Global Challenges and the Shaping of International Law

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In recent decades, the world has witnessed an exponential development in communications and an increased interest of nations in different issues, such as trade, environment, poverty, nuclear proliferation, intellectual property and human rights. These issues are viewed as matters of global concern. As such, they have been subject to a growing political effort to develop internationally agreed upon principles and norms to discipline the action of national governments. This is not an entirely new fact: international law has been used since States became the major actors in world affairs as one of the main instruments to manage their relations peacefully. Now, however, the issues at stake encourage some schools of thought to question the clear separation that existed between the "domestic order" and the lack of a hierarchy among nations. This has led to discussions that, in view of their complexity, are still unresolved about the role and the future of the nation-state and the extent to and form by which sovereignty should be invoked in dealing with matters of interest for the world as a whole.

The instantaneousness of communications increased the speed of information and also trade and financial flows. Technological progress and its effects on the international division of labor introduced a new and decisive element in the capacity of nations to compete internationally. This has raised new expectations and influenced patterns of production and consumption, occasionally aggravating existing inequalities, particularly in developing countries. The repercussions of these changes called into question the capacity of governments to manage emerging social demands, particularly in the developing world.

Asymmetry, globalization and international institutions

The dynamics of politics among nations have been altered as the linkage between different issues became more evident relating their specific variables and processes to social conditions and activities, as well as to national and regional circumstances. As decisions on environment, finance, trade, poverty eradication, human rights, and non-proliferation generated greater concern in different societies, the action they required became global challenges as a number of nations would not be able to cope or to endorse some of the choices eventually made. This was clearly the situation of the developing nations, where economic, financial, technological and political vulnerabilities are higher in view of the asymmetries that characterize the international system.

These challenges were generated mainly by the crises and the transformations that occurred throughout the world, particularly at the end of the 1980s and during the 1990s, which deeply influenced the interests of the industrialized countries. Their international and diplomatic discourse could be summed up in three key assumptions:

(i) The need for domestic economic and political reforms with emphasis on the reduction of the role of the state and increased participation of the private sector;
(ii) A new approach to development problems with greater concern for their impacts on the global environment and the creation of sound and stable conditions to attract investment conditions, in particular by transnational corporations;
(iii) The need for collective global action to resolve problems that transcend international boundaries, such as those related to non-proliferation, human rights and climate change.

These assumptions have deep political implications. They are structured around concepts that have different interpretations according to the situation that prevails in a society. For example, the "reduction of the role of the state" is a concept that was widely used in public documents and in the academic literature of the 1980s and 1990s and strongly recommended by international institutions and the Governments of rich countries to be part and parcel of economic reforms in the developing countries. On the other hand, in some industrialized countries, this concept was applied in a selective way. The state gave up some activities, but maintained or even enhanced its participation in other areas, in particular those related to defense. Characterizing issues and actions as global implies a concern for events or activities in the developing countries that could have repercussions for the security and the way of life of the rich nations. The assumptions imply a willingness to understand and respond to new social realities, but, at the same time, they reveal an essential fragility faced by nations to give responses to the challenges they face simply by adopting policies and measures at the national level.

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2 RIACHOWIL, 1991, p. 3
The discourse of the time was pervaded by the economic liberalization experienced by some societies and transmitted a vision of the future, according to a set of ideas and the Weltanschauung of these societies. The message conveyed was a representation of a new era that had begun with the end of the Cold War and the so-called "victory of democracy and capitalism." The almost absolute hegemony enjoyed by the developed countries, in particular by the United States, since then, has defined the meaning of their discourse. It should be borne in mind, however, that the discourse is understood in different ways according to the representations that each people gives to their lives and to their experience of the social order and of historical change at a certain period of time.4

The agenda spelled out in the discourse of the rich nations put politicians, businessmen and civil society in the developing world at a political crossroads: how to promote change given the political and economic imbalances caused by the disparities of power?

The very nature of these challenges ensures that addressing them requires new arrangements for individuals and institutions to act within the political system. The issue here is one of significance, i.e., what did the text of the discourse mean to different audiences.5 Action is related to a whole series of people's attitudes, beliefs, values and common abilities, which form political culture. As recognized by Giorgio Del Vecchio "there is no interaction between men, there is no possibility to recover the more complicated and unforeseen it can be that admits and demands a legal solution." Therefore, a change in political culture is associated to the responses to these challenges and presupposes devising more democratic and effective decision-making processes.2 This is a complex and controversial task both at the domestic and international levels with important consequences for the development of international law.

One of the main conceptual controversies put forward by global challenges is that of "deteriorization"? At the political level, the notion of "deteriorization" refers to the ability of national governments to preserve their autonomy to adopt policies and measures to comply with their international commitments without jeopardizing their national interests. Solutions for issues of global concern should be applied all over the world with the support of international organizations and civil society. The mobility of economic, political or social interests should not be hindered by the geographical notion of the territorial materiality that links people to land, one of the historical pillars of international law.

