droit interne, sans vouloir là oublier le droit communautaire qui peut être appréciable à côté de celui-ci.

Or, quel que soit l'ordre (ou les ordres) juridique compétent, il faut qu'ils parlent un langage comparable. D'où la règle, que l'on peut imposer en droit international, selon laquelle certains critères minimaux doivent être en vigueur, quel que soit l'ordre juridique sur le plan duquel la discussion se pose.

Les paragraphes 2 et 3 s'occupent du caractère fautif ou non fautif des actes dont on discute. Si l'acte n'est pas fautif, il faut tout de même indemniser le préjudice, que ce soit en droit international ou ailleurs. Mais si l'acte est fautif, il faut trouver un ordre juridique selon lequel apprécier la faute. Ce sera, dans ce cas, l'ordre juridique dans lequel la faute est invoquée, quitte, évidemment, à le substituer si les Etats visés dans la matière en ont ainsi voulu.

Enfin, car en cette matière la garantie joue un rôle important, il est dit que lorsqu'on doit l'apprécier on tiendra compte des possibilités d'indemnisation offertes par les ordres juridiques compétents, chose qui signifie faire jouer ensemble des ordres internes et l'ordre juridique international (ou, si l'on veut, des organisations internationales).

Mais, au-delà de la recherche de l'ordre juridique compétent, qui peut, à la limite, être influencée par les vues des parties au litige, ce qui est vraiment important c'est que l'évaluation doit se faire de manière à être fiable. Ce critère vaut en toute circonstance, comme le dit l'article 9, tant si l'on se pose sur le plan du droit international que si l'on est sur celui du droit interne.

Une enquête doit donc être menée par une autorité impartiale de manière à être acceptée partout. Il est évident qu'à cette fin, l'aide que peuvent apporter des organisations internationales compétentes (et il y en a) est fondamentale.

Enfin, l'article 10, sans aborder le problème de la solution des différends qui, de l'avis du rapporteur, n'est pas encore mûr, établit certaines petites règles valables dans n'importe quel contexte de règlement. La première c'est que les entités oeuvrant dans la matière objet du différend ont le droit d'être entendues, même s'il ne s'agit pas de sujets du droit international.

La deuxième règle (et ce n'est pas M. de la Palisse qui parle) c'est que tout jugement international doit être respecté. Respecté, dirai-je, au-delà de l'ordre juridique international, mais surtout lorsqu'il est question de le transporter en droit interne pour lui donner son efficacité.

VI

Avec l'article 10 s'achève le projet de résolution. Le rapporteur a voulu s'arrêter là, car, à son avis, ce qu'il aurait pu, ou, dans certains cas, voulu, ajouter ne correspondait pas, à l'heure actuelle, à l'évolution, même *in itinere*, du droit international. Dans ces conditions, il aurait représenté simplement un voeu, un souhait, bref quelque chose qu'il n'appartient pas à l'Institut de droit international de formuler.

Il est évident, toutefois, que la présente résolution, et les deux autres qui l'accompagnent grâce aux efforts des deux éminents Confrères,

Francisco Orrego Vicuña et Felipe Paolillo, n'épuisent pas ce nouveau chapitre du droit international, qu'est "L'Environnement". D'autres développements arriveront au fur et à mesure que l'humanité devient consciente de l'unité des intérêts en jeu dans cette matière et de la nécessité, par conséquent, de réduire l'impact d'autres principes surtout celui de la souveraineté des Etats. Le progrès viendra mais il ne faut pas précipiter les choses. Il n'est pas possible, de l'avis du rapporteur, de penser déjà aux "droits" des générations futures et aux "titulaires" de ces droits, comme le désirent certains savants. Même au prix d'être considéré conservateur et peut-être "vieillot", le rapporteur préfère se tenir à ce qui existe réellement. Et, pour ce faire, il met de côté les lunettes vertes des environnementalistes et regarde la réalité autour de lui simplement de ses yeux.

