

## SUMARIO

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## ***GREETINGS BY ICEAC SECRETARY GENERAL***

Dear colleagues:

The celebration of the new **International Seminar of Environmental Law**, which will take place in Cocoyoc, Morelos, Mexico, from the 5th to the 14th of November 2007, will offer us the opportunity to gather among hundreds of environmental jurists and other environmentalists, with the shared objective to meet, discuss

and advance concrete and viable proposals, by acting jointly in a multidisciplinary work.

The environmental recovery of our countries requires perseverance, creativity, understanding, skills, talent, sensitiveness and partnerships.

We have to back up and rescue the efforts of all the citizens of the world who, from their NGO, from their government, from academic institutions, or alone in a moving attempt to translate into deeds their purpose, turn up before our free will and horizon.

That is the reason why we strongly wish that you'll support the **Environmental Law International Meeting** of Cocoyoc, where we'll be audacious, open-minded, intensive and positive, as these days, marked by rapid though unequal changes in the information society, demand.

Wishing each other a happy new year is not enough. We should rather wish a prosperous year to environment, to natural resources, to biodiversity, to any living being, his environment and surroundings.

Even that remains insufficient if we don't work to encourage, to educate, to channel and to act with braveness and tenacity.

Nobody is small. Nobody is few. Nobody is unneeded in our common struggle for environmental justice.

Everybody be welcomed.



<http://www.cocoyoc.com.mx>

### **Dr. Ramón Ojeda-Mestre**

Secretary General of the International Court of Environmental Arbitration and Conciliation

President of the Mexican Academy of Environmental Law

## *LA PERSONA Y EL MEDIO AMBIENTE*

**Demetrio Loperena Rota**

Catedrático de Derecho Administrativo UPV/ EHU

Secretario General Adjunto de la Corte Internacional de Arbitraje y Conciliación Ambiental

El debate político no supera todavía las más primitivas y erróneas concepciones del medio ambiente. Si se observan declaraciones y artículos de opinión vemos con demasiada frecuencia que reducen el medio ambiente a una cuestión opcional, ideológica y, sobre todo, estética. Por otra parte, para los biólogos lógicamente somos una especie más dentro de la cadena de la vida.

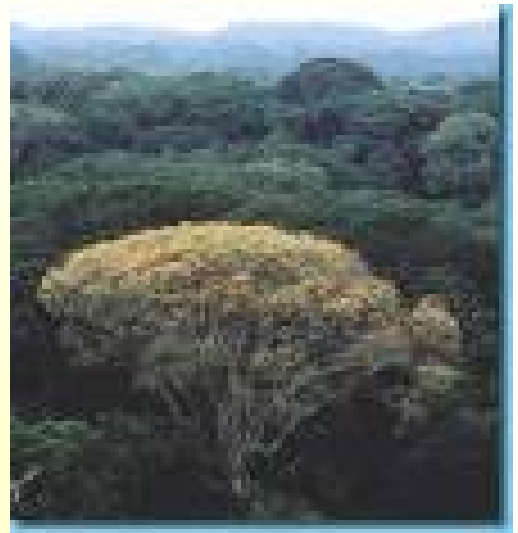
-¿Qué es antes la persona o el medio ambiente?- me espetó una alumna cuando hablaba de biodiversidad. Desde el punto de vista cronológico los bosques preceden al ser humano. Pero desde el punto de vista ético, jurídico o político es a la inversa. Digámoslo con crudeza, el Planeta no está en peligro, sólo estamos alterando algunos de los parámetros biosféricos, exactamente los que necesitamos para sobrevivir como especie. Hace ya años el profesor MARTÍN MATEO escribió un libro divulgativo titulado: “El hombre, una especie en peligro de extinción.” Pues bien, ni al gran maestro del Derecho ambiental de nuestro país se le ha leído.