Domestic interests are critical to identify the basis for calculating the implications of collective responses to global challenges. The contemporary patterns of production associated to the development of technology have created new kinds of potential dangers and risks for society. Dangers and risks are not limited to the geographical area where they are caused; their effects can be even worse for those societies that have contributed the least to their creation. As Beck says, societies become "self-referential", in the sense that their interests have little or no regard to broader human needs. Therefore, the issue of managing the international order and the quest to make relations among States more democratic and based on the rule of law have become critical.

At the end of World War II the international system was at the same time in shambles and marked by the preeminence of the United States as the dominant power in world politics. The Cold War was based on the idea of a condominium between the United States and the Soviet Union to run international relations. This drew attention to the lack of a world government and the asymmetry derived from economic, technological, military and political power. In this context, governments perceived the importance of international institutions as instruments for promoting cooperation among States. These institutions also proved themselves useful for the rich countries to promote their domestic agenda and enhance their national interest by furthering the adoption of resolutions, statements, declarations, agreements and other types of international decisions that gave international transcendence and legitimacy to their domestic norms. The role of international organizations became a key factor in giving a clear meaning to international governance regarding the issues associated to global challenges. These institutions also had a significant influence in the shaping of national policies and, therefore, setting the guidelines for the development of national laws and regulations through their operational activities and other cooperation programs. This occurred particularly in the developing countries, either because of the lack of capacities or as a result of the conditionalities they have to meet to have access to development aid from multilateral sources or from bilateral donors. Their decisions, procedures, approaches and constitutional charters reflect the existing political and economic asymmetries and are also used as legal frameworks to set up a road for collective action that frequently disregards those distortions. The

4 That hegemony, however, was not something new. It was built in the decades that followed World War II to restore the dominance enjoyed by the West in the previous centuries. In 1940, one of the chief architects of the post-war world - George Kennan - was already concerned about how the United States could help basing on resentment from the ashes of war and assure peace and prosperity for future generations. This concern was evident in Kennan's role in the implementation of the Marshall Plan, MACYN, J., 1986, p. 130

5 HIBCH, JI, 1967, p. 226; GIERFF, J., 1994, p. 34.


7 DEL VECCHIO, 1912, p. 115.

8 ALMOND, BINGHAM POWELL JR., 1972, p. 19 e ss.

9 NAFFARBET, 2006, p. 24 e ss.

International law is a tool to ensure public order regardless of the profound differences between nations that occur in governance, politics, economy, and culture. The WTO's role is to promote and conclude agreements on the non-commercial aspects of international trade.

As stated by Philip Alston, the legal relations and all human societies, including potential solutions to overcrowded cities, have been developed as a means to face some challenges. Even when the issues at stake are heavily dependent on the best scientific knowledge available (e.g., combating climate change), the design and implementation of successful solutions require the involvement of those involved in the negotiation of treaties. The diversity of agreements and the negotiation of the forms of societies conventionally known as "States" is the best way to face some challenges. Even when the issues at stake are heavily dependent on the best scientific knowledge available (e.g., combating climate change), the design and implementation of successful solutions require the involvement of those involved in the negotiation of treaties. The diversity of agreements and the negotiation of the forms of societies conventionally known as "States" is the best way to face some challenges.

In recent years, discussions about the relation between domestic law and international law have gained emphasis as a result of the adoption of a plethora of non-legally binding international decisions such as resolutions, statements, declarations, and other agreements. The legal nature of these agreements varies from being considered legally binding to being advisory or non-binding (e.g., the Paris Agreement on climate change).

In recent years, the interaction between domestic law and international law has been a focus of attention. This interaction is both regulatory and interpretive, involving the adaptation of domestic law to international norms and the interpretation of international law in the context of domestic systems. The relationship between domestic and international law is complex and dynamic, reflecting the interdependence of legal systems in a globalized world.
codes of conduct, international regimes, or arrangements, generally known as soft law. The basis for soft law may be found in legal doctrine. Kelsen argues that norms are not only prescriptive of a specific conduct but may also authorize (i.e., give a mandate) to do something. Such mandate means the capacity of "producing law" through a positive action.\textsuperscript{14} The issue here is the nature of such positive action.

At the international level, compliance with treaties depends chiefly on the commitment of the parties. Here lies one of the roots of the frustration of some groups in the civil society that are frequently pressuring for stronger and more consistent moves in the international arena. The implications of the disciplines agreed to in a negotiation may, however, lead to a freezing of adverse circumstances that prevail in a particular society or impose an abnormal cost on another one to comply with the agreement.

The effects of international legal norms in view of the internal sphere of states to address global issues lead us to one of the central questions of the theory of law, i.e., the relation of municipal or domestic law and international law.\textsuperscript{15} At stake here is the extent of the primacy of international law over domestic legislation in shaping the behavior of states or regional economic integration arrangements in areas viewed as of global concern (such as non-proliferation, human rights, environment, and trade). Kelsen's position in favor of international law as the basic norm governing the international order and, therefore, a source of validity or legitimacy of domestic law is well known.\textsuperscript{16} The position that international law results from the willingness of states to yield their sovereignty over certain issues, since they are the sole actors in the international arena in a position to do so, is also known.