Luigi Ferrari Bravo

Projet de Résolution

Février 1997

L'Institut de Droit International,

Ayant considéré, au cours des dernières sessions, les problèmes posés par une gestion satisfaisante de l'environnement, tant au niveau du droit international que sur le plan des conflits de lois et de l'harmonisation des systèmes de droit interne ;

Ayant à l'esprit que la recherche de nouvelles réglementations en la matière conduit à considérer que tout progrès concernant la protection de l'environnement est lié à la considération des exigences du développement des collectivités humaines telles que déterminées par les pouvoirs souverains qui les gouvernent ;

Considérant par conséquent que toute codification concernant l'environnement doit sauvegarder la libre expression des impératifs de souveraineté légitime et que pour ce faire elle doit s'arrêter là où se manifeste un risque d'empiétement sur les pouvoirs souverains ;

Faisant application des idées énoncées ci-dessus et limitant, partant, l'objet de la présente résolution à certains principes qui àl'heure actuelle peuvent se référer tant à des questions se rapportant àla protection transfrontalière de l'environnement qu'aux questions réglées à l'intérieur d'un seul ordre juridique ;

Considérant que, de cette façon, l'Institut s'est acquitté du mandat formulé en 1991 dans le cadre du programme de la «Décennie du droit international» et a apporté sa contribution à ladite «Décennie» ;

Ayant bien à l'esprit que la présente résolution ne touche que certains aspects de l'architecture générale du droit international de l'environnement, sur lequel deux autres résolutions traitant respectivement de "Responsabilité et environnement" et du "Processus d'adoption et de mise en oeuvre des règles dans le domaine de l'environnement", ont été simultanément approuvées, résolutions qui, à leur tour, se rattachent à celles adoptées à Athènes en 1979 et au Caire en 1987 ;

Considérant que l'environnement en tant que thème général doit rester présent dans les travaux futurs de l'Institut, tant sur le plan du droit international public que sur le plan du droit international privé ;

Proclame les règles qui suivent :

Article 1

1. Aux fins de la présente résolution, le concept d'«environnement» englobe les ressources naturelles abiotiques et biotiques telles que l'air, l'eau, le sol, la faune et la flore ainsi que l'interaction entre ces mêmes facteurs. Il comprend aussi les aspects caractéristiques du paysage.

2. Le fait que d'autres biens, tels que par exemple le patrimoine culturel, ne soient pas compris dans l'expression «environnement» que retient la présente résolution, n'affecte en rien la signification desdits biens dans des matières autres que celles visées ici.

Article 2

Tout être humain a le droit de vivre dans un environnement sain.

Article 3

L'exercice du droit proclamé à l'article 2 ainsi que la portée de sa pleine réalisation sont conditionnés par le degré de développement des collectivités humaines dans le cadre desquelles s'inscrit l'existence de chaque individu. Par conséquent, la réalisation effective du droit de vivre dans un environnement sain est subordonnée à la jouissance du droit au développement.

Article 4

1. La mise en oeuvre des règles internationales concernant l'environnement tient compte des exigences des collectivités nationales.

2. Elle s'effectue par conséquent, et tout d'abord, sur le plan du droit communautaire, national ou intra-étatique, qui gouverne lesdites collectivités, la réglementation internationale n'intervenant qu'au niveau des schémas généraux de comportement.

3. Toutefois, il est fait recours au droit international pour déterminer si la législation communautaire, la législation nationale ou les réglementations intra-étatiques sont conformes aux modèles fondamentaux de la protection de l'environnement et, si tel n'est pas le cas, pour en tirer les conséquences pertinentes.

Article 5.

1. La protection de l'environnement implique une connaissance approfondie des effets sur l'environnement des activités humaines.

2. L'Evaluation des Effets sur l'Environnement (EEE) de toute politique importante, qu'elle soit internationale ou locale, doit s'effectuer en tenant compte des conditions de vie et des perspectives de développement des collectivités humaines visées par celle-ci. Elle se fait selon des critères comparables d'un pays à l'autre et dans un esprit de coopération internationale.