Hemos aprendido que contaminar el agua nos perjudica. Estamos aprendiendo que alterar la atmósfera también. Pero sobre esa tercera pata, que es la biodiversidad, todavía son mayoría los que no entienden que debemos conservarla, siendo tan necesaria como el agua potable o una determinada estructura de la atmósfera.

Se sigue talando en nombre del progreso. A veces con gran escándalo, como estos días pasados. Pero muchos no entienden por qué el desarrollo económico de un pueblo debe ceder ante unos nidos. La biodiversidad que tenemos es suficiente todavía para que no corra peligro nuestra especie. Pero si todos los pueblos del mundo aplicaran el criterio de que el progreso es un valor superior a la biodiversidad, el colapso habría llegado o estaría a punto de hacerlo.

Los bosques, además de ser parte principalísima de la biodiversidad, cumplen funciones sobre el régimen de lluvias y, sobre todo, en el ciclo del carbono y el oxígeno en la atmósfera. Todo el Planeta necesita que los denominados “pulmones del mundo” sean conservados a toda costa. Singularmente tenemos hace décadas puestos los ojos en la cuenca del Amazonas y, más recientemente, en las selvas tropicales de Indonesia. En efecto, Brasil e Indonesia siguen talando bosques para vender la madera y poner tierras en cultivo. Este desastre ambiental tiene como agentes causales los Gobiernos y las empresas que talan para su propio lucro. Equipos científicos ayudados por imágenes procedentes de los satélites muestran al mundo con asombro y repugnancia la desaparición progresiva de las selvas referenciadas.

Sin embargo, a mi entender, Europa sobre todo y también los Estados Unidos en menor medida en su actividad económica orientada a satisfacer las demandas de todos sus ciudadanos jamás han reparado en los sacrificios ambientales que infligían al Planeta. Recordemos que Europa fue antiguamente algo parecido a un gran bosque al que podemos dar ya por desaparecido. ¿Es lícito exigir a Brasil e Indonesia que frenen su desarrollo a pesar de que gran parte de sus ciudadanos no tienen satisfechas sus necesidades básicas? Un elemental criterio de justicia material nos dice que no. Esto es, a un país pobre no se le puede exigir que frene la explotación de sus recursos por el bien de la Humanidad. Salvo que los ricos, que previamente han esquilado sus propios bosques, sufraguen los costes completos del desarrollo humano básico de los países que todavía conservan bosques. Por eso no me parece lícito que tengamos cientos de grupos de investigación mirando la Amazonía para denunciar su progresivo deterioro, como si ello fuera independiente de las enormes carencias de millones de ciudadanos en esos países. Hemos inventado la madera certificada, dejando al margen el hambre y la miseria de personas. Y aquí se plantea un dilema filosófico que escasamente se aborda. Es cierto que el agua y la vida de otras especies vegetales y animales preceden cronológicamente a la vida humana. Pero ello sólo es desde el punto de vista ecológico o biológico.



[www.somosamigosdelatierra.org](http://www.somosamigosdelatierra.org)

Como digo, desde el punto de vista de la ética, la política y el derecho, el ser humano está supraordenado a las cosas, cualesquiera que éstas sean; el sujeto de derecho precede al objeto de derecho. Otra cosa es que no hagamos un uso inteligente del objeto medio ambiente y lo volvamos contra nuestra supervivencia. Por eso, a veces, se observa también con preocupación a investigadores que ven los peligros del deterioro ambiental sin detenerse a considerar el lado humano del problema. Estas percepciones podrían llevar a un cierto ecofascismo en el cual se determinase científicamente el número ideal de individuos humanos a existir en el Planeta y considerar, subsecuentemente, cuántos miles de millones constituyen desde el punto de vista biológico una plaga a erradicar. Esta monstruosidad, lógicamente, todavía no conozco que se haya planteado de forma tan cruda, aunque en los foros académicos de EEUU sí se está dando una dura polémica sobre democracia y protección ambiental. Pero si observamos los estudios de ciencias ambientales que no consideran al ser humano sino como otro ser vivo más, uno siente una honda preocupación, porque parecen presagiar un orden ético que desconsidera al individuo como persona, adquiriendo en su sustitución la nueva personalidad un ente colectivo como la especie humana cuya supervivencia hay que preservar por encima de todo, sacrificando incluso vidas humanas en el intento.