Exercising such willingness is, however, closely related to the distribution of power among States. The effects of international arrangements drafted either as hard law or as soft law may exceed the strict subject matter under negotiation. These consequences may spill over to other areas, which are apparently unrelated or inhibit diplomatic action by the parties. This is a critical aspect that, in countries like Brazil, requires political and strategic evaluation by the Executive Branch before and during the negotiations. It is at the heart of the role of the Congress when it is called to give its approval to treaties. Although soft law instruments, such as resolutions of international organizations or declarations and statements, do not require congressional review, they constitute a political commitment with repercussions for the diplomatic action of the country. Such commitment does carry a political weight for the diplomatic standing of the country and its policies, even if it should produce no encroachment on the state's sovereignty, since the government may disavow it at any time.

The emergence of supranational law with the development and consolidation of regional economic integration organizations, particularly the European Union (EU), created a new situation regarding the classical separation between municipal and international law. In many areas, the norms adopted by the EU have immediate applicability into the national realm of its member States. The European Commission, the executive body of the EU, has the responsibility to define policies and negotiate, on behalf of member States of the bloc, international norms on issues where its competence has been delegated by the member States.

MERCSOUL, another regional economic integration organization, but not as advanced as the EU, is beginning to step in the same direction, even if, here in South America, significant developments still have to take place to provide the necessary political and economic conditions for that. Some of the norms adopted by the organs or bodies of MERCSOUL may be directly incorporated into the legal framework of member States. These norms, however, should not create rights, obligations nor be in contradiction to national law, nor generate financial obligations to the national treasury. This is the case of the decisions adopted by the Common Market Council, the resolutions of the Common Market Group and the guidelines issued by the Trade Commission, The Protocol of Ouro Preto,\textsuperscript{17} which created the institutional framework of MERCSOUL, declares these acts as obligatory and they can be invoked after the internalization procedure defined in its Articles 38 and 40. All other norms adopted by the organs and bodies of MERCSOUL still have to be formally internalized, and in many cases, approved by the national Parliaments. The Supreme Federal Court of Brazil drew up a unanimous judgment on the entering into force of the MERCSOUL Protocol of Interim Measures of Protection. In this decision drafted by Minister Celso de Mello, the Brazilian Highest Court clearly establishes the requirements for internalization of international legal norms into the Brazilian legal order:

*The acceptance of international treaties in general, and of the agreements signed by Brazil within MERCSOUL, depends for their later internal execution, on a causal and ordered succession of acts of a political-legal nature, thus defined: (a) approval by the National Congress, through a legislative decree, of said conventions; (b) ratification of these international acts by the Head of State, by means of depositing the respective instrument; (c) promulgation of said agreements or treaties by the President of the Republic, through a decree, in*

\textsuperscript{14} Kelsen, 1974, p. 175
\textsuperscript{15} Brownlie, 1980, p. 32 ff
\textsuperscript{16} Kelsen, 1974, p. 447 e ss
\textsuperscript{17} See articles 9, 15 and 20.
order to enable the consequences of the following basic effects, essential to its entering into force domestically: (1) official publication of the text of the treaty; and (2) implementation of the international public law act, which then—and only then—becomes binding and obligatory within the internal positive law. Under the aegis of the Brazilian constitutional model, even when dealing with integration treaties, the classic institutional mechanisms for acceptance of international conventions in general still apply, notwithstanding the existence of the rule provided for in the sole paragraph of Article 4 of the Constitution of the Republic, which is not enough to relegate it, since it has a merely pragmatic content and whose sense does not make the action of the constitutional instruments for transposing to the domestic legal order of agreements, protocols and conventions signed by Brazil within the MERCOSUL unnecessary.14

International Cooperation

The consolidation of international law as a key instrument for governing international relations has had deep impact in the development of international cooperation. A fundamental step in this direction was the establishment of the scope of international cooperation in the Charter of the United Nations when it refers to achieving “international cooperation in solving international problems of an economic, social, cultural or humanitarian character” (article 1, § 3) among the purposes of the organization. The Charter further states that “…the UN shall promote: … b. solutions of international economic, social health and related problems;…” (Article 55).

The language agreed to in the Charter provides for legal force to international cooperation as an instrument to tackle international problems. Cooperation should supersede the idea of violence that for a long time had been invoked by States to solve the problems inherent to living in an anarchical society. Force and violence are not synonymous, as Bobbio points out,15 even if both occur in the sphere of social and political relations. Understanding cooperation as a force, as envisaged in the Charter of the United Nations, means a consolidation of rights of the individuals and the right to resist oppression as the foundation for the action of the State16 and the ultimate aim of politics. Oppression, however, does not result exclusively from violence (expressed by the suppression of political freedoms), but also from the persistence of ignorance, disease, poverty and human and economic exploitation.