Article 6

1. Dans le respect de la souveraineté territoriale des autres Etats, tout Etat a le droit de se préoccuper des conséquences transfrontalières des activités conduites en territoire d'autrui.

2. Par conséquent, tout Etat a le droit d'installer sur son territoire tout système d'observation qui puisse le prévenir à temps de tous dégâts à l'environnement dérivant d'activités conduites en dehors de ses frontières.

3. Toute information obtenue au moyen d'instruments d'observation doit être immédiatement mise à la disposition de la communauté internationale et notamment du pays où le danger pour l'environnement peut trouver sa source.

4. Des règles de droit international conventionnel régissent la coopération internationale dans ce domaine.

Article 7

1. Tout Etat, lorsqu'il intervient par des décisions prises dans l'exercice de sa souveraineté nationale dans des domaines d'activité où les conséquences sur l'environnement sont évidentes, doit s'assurer que son action ainsi que celle de tout sujet oeuvrant dans son territoire ou soumis à sa juridiction, n'aient pas des conséquences dommageables qui puissent affecter la vie des générations présentes et futures.

2. A cet effet, l'action de tout Etat, ainsi que celle de tout sujet oeuvrant dans le cadre de sa juridiction, doivent être accompagnées par une vérification scrupuleuse des données scientifiques disponibles.

3. Tout autre Etat, qui craint que de telles actions puissent porter atteinte à ses droits souverains sur l'environnement, peut invoquer tout moyen licite pour faire vérifier, de façon impartiale, quelles sont les conséquences ultimes de l'action envisagée. L'Etat dans le territoire duquel l'action est mise en cause a le devoir de permettre de tels contrôles.

Article 8

1. L'Etat, l'administration locale, la personne juridique ou physique à l'activité desquels peut être rattaché un préjudice porté à l'environnement qui soit capable d'en réduire de façon appréciable la jouissance par d'autres sujets juridiques, doivent, dans toute la mesure du possible, faire en sorte que ce préjudice ne survienne pas. En tout cas, ils doivent l'indemniser selon les règles des ordres juridiques compétents. L'indemnisation ne doit jamais se situer en-deçà des normes minimales en vigueur, quel que soit l'ordre juridique compétent.

2. L'obligation d'éviter le préjudice ainsi que le devoir de l'indemniser existent indépendamment du caractère fautif de l'activité qui les a causés.

3. Si, toutefois, l'acte découle d'une faute, les règles pertinentes de l'ordre juridique dans lequel la faute est invoquée s'appliquent. Les Etats peuvent, par réglementation conventionnelle, déterminer quels sont, à cet effet, les ordres juridiques compétents.

4. La garantie, sur le plan interne ou international, de l'activité génératrice du préjudice tient compte des possibilités d'indemnisation offertes par les ordres juridiques compétents.

Article 9

1. L'évaluation des circonstances qui ont donné lieu à un préjudice à cause duquel une indemnisation est requise ainsi que de tout élément factuel concernant l'environnement doit se faire de manière à être fiable, tant si la question se pose sur le plan de l'ordre juridique international que si elle surgit au sein d'un ordre juridique interne compétent.

2. A cette fin, il est nécessaire que toute enquête soit menée par des autorités internationales impartiales et que les résultats auxquels elle parvient soient tout aussi acceptables sur le plan interne que sur le plan international. L'aide, dans ce domaine, d'organisations internationales compétentes est vivement recommandée.

Article 10

1. Toute procédure internationale de règlement de différends en matière d'environnement doit permettre aux entités oeuvrant en la matière d'être entendues et de se défendre effectivement, même s'il ne s'agit pas de sujets de droit international.

2. Lorsqu'un jugement international est rendu, il doit être respecté, quel que soit l'ordre juridique où la question concernant l'environnement se pose.

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