Los juristas, en lo que a mi me toca, debemos estar muy atentos en la labor hermenéutica de la legislación ambiental, dado que una gran parte de ella está redactada con criterios científicos. Nuestra tarea es entender sin excepciones que los principios jurídicos que anteponen la persona al objeto se cumplan siempre.

## ***EL RÍO URUGUAY COMO RECURSO NATURAL COMPARTIDO***

**Por Eduardo A. Pigretti**  
Miembro de la CIACA

### **Introducción**

La instalación en la margen uruguaya de dos fábricas de pasta de papel con su secuencia de posible contaminación ha provocado una serie de sucesos que conmueven la relación argentino-uruguaya de una manera llamativa.

No hay a la vista camino de acuerdo o solución pese a la preocupación de los gobiernos involucrados y de la civilidad de las dos repúblicas.

Empiezo por recordar que el Río Uruguay es lo que en la teoría de los recursos naturales se conoce como recurso natural compartido.

El más célebre exponente de la evolución de los conceptos sobre este tipo de recursos es el doctor Julio A. Barberis, quien seguido por otros profesionales como son la Dra. Frida Armas Pfister y María Querol han logrado presentar el tema con total completividad.

Después de una obra inicial fruto de los trabajos en Alemania del Dr. Barberis, tomamos como referencia un libro de Editorial Civitas (*El derecho de aguas en Iberoamérica y España: cambio y modernización en el inicio del tercer milenio, 2000*). Se presenta en el mismo una colaboración que resume la problemática bajo el título "*Aplicación de principios de derecho internacional a la administración de ríos compartidos. Argentina con Paraguay y Uruguay*".

### **Opinión que sustentamos**

Coincidimos en totalidad con las posiciones adoptadas por el Dr. Julio Barberis y sus seguidores lamentando que nuestro país no haya tomado la dirección de su política sobre las papeleras, en función de los puntos centrales que dichos autores sugieren.

Si algún defecto de conducción por nuestra parte vemos, en la política nacional de esta materia es que:

1°. No se ha logrado establecer una mesa de negociación que permanezca quieta y tranquila autorizando una línea coherente y una conversación posible.

2°. No se ha utilizado en lo que hace a la aplicación del Estatuto del Río Uruguay sus contenidos, como por ejemplo: la intervención directa en cualquiera de las aguas y márgenes de la policía jurisdiccional. La Argentina y el Uruguay en cualquiera de los caudales o de las riberas de dicho río, tienen por el Estatuto derecho a intervenir sin aviso público y resolver (llegando al apresamiento de los responsables) cualquier hipótesis de afectación del río y de su contaminación.

Este derecho establecido en tiempos de auténtica fraternidad, no se ha mantenido ni aplicado como tampoco los intercambios de información que debieron haberse realizado con la comisión reguladora del río que el Estatuto establece.

3°. No se citó a los estados amigos de España y Finlandia que tienen responsabilidad internacional por las firmas de su bandera y derecho a requerir y brindar protección internacional sobre estos asuntos. Nadie cita a las autoridades nacionales de esos países.



[www.andinia.com](http://www.andinia.com)

4°. La preocupación por el abandono de las fórmulas jurídicas al caso nos provoca preocupación porque este camino nos llevará a una posible suspensión de relaciones internacionales con la grave perturbación de una posible intervención extranjera en el conflicto proveniente de cualquier país que considere posible su intervención en este tipo de cuestiones.

5°. Cuando el Uruguay sostiene que requerirá indemnizaciones por el corte de los pasos fronterizos debe saber que igual derecho le corresponde a la Argentina desde que el dispendio de esfuerzos y tareas de los propios nacionales, también es indemnizable.