Through the United Nations Charter, member countries grant the organization an active role in the search for solutions to international problems. This role goes beyond persuasion and serves to legitimize international concerns over issues believed to transcend national borders. In the last 15 years, globalization, as a political, economic and social phenomenon, has triggered and deepened challenges to the work of the United Nations and its agencies as well as other international organizations. Questions regarding the legitimacy of the role taken on by these institutions, in view of the disparities of power among their members, have been given prominence by globalization. The work of the international organizations derives from the mandates assigned to them in the resolutions, declarations and other legal instruments adopted by their members. Globalization facilitated the action and influence of other actors at international level, such as non-governmental organizations, transnational corporations, or interest groups. On the one hand, the rise of these new actors may represent stronger pressure on governments and international organizations; on the other, since international organizations are composed by States that exercise decision-making power, one could say that the legitimacy of the role of the organizations still rests in the hands of the governments of member countries.

The multiplication of international, regional and subregional organizations, international financial institutions, secretariats of multilateral agreements and specialized agencies, together with the economic, political and social factors that have spurred globalization enhanced the need for coordination at various levels to grant more effectiveness to international cooperation efforts. Associations became more aware of the transboundary consequences of global issues, the need for cooperation not only among States but also among business and civil societies has been reinforced. As a result, efforts to reach international agreements have intensified. These efforts seek to establish legal relations, i.e., “a pattern of potentiality into which actual persons and situations may be fitted.”17

A good illustration of this point is the strengthening of the relations between Brazil and Argentina, since 1985, and the celebration of the Treaty of Asunciòn, which created the MERCOSUL, in 1991, also incorporating Paraguay and Uruguay. In the preamble of the Treaty, the Parties acknowledge the importance of “international trends, particularly the integration of large economic areas and the importance of securing their countries a proper place in the international economy.”18 The Treaty was the offspring of a profound change in the relations between Brazil and Argentina operated at the political, economic, technological and military level. The increase in bilateral trade, the establishment of regular high level political consultations, formation of joint ventures and strategic alliances among companies of both countries and nuclear cooperation between Brazil

14 DIÁRIO DA JUSTIÇA, 10 de agosto de 2000. (translation by Cláudia Vargas)
16 BOBBIO, 1992, p. 4
17 ALLOY, 2001, p. 74.
and Argentina created a web of interests with the objective of reaping benefits not only in the economic field but also in terms of the interaction of Brazil and Argentina with other countries. The agreements resulting from establishment of MERCOSUL not only enhanced the political and economic relations among the four countries but also had profound repercussions in their domestic markets and served as a cornerstone for their negotiations with other partners, as was the case in the negotiations to create the Free Trade Area of the Americas (FTAA).

Legal rules play an increasingly significant role in view of the international repercussions of domestic law and the constraints imposed by international norms. One evidence of this is the impact of domestic subsidies for agriculture provided by European countries and the United States in international trade; another, the changes required in the industrialized countries and countries with economies in transition by the targets for limiting the emissions of greenhouse gases agreed to in the Kyoto Protocol.

Problems generated by anthropogenic activities start to have possible widespread consequences, both in terms of timing and place. These actions have the national territory as their locus. They can be seen from a dialectical point of view in which power and space are categories to understand why certain actions and behavior were fully accepted in the past and why analogous ones are being restrained today. State power has allowed in the past that individual states pursue policies within their sovereign sphere without constraints about the consequences to others. With the realization of the global effects of some decisions there has been a growing movement to change the notion of unrestrained power over space into a concept of space of power that would provide the boundaries for societies to choose their development path. This represents a new approach for the interaction between men and the legal solutions to be given to its consequences.

Finding these legal solutions either through hard law or through soft law is not simple. Choosing the path to follow is a political decision, taken in the negotiations of international organizations or at the treaties’ conference or meeting of the parties. It requires the establishment of a kind of “road map” that defines the format, the content and the legal status of what will be negotiated.

A good example in this regard is the Buenos Aires Plan of Action, adopted by the IV Conference of the Parties of the United Nations Framework Convention on Climate Change (COP-IV). In adopting the decision, the Conference of the Parties clearly stated its determination to “strengthen the implementation of the United Nations Framework Convention on Climate Change and prepare for the future entry into force of the Kyoto Protocol to the Convention, and to maintain political momentum towards these aims”. This launched a process that was concluded with the adoption of the Marrakesh Accords, in 2001. These Accords are a set of decisions and recommendations to deepen international cooperation to combat climate change some of which were formally adopted at the I Meeting of the Parties of the Protocol (COP/MOP 1), when it came into force. None of these decisions are legally binding strictu sensu. They reflect, however, the willingness of the Parties to the Convention and to the Protocol to complement the norms of those legally binding instruments with less stringent rules. This willingness can find a basis in the lesson of Nguyen Quoc Dinh: “the law of the treaties is not too formalistic.”