6°. La suspensión, en particular provisoria, de las obras de construcción de las papeleras, es una facultad nacional que cualquier estado tiene derecho a ejercer por el imperium que le es propio.

Todas las situaciones por ríspidas que parezcan, pueden resolverse en los ámbitos nacionales si se atiende a un principio de equidad.

7°. Hemos anticipado al mundo que concurriremos al Tribunal Internacional de La Haya mucho antes de haber agotado los tiempos de la solución de controversias que corresponde.

Por otra parte, el Tribunal es famoso por los largos tiempos que necesita para expedirse lo que permite suponer que las papeleras estarán terminadas y en operación mucho antes del resonante triunfo judicial que esperamos.

## **La posición de los estudiosos**

Los juristas citados anteriormente han desarrollado en sus obras y artículos las obligaciones que están en juego que ya fueron insinuadas en 1933 por la Declaración de Montevideo del citado año propiciado por la Unión panamericana. En esa declaración se establecieron los principios respecto de: no causar un perjuicio sensible en la calidad de las aguas; respetar el uso equitativo y razonable de las aguas; comunicar a los estados los trabajos que afec-

tan la condición del río lo que supone: la necesidad del consentimiento previo; el consentimiento de los estados afectados; la comunicación previa y el deber de negociar de buena fe.

Estos postulados han sido desarrollados cuidadosamente por el profesor Julio Barberis y sus colaboradores.

A continuación agregamos algunas citas del último trabajo del Dr. Barberis arriba señalado:

*“La VI Conferencia Internacional Americana adoptó una recomendación a la Unión Panamericana de realización de estudios sobre la regulación jurídica de los ríos internacionales. Esta tuvo lugar en Montevideo en 1933.”*

**“Perjuicio sensible:** Por “perjuicio sensible”, no se entiende un daño de una magnitud considerable, cuanto un menoscabo pueda ser constatado objetivamente.”

**“Comunicación previa:** Los estados generalmente acuerdan un procedimiento en virtud del cual uno comunica a otro su proyecto de obra, el modo de operación del mismo, y demás información necesaria.”

**“El deber de negociar:** Ambos estados deberán intentar llegar a una solución mediante negociación diplomática.”

*“En este sentido, debe destacarse que la obligación de negociar de buena fe no se respeta cuando la misma se somete a plazos anormales, no se respeta el procedimiento previsto, una de las partes rompe injustificadamente la negociación o bien rechaza de manera sistemática tener en consideración las propuestas o intereses de la otra parte.”*

*“El derecho de vecindad se limita a prescribir que los Estados no deben realizar en las zonas próximas a un límite internacional actos que provoquen consecuencias perjudiciales para un país vecino.”*

*“Igualmente el concepto de abuso de derecho impide el ejercicio de un derecho propio cuando ocasiona una lesión proporcionalmente importante a otro.”*

*“Estas concepciones no pueden constituir un fundamento para todo el régimen jurídico de los recursos naturales compartidos porque sólo se refieren o sirven de fundamento a la regla de no causar perjuicio sensible.”*

Finalmente pongo en evidencia algunas consideraciones no suficientemente explicitadas en relación al tema de las pasteras :

- ◆ Las dos partes del conflicto cometieron enormes errores. Cada quien falló todo lo posible
- ◆ La Haya no tiene un ambientalista especializado, de modo que los principios preventivos no están asimilados como parámetros jurídicos de dicho alto tribunal.
- ◆ La empresa papelera finlandesa Botnia no ha adoptado en tiempo útil un método moderno totalmente libre de cloro si no que de forma habitual ha utilizado un sistema más económico pero altamente contaminante.