The decisions adopted at Marrakesh, for example, are much more precise than the norms of the UNFCCC and its Kyoto Protocol that are their cornerstone. The decisions address general policies and measures together with detailed regulation of some of the Articles to strengthen the implementation of the Convention and the Protocol, at the local level and also at the level of the international institutions, as prescribed in the mandate given by COP-IV. The lack of a binding nature to these decisions does not diminish the political commitment therein implied, even in the absence of a legal responsibility of the Parties. A party to the Protocol may, for example, miss the approval of a project of its interest if it does not comply with the requirements established in the corresponding decision on the Clean Development Mechanism.

Soft law has progressively been used in view of the flexibility and freedom it provides for parties to act in a changing environment. It is frequently a more suitable resource to regulate international cooperation, when the differences of views and perceptions among countries clearly do not leave room for commitments under a legally binding instrument or when a less stringent approach leaves room for adopting national legislation in view of political and economic interests or changes in technology. In the latter case, decisions explicitly incorporated in the domestic legislation make the norms part of the law of the land and, therefore, capable of being used as basis for claims before national courts. A good example is found in the rules of the Missile Technology Control Regime, which have been incorporated in the legislation of its member states or have been acknowledged by non-members, through a unilateral statement, as their norm of conduct in dealings involving dual use technologies.

The case of difference in perceptions can be illustrated by the discussion on

13 Veniotes alumni at full member of MERCOSUL in December 2000. The negotiations on the FTAA, collapsed, frustrating the target of concluding them in 2005, as agreed to in the Miami Declaration adopted at the Summit of the Americas in 1994.
15 This occurred in Montevideo in December 2001.
forests since the Rio Conference, in 1992. Since most of primary forests are in developing countries, the negotiation of a Convention on Forests would mean a limitation to their ability to autonomously decide how to implement public policies for the sustainable management of their resources. The implementation of these policies is expensive and demands the existence of national human, institutional and scientific capacities together with financial resources and technology in the countries that have jurisdiction over forest areas. The commitments in these areas undertaken by the rich countries in Rio, in 1992, and in the Conventions that came into force since then were not fulfilled as expected. Therefore, a convention on forests would certainly require commitments by the developing countries regarding targets to reduce deforestation and increase the area under sustainable forest management without any assurance from the developed countries about the provisions of new and additional financial resources and the transfer of technologies on favorable terms, including on concessional and preferential terms.

Some authors question the view of international law as the result of solutions of rights and obligation between sovereignties. They argue that the range of problems associated to the protection of the environment, for example, demand that States behave in a positive way by fostering cooperation through the establishment of regulatory institutions and common management of responsibilities. This position leads us to think that, in view of the global nature of the challenges and problems faced by societies, the assumptions and obligations embedded in international agreements should have a priority over the national legislation.

Cooperation, however, is not simply a legal obligation that is fulfilled once an international agreement comes into force for its Parties. It involves important political dimensions since the scope and terms under which such cooperation will take place is not necessarily a matter of consensus among the Parties of an agreement. The international experience with the implementation of obligations under environmental agreements is that certain obligation become either qualified via decisions adopted by Conferences of the Parties or are simply ignored by some Parties. The idea of collective response to global environmental problems through the implementation of international obligations has been mitigated by a formal recognition of the differentiation in the responsibilities of societies in causing the problems or in acting to preserve further damage.

At the Outreach Session of the G8 Meeting, held in Glenelg, in July 2005, the leaders of the five developing countries invited to participate - Brazil, China, India, Mexico and South Africa - issued a declaration urging the G8 leaders and

the international community to devise innovative mechanisms for the transfer of technology and to provide new and additional financial resources to the developing countries under the UNFCCC and the Kyoto Protocol.

They proposed a "new paradigm for international cooperation" focused on the achievement of concrete and properly assessed results, taking fully into account the perspective and needs of developing countries. Under this new paradigm, cooperation will require an adjustment of national policies to achieve results that can really alter the status quo.

Cooperation is characterized by a unidirectional and insufficient transfer of financial and technological resources from developed to developing countries, with little regard for local capacities and the applicability of such technologies to the realities of developing countries.

Under this new paradigm, the global challenges should be tackled through collaborative research that harnesses existing abilities, by building new capacities in developing countries and by fostering the transfer of these technologies between countries of all latitudes, not only from the North to the South. This collaborative approach would help address issues that can best be met by South-South technology transfer, but whose implementation is often hindered by the unavailability of financial resources, appropriate credit, and capacity-building measures, among others.

The role of international institutions can be pivotal in this new paradigm by providing resources, expertise and assistance to governments and the private sector to actively pursue policies that promote sustainable development. The goal for a new paradigm of international cooperation should be to spur economic and social development and eradication of poverty and, at the same time, provide the instruments for sustainable development in accordance to the situations and circumstances of countries.