## ***THE EVOLUTIONARY RATIONALE OF INTERNATIONAL LAW AS A MEANS TO ADDRESS THE RELATIONSHIP BETWEEN CONFLICTING NORMS: TOWARDS THE COHERENCE AND STRENGTHENING OF INTERNATIONAL LAW***

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ICEAC Legal adviser

### ***Abstract***

*Over the last decades, the expansion and diversification of international law, law makers and judiciaries has led to its fragmentation and situations of legal uncertainty. The rules of the Vienna Convention of the Law of Treaties (VCLT), providing the main criteria to regulate the relationship between international norms, alone are insufficient and incapable of uniformly resolving normative conflicts between different special branches of international treaty law (as human rights law, environmental law and trade law), also in relation to general international law.*

*This article argues that deep social changes of the core values of international community have not been followed by an integral process of adaptation and reform of the corpus of international law. Such reform, even if painful, is needed to ensure a coherent, harmonized, enforceable, and wholly credible, system of international law and governance. The article puts forward a number of points - the evolutionary reinterpretation of the scope and meaning of peremptory norms, the centralisation -or a comprehensive coordination- between international judicial bodies, the necessity of a transparent multi-stakeholder process of review of international law and governance aiming to redress current imbalances between the implementation of human rights law, environmental law and trade law, with the overall objective to promote an international legal order and governance transparent, balanced, enforceable, accountable and responsive to core values and demands of the international community.*

### **Background**

Today, the conservation of nature is an ethical imperative because ecosystem services have become indispensable, not only as a consequence of the intrinsic value that biodiversity, animal and vegetal species hold, but also for 6.6 billion people all over the world. However, if, as a hypothesis, we should face a new glacial era or any global-scale environmental disaster, a new ethical imperative would, as in the past, become the protection of humanity: nature would re-convert into an enemy to fight and from which to defend against. That means that at the root of any law and rule we create, there are paramount but relative-in-time values we are willing to defend and promote. Such values - and consequent principles and norms - change and logically adapt to new factual circumstances.

After the Second World War, when the United Nations were created and when the main corpus of international law progressively began to be forged, the spirit of states consenting to

give part of their sovereignty was centred on the intention to secure international peace, security and justice by means of diplomatic co-operation. Government representatives then embodied the will of millions of people in the world, united by the desire to live in peace and security.

Mentioning the *raison d'être* of modern international law serves to remind us that the current rationale has been seen to take shape over the past half-century whilst the challenges of the international community have expanded and diversified.

Returning to the initial consideration on the relativity of the values at the core of the norms we have created throughout time: at present, globalization (intended as the free flow of goods, services, capital and to a certain extent people) is posing great challenges. Such challenges can only be faced on a global level. For this reason, we do need global institutions, since we have no global government, nor can we successfully overcome such challenges limited within national borders. At present, some of the main challenges are: social justice (poverty reduction, universal health and education) population growth, environmental protection and conservation of cultures and identities. These are the paramount challenges because without their resolution, we jeopardise the lives of the vast majority of people and the conservation of the planet as we now know it. Trade liberalisation is not part of such challenges. Trade liberalisation is merely a means; a means that, if regulated in a balanced, just and forward-looking manner, can bring general prosperity and benefits to the majority of people all over the world; if imposed as it is currently imposed, it will continue to benefit only the few, the haves, exacerbating the lives of those already impoverished, the have-nots, and depleting our finite and fragile environment.

The implications of such assumptions on International Law are manifold, linked to one another and of extreme urgency:

## **1. An International Law adapted and respondent to global changes and demands**

During the past fifty years, in response to the demand of a pluralistic and increasingly closer global society, the scope of international law has enormously expanded, seeing the emergence of special regimes and specialized rules, relatively autonomous and not coordinated. The emergence of several specialized branches of international law, covering diverse sectors - such as human rights law, environmental law and trade law - has increased normative conflicts and, at the same time, has shown the inadequacy of the traditional system of international law. Indeed, with the exception of *ius cogens*, in international law there is not a formal hierarchy between norms; there is only a set of rules established in the Vienna Convention of Law Treaties of 1969 (VCLT), such as *lex posterior* and *lex specialis*. International law is based on the voluntary consent of its parties, the states. States can sign and be bound by diverse Treaties with different scopes and objectives. The coordination between different norms of international law is assumed: it is supposed that States are capable and responsible to ensure compliance with any treaty they sign and any norm of international law they are bound to; nonetheless, such supposition does not correspond to reality. Despite the absence of a formal hierarchy and a comprehensive set of coordination rules in international law, lies

the fact that a substantial hierarchy among norms, based on the values that shape them, does exist, as with the Purposes and Principles of United Nations, and some norms of the UN Charter, such as Article 103. These principles and norms are directed to ensure individual respect, social justice, international security and general prosperity. The nature of peremptory norms universally recognized and accepted by the international community, undoubtedly has the nature of human rights law and not of trade law. Currently, such consideration does not have any relevance or consequence within the international legal order with reference to the relationship between conflicting treaty norms; however it should have.

Bestowing the same value and legislative hierarchy to Human Rights Law <sup>1</sup>and Trade law can lead to an absurd interpretation of International Law, in cases where the parties of a law conflict are both parties of the same human rights treaty: human rights, as with the rights of individuals against public authorities, limits the action and the power of any public subject, including governments. Consequently, if in a conflict between trade law norms and human rights norms we confer the same value to both laws and we solely follow the rules of coordination and interpretation of the VCLT<sup>2</sup>, we won't achieve a clear and uniform solution. Moreover, in some cases the possibility of the primacy of trade law over a directly conflicting human rights law would deprive a human right of any meaning: trade rules dis-applied under specific circumstances and exceptions continue existing and being enforced; on the contrary, the violation of a human right is often a situation no more reversible and redressable. Consequently, state acceptance to incorporate human rights law into its legal system, with the consequent limitation of public powers that it implies, cannot reasonably apply only in the relation between international human rights norms and national legal norms; it must necessarily apply in the relationship between an international Human Rights rule and another International Law rule susceptible to undermine the compliance of the first. If states accept to limit their powers and acts for the recognition and respect of certain human rights, they cannot justify their non-fulfilment by arguing a duty to comply with another international obligation.

## **2. Reforms of international law**

International law is not a static but a dynamic legal order. Thus, it is to be interpreted systematically and in an evolutionary way, in the light of the law and the principles contemporary with it, adapting to emerging norms and principles. That applies, or at least should apply, to general principles of international law, which should adapt to evolving and contemporary values shared within the international community. If that were to happen, a new *stand still* ("only accumulation") clause on human rights would come into existence, preventing other rules emanating from governments allow them renege on the fulfilment of individual fundamental rights by applying other rules of international law directed to regulate economic and commercial relations: international law, created as a means of cooperation among nations to achieve peace, cannot be degraded into a legal instrument capable of jeopardising instead of strengthening individual and communities rights. Being *lex specialis*, WTO permissive norms

<sup>1</sup> contrary to article 32 (b) of VCLT.

<sup>2</sup> With particular reference to: Article 30 VCLT "*Application of successive treaties relating to the same subject matter*", posterior law; Article 31.2 (c) on the interpretation of treaties through general international law; Article 41 on "*Agreements to modify multilateral treaties between certain of the parties only*"

can prevail over general international laws or – in some cases – over other special regimes' prescriptive norms pursuing the protection of human rights or the environment<sup>3</sup>. The current absence of a coordinated and coherent corpus of international law is unleashing a range of perverse effects: economic interests can legally undermine the implementation of human rights and the achievement of sustainable development. Treaties must be applied and interpreted against the background of other rules and the general principles of international law: if that applies, when compliance with one particular norm breaches another norm of international law not hierarchically superior but fundamental or expressive of inviolable principles of international law or humanity, that should imply the misapplication of a such norm. Nevertheless, even fundamental human rights and basic environmental laws are currently considered sources of international law with the same value of trade law rules. In some cases, that is not in line with current values and priorities of the international community. Peoples of the world do not consider the respect of human rights and trade rules as having the same value. Over the past 10 years, people have seen how the implementation of the trade laws of liberalisation has benefited very few people in the short term, meanwhile corroding general welfare and people's right to decide in the long term.