Sustainability and International Law

The adoption of the concept of sustainable development and its incorporation in public policies, since the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992, and reaffirmed at the World Summit on Sustainable Development, in Johannesburg in 2002, has raised the issue of how to assess the multiple impacts of economic and social activities on the environment and on the quality of life (particularly on human health and social fairness). The notion of sustainability seems to be impossible to define in a universal manner.

31 "The Missile Technology Control Regime is an informal and voluntary association of countries which share the goal of non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction, and which seek to coordinate national export licensing efforts aimed at preventing their proliferation. <http://www.mtcrc.info/english/index.htm>

32 Joint Declaration of the Heads of State and/or Government of Brazil, China, India, Mexico and South Africa participating in the G8 Glenelg Summit Introduction <http://www.g8summit.ca/summit/2005glenelg/ productive.pdf> (access on February 28, 2006)
The traditional view that a political economy anchored on land, capital and labour as its defining factors has been increasingly challenged by the politics of sustainable development, which have added issues such as identities, territories, and sustainability processes to the former defining factors. The relationship between production processes and production forces now have to take into account their impact on nature and on the new methodologies that must be developed.

Dealing together with the imperative of more development in the developing countries and introducing the ingredient of sustainability in the economic process -- particularly in advanced societies, because of their unsustainable patterns of production and consumption -- as well as with the need to preserve the environment worldwide, the decisions adopted at the Rio Conference21 introduced nuances in the discourse initially championed by rich countries. From a legal point of view, the results of the Rio Conference are a combination of soft law and hard law. The Conference adopted two documents that set non-binding principles for the conduct of States and the international community regarding the relationship between environment and development: the Rio Declaration on Environment and Development and the Non-legally Binding Authoritative Statement of Principles on All Types of Forests (also known as the Forest Principles). The Agenda 21 adopted by a decision of the Conference is a program of action aiming at spelling out concrete actions to put those principles into practice. Including a section on "means of implementation" as an integral part of each chapter of Agenda 21 and agreeing on specific chapters on technological cooperation and the provision of new and additional financial resources meant that the objective set out by the Conference had to be attained by actions that had a normative component. As Kratschvil says, "such actions would not make much sense if there were no underlying norms which provided the meaning for these actions."20

The United Nations Framework Convention on Climate Change and the Convention on Biological Diversity were negotiated within the process of preparation of the Conference but in parallel to the activities of its Preparatory Committee. Each had its own negotiating body established by the UN General Assembly (UNGA) and by the Governing Council of the United Nations Environment Programme. The UNGA resolution and the decision of the Governing Council are examples on how a political negotiation can be enforced through soft law, notwithstanding its non-binding nature. Both Conventions awarded binding character to the principles enshrined in the resolution and the decision that convened the negotiating process as well as agreed to in the declarations, such as the precautionary approach and the principle of common but differentiated responsibilities of states.


Shaping international environmental law in Rio and afterwards can be easily understood along the lines proposed by C.M. Chinkin to characterize soft law instruments, i.e., "to combine collective regulation and restraint in economic dealings with a flexibility and freedom to manoeuvre where events or changing circumstances so require. They are, however, frequently not only regulatory but also intended to construct and programme the development towards a new international economic structure."21

Constraints and opportunities are at the origin of engaging in any collective bargaining but they have different impacts on societies. These impacts may be aggravated by the complex inter-relationship among phenomena, the extent of their effects and the change that they may provoke. The lack of scientific certainty about their genesis is also an important consideration in this regard. Apportioning responsibilities, in this context, is critical and has direct impact on vested interests, both established and long term ones. Those interests are divergent, but they find a common cause in trying to safeguard them or to have the least possible burden from any concerted international action. Responsibility here should be understood not only in its traditional legal meaning of repairing the damage caused to someone else, but also in the sense of self restraint from actions that may concur to increase damage or danger in accordance of the respective capacities of nations.

This was one of the major achievements of the Rio Conference in 1992, which was and reinforced at the Johannesburg Summit in 2002. In Rio, it was unanimously agreed that developed countries should take the lead in the quest for sustainability by changing their unsustainable patterns of production and consumption. Developing countries, on the other hand, should undertake less predatory development initiatives, provided they had access to new and additional financial resources and to technology on more favorable terms.

The emphasis on the differentiation of responsibilities has to do with the issue of the right to development. The recognition of this right in the Rio Declarations22 resulted from a long struggle of developing countries with industrialized nations, during the 1960s and 1970s, particularly in the context of the negotiations of the New International Economic Order (NIEO). At the heart of the discussions was the sovereignty of countries over their natural resources and, therefore, the right of developing countries to monopolize their exploitation via national or state companies. Development was seen as the way to radically change the distribution of wealth inherited from colonial times including by administering the prices of commodities. Transforming the international economic order meant to delegitimize traditional norms that would otherwise be regarded as authoritative.23

Had the demands of the developing countries been accepted when the NIEO was proposed, it would be possible to set a peaceful and revolutionary transformation in the international order by setting new standards and rules for cooperation among States. The reality, however, was that a conservative view championed by rich nations prevailed. Even when some slight progress was achieved, such as in the negotiations of the UN Convention on the Law of the Sea, it did not come into force until it was modified under the pressure of the interests of the most powerful nations.