States have to acknowledge such discrepancy between the international legal system and global social values and priorities, as an initial step to reform the corpus of international law. The possibility of reform stems from article 64 of the VCLT<sup>4</sup> which contemplates the case of the emergence of new peremptory norms. The principle of the "continued compatibility with international law" is nothing new. It was affirmed already in 1959 by Mr. Fitzmaurice, Special Rapporteur on the Law of Treaties who stated that "A treaty obligation, the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens*, will justify (and require) non-observance of any treaty obligation involving such incompatibility". At present, the conflict between a multitude of specialized incompatible treaty norms leads to the dislocation of the principle of harmonisation of international law. Despite this, an official debate within UNHCHR, ILC about the necessity or opportunity to create a hierarchy between norms of international law of different special regimes has yet to take place. Paradoxically, and evident from the international UN agenda, it remains clear that global priorities for the twenty-first century are all issues directly and strictly related to human rights and sustainable development and not with trade liberalisation.

As a corollary, the proliferation of international judicial bodies contributes to contradictory rulings, which are likely to undermine the principle of legal certainty. The sole establishment of additional rules of coordination on the relationship between international conflicting norms would be insufficient by itself, as long as different treaty-adjudicating bodies apply aseptically "their" treaty norms without a due comprehensive consideration and application

<sup>3</sup>That happens when applying article 31. 2 (c) of VCLT, general international law does not provide a "sufficient" legal background to make trade law fully and substantially complying with conflicting human rights or environmental principles (among others, the recent Biotechnical Products case (2006) before the WTO Panel.)

<sup>4</sup>Article 64 VCLT "Emergence of a new peremptory norm of general international law (*'ius cogens'*)" states: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

of other relevant treaty norms and general international law, thus favouring the “sectorization” of international law. A limitation of such proliferation, or coordination mechanisms to ensure the constant application of Article 31.3 (c) of the VCLT should be set out.

### **3. Intergovernmental governance and participatory democracy.**

International law emanates from governments’ consent and will. Governments are representative of the will and demands of the people. Therefore, there needs to be a strict correspondence between the will of the people and state decisions at national and international level. States have to embody people’s values, priorities and principles; formal obstacles cannot justify the absence of action or undue actions. The majority of the world’s people choose and want to escape from poverty, misery, illness, and to overcome a degraded and depleted environment; they are not thinking about trade barriers, quotas and the plethora of instruments that, as currently managed, enrich the lives of the few haves and impoverish the majority, as well as the nature’s biodiversity. The paramount challenge to international law is to reflect such a hierarchy of priorities and values in order to adequately and effectively respond to current global demands. That entails a reform of international law, included in the Vienna Convention on the Law of Treaties and the UN Charter itself. Following from this, the “*Report of the Secretary-General’s High level Panel*” of November 2006 is an official recognition of the current deficiencies of the International Law System at institutional level. By the recognition in recent ILC reports of the current fragmentation of international public law, we may infer that a first step is to set up a process of reform directed to make international law coherent and effective, adapting to and responding to global demands, making the relationship between international law norms of treaties, customs and principles coordinated and clear.

The reform of the relationship between conflicting norms in international law and with it, the corpus of international law, is an issue of interest for the international community; as such, it has to be internationally negotiated through an open debate, giving a voice to people by means of a multi-stakeholder form of participation. Concepts such as “fundamental norms”, “inderogable principles” or “elementary considerations” of humanity, “intransgressible principles of international customary law” and “environmental individual rights *erga omnes*” need to be defined – even without any ambition of constitutionalization of international law -to ensure their correspondence with the core values commonly accepted by the international society.