The resistance of the developed countries to accept a language on the right to development can be attributed to their awareness about the broad political, economic and legal implications of such recognition. The consequences could have clear political connotations, since if the right to development was incorporated into an international instrument it could lead to expectations and demands that could give rise to conflict enabling individuals and States to question the policies of developed countries in the courts. The fear was that claims against those policies would open the possibility to justify the nationalizations of foreign assets and taking over foreign companies established in the developing nations, particularly those exploiting natural resources.

Adopting codes of conduct that promote sustainability involve complex relationships between human activities and their impact on the environment. In the developed and developing countries the demands for consumption and the demographic trends have mixed society and nature. On one hand, this interlacing was caused by the need for wellbeing and economic and technical progress; on the other, it led to what has been defined as the "societization of the natural destruction", i.e., the internalization of social economic and political threats within the production system has the industrial society as paradigm.

This conflict between progress and destruction faces what Joan Robinson referred to as the impossibility to "define precisely an excess of production over the necessities of subsistence. The necessities, as all of us know well, grow with the resources that satisfy them."

Concerns regarding the possible impacts of trade activities on the environment were raised almost in tandem with the debate on the sustainability of the development policies practiced worldwide. The negotiation and entry into force of several environmental agreements over the last 15 years have increased concerns regarding the compatibility between the rules of Multilateral Environmental Agreements (MEAs) and those adopted in the WTO agreements. This is still an ongoing discussion; a final conclusion does not seem at hand. The grounds for such skepticism are the existing asymmetries among countries with respect to international trade and the fear that environmental laws and regulations may be used as non-tariff trade barriers particularly against the exports of the developing countries.

The Doha Ministerial Conference, in 2002, held the promise of a strengthened international trading system in which trade negotiations would go hand in hand with development needs. Some outcomes were especially important, such as the decision to increase the liberalization of the agricultural sector, the adoption of the Declaration on the TRIPS Agreement and Public Health and the commitment to clarify and improve the rules relating to anti-dumping and countervailing measures. However, since then, a number of protectionist measures adopted by major trading countries have cast a shadow over the future prospects for the Doha negotiations.

If developed countries want developing countries to take on further commitments regarding sustainability in international trade, a first step would be a comprehensive review and phasing out of the imperfections that prevail in international markets. This review must include those perverse subsidies in developed countries that are now being industriously hidden behind other façades or names, such as "positive subsidies" or "subsidies that protect the environment" or "subsidies that protect the cultural and aesthetic values of agriculture or of agricultural landscapes". These are all one and the same and they contribute to perpetuate social inequalities, poverty and environmental degradation in the developing world, with dire consequences for us all.

Shaping International Law

The points raised throughout this paper aimed at highlighting the importance of discerning the dynamic forces that condition national action and project themselves into multilateral discussions on challenges that require global responses.

Understanding how global challenges and the international cooperation to address them work requires the use of analytical models that simultaneously explain the interaction of nation-states in the international system, the relationship of government agencies and civil society actors at the national level, and the influence of individuals in the agencies and institutions where they work. The decisions adopted should be understood in light of the identities, norms, and social processes

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44 The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3) UNGA resolutions 47/184 adopted the Declaration on the Right to Development. This resolution, however, was opposed by the United States against, eight Western countries and Japan—abstained while the Rio Declaration was adopted by consensus.

45 SCHACHTER, 1985, p. 526.

46 SCHACHTER, 1985, p. 527.

36 BECK, 2001, p. 17.

of which the actors have limited control or are sometimes even unaware of. These interactions and decisions are merged in the discourse that is a representation of the values, beliefs and interests that are at the root of the decision-making process.27 All this is pertinent in the discussion of global challenges and international law, as law mirrors the basic outlook and fundamental assumptions of societies.28 Shaping international law is, moreover, closely associated with the intricacies involved in the causes and effects of global phenomena such as climate change, poverty and trade.

The asymmetries that characterize the existing international order are understood and interpreted according to national or even sectoral interests, not necessarily from the perspective of social justice that could alter the situation of nations whose progress is hindered under the prevailing circumstances. This is clearly stated by Amartya Sen in his now classic book Development as Freedom: “Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers – perhaps even the majority – of people.”29

All this has profound repercussions for the international legal order. Reaching a common understanding on modalities for its change and/or development requires an important conceptual effort to typify these dynamic forces, define the global nature of challenges and agree on collective responses. Therefore, to use the words of Chinkin,

the participants within the decentralized international legal system do not have available for use the legislative processes or other sophisticated techniques for change that typically exist in domestic legal systems. They must draw upon the entire continuum of mechanisms ranging from the traditional international legal forms to the soft law instruments.20

The existing international mechanisms for cooperation among states are being subject to pressures by the most powerful nations to endorse their actions and policies in defense of their national interest. Combating terrorism has led to a progressive change in the security legislation of most countries inspired by the domestic measures adopted by the United States. The resistance by some US political circles to the takeover of a British company that runs some American ports by an Arab firm on the grounds that the nationality of the new owner could increase US vulnerability is a case in point.21 The United States has pressured countries, under

the threat of retaliatory measures, to adopt security procedures in their ports and airports and has also tried to ensure the “right” of its officials to inspect the effectiveness of the actions taken by other countries. Another example is the use of environmental protection measures as means to justify economic incentives to local producers or to hinder the competition of foreign goods, particularly those coming from developing countries, in the markets of industrialized countries if they are not certified to be sustainably produced.

The diversity of legal systems and the complexity of global challenges bring to the fore the question of how to harmonize conflicting standards in the domestic order and how to implement collective decisions. Harmonizing standards, particularly when they refer to the organization of national economies, is an ambitious – and sometimes quite frustrating – task in international negotiations. Harmonization of policies, rules, tariffs and/or procedures may increase competitiveness by promoting economies of scale, facilitating market access and reducing areas of conflict among participants. Harmonization also requires internal support for what will be conceded and what will be safeguarded in the international bargaining.

The role of the government here is unique. It has to provide the institutional leadership and the ability to form a national consensus taking into account different and often divergent interests. In this endeavor, it also needs to bring broader and long term political interests to the center of discussions. As proposed by Moravcsik, this constitutes a “two-level-games approach” that brings together constraints and opportunities at domestic and international levels: “domestic policies can be used to affect the outcomes of international bargaining, and (...) international moves may be solely aimed at achieving domestic goals.”42

The implementation of collective decisions, either through soft law or hard law, is the other element in the equation to address global challenges. One important aspect in this regard is the evolution of scientific knowledge about the nature of some phenomena, like climate change, or a shift in the situation of a country during the period between the end of negotiations and the entering into force of an international agreement. The increase in the production of genetically modified soy in Brazil after the conclusion of the Cartagena Protocol on Biosafety, in the year 2000, is a case in point.

Governance at the international level is another dimension concerning implementation. Globalization, as it has occurred over the last two decades, has had a deep impact in this regard and has led to two different, paradoxical outcomes. On one hand, it enables greater interaction among societies. This interaction creates

29 SEN, 1999, pp. 3-4.
a favorable environment for shared values, demands and interests, especially those related to global environmental issues. On the other hand, it deepens the gap between economically advanced societies and the other ones. Developing countries are facing huge difficulties in implementing their agreed commitments due to the lack of financial and technological resources. In some cases, even the basic institutional machinery and technical knowledge – a necessary condition for engaging these countries in international mechanisms of cooperation – has not been put in place. Proposals have been made to create international institutions for concentrating political negotiation and consideration of scientific contributions for a better understanding of the natural limits and possible paths towards sustainable development and for monitoring the fulfillment of obligations internationally agreed upon by countries, with a mandate to impose sanctions on countries that have not fulfilled those obligations. In fact, the response is not in enlarging the web of international institutions but in enhancing the capacity of developing countries to contribute, from the point of view of their national interest, to the decision-making process established both in international organizations and in multilateral agreements. In this sense, the creation of the G-20 in the trade negotiations of the Doha Round at the World Trade Organization and the establishment of regional institutions, like the African Union, can be seen as an awakening of poor nations to international developments that can have deep impact on their daily lives.

The causes and interests championed by actors other than the State that have risen to center stage of international politics have had a deep impact in the thinking, the internal procedures and the activities of international organizations. The understanding and the debate about the global challenges referred to throughout this paper have given new meanings to concepts like security, development, freedom, right with radical impacts in politics and its theory.43 This is leading to a structural transformation in social and political relations at the individual level as well as at the state level.

Philip Allott argues that this transformation requires the formulation of a new paradigm of the international legal system, which minimizes the role of the States in determining the common interest of all mankind, blurs the boundaries between the national and the international spheres, and “implies and requires an idea of a society whose legal system it is, a society with its own self-consciousness, with its own theories, values and purposes, and with its own systems for choosing the future, including a system of politics.”44 The issue, however, is how can one think of a society that goes beyond the existing nation-states when political, economic and social asymmetries still hinder the possibility of a better life for the majority of peoples.

Shaping international law to respond to global challenges must be closely associated with the notion of equity. This implies the recognition of different impacts of societies in generating these challenges and the distinct capacities available in each nation to contribute to their response. The urgent need to globalize responsibilities for dealing with global challenges must be accompanied by greater insertion of developing countries in the global economy. In other words, developed countries should comply with their international commitments and “globalize” the means that will enable those countries to adopt domestic development models and practices to comply with the commitments they undertake.

Equity requires that each society acknowledge its responsibilities in causing risks and challenges of global concern and be prepared to work with others, recognizing that they all have to contribute to achieve concrete results in facing those challenges, according to their respective capacities.
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