It is urgent that relevant international institutions, with the help of competent organisations, rethink and reshape the whole system of international law, which was created in a unique historical context in response to very diverse societal demands. The objective is to give it strength, responsiveness, coherence and coordination. In addition, we must boldly take the necessary step to hone, review and reshape, the principles of international law that are consolidated but obsolete and no longer respond to the reality: as three examples, the principle for which states are only the passive and responsible subjects in international law does not correspond to reality where corporations breach international law more than states and are

often not held responsible at national level<sup>5</sup>; the traditional concept of representative democracy is to be readapted since consented and meaningful decisions at international level must be previously discussed, negotiated and forged through the participation of stakeholders<sup>6</sup>.

The same occurs with the evolution of the concept of self-determination: colonization today is an economic colonization which can contribute to the erosion of local culture and way of living. Nowadays self-determination depends on economic not political freedom and independence. It is the freedom not to be directly or indirectly constrained to import systems and economic reforms; it is a right held by people not by governments, as the ICJ stated: people's lifestyle and choices must be volitional and self-determined and states must operate to guarantee such a right. The indiscriminate elimination of national barriers to trade should be consented to and realized gradually, in order to enable local markets and small-scale producers and traders to adapt and adopt adequate strategies in response.

The paradox of International Law is its impotency to global social demands and expectations, which undermine its credibility and legitimacy before society. We all know the challenges we need to face. In most cases, we even know the solutions, or at least there is a vast spectrum of possible solutions. We know the consequences and the cost of non-action. But we miss opportunities and are failing to shape appropriate and efficient tools to succeed. Within intergovernmental institutions, there is not - as some believe - a political or economic conspiracy not to achieve a more just society and a safe environment; rather, there is disagreement on tools (for example those who still believe in the current functioning of the IMF and those who do not), inertia and institutional weakness, an absence of visionary and forward-looking minds, an incapacity or unwillingness to acknowledge empirical evidence and bet on alternatives not based on a *a priori* ideology.



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#### 4. WTO and coherence with international law

It has generally been taken for granted that the WTO system and the set of WTO rules are substantially, as in any other Treaty, part of the corpus of general international law. That assumption arises in my view by conveying two distinct concepts: the concept of a “law-based” legal system and the concept of a “right-based” legal system<sup>7</sup>.

<sup>5</sup> See UN Document “*Responsibility of States for Internationally Wrongful Acts*”, in Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), and E/CN.4/2006/97 of the 22<sup>nd</sup> of February 2006 “*Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*”.

<sup>6</sup> That was officially recognized by the UN Commission of Sustainable Development (CSD) in 1996.

<sup>7</sup> Even dictatorships may be “law-based” since the rule of law is legally created within such a system in compliance with legal procedures. This extreme example is to draw attention to the significance of the adherence between legality and legitimacy.

If we consider the corpus of international law merely as a “law-based legal system” – that is a system created fully complying with legal *procedures* - then WTO rules do not differ to any other branch of international law.

However, if we analyse WTO origins and specific norms, we cannot but affirm that the WTO covered treaties are a *sui generis* legal order because of their unique *raison d'être*:<sup>8</sup> it is a system the implementation of whose norms has led and can lead to the breach of environmental and human rights laws and principles, even when the latter are fully consistent with the core objectives and the rationale of international law, (that is cooperation and friendly relations among states; general prosperity; respect of nations' identities). WTO functioning and rules should be fully legitimated and harmonized with the remaining corpus of international law for the following reasons:

- a) Trade relations among states throughout the WTO have been demonstrated not to represent people's social, humanitarian, cultural and environmental interests. Such trade relations, under some circumstances, are quite likely to undermine UN general objectives of cooperation and friendly relations. International trade law should be based on a legal framework established within the UN, to be negotiated through extensive stakeholders' involvement, striving to secure compliance and consistency with UN Charter objectives and fundamental norms.
- b) Most international treaties drafted within UN Agencies often regulate their relationship with other norms of international law; by contrast, WTO rules, drafted and concluded upon behind closed doors by trade ministers, do not deal with their relationship to other rules of international law, although they affect and are affected by them. WTO rules' omission to clarify and regulate the relationship with other norms of international law contributes to the non-harmonisation of international law: compliance to the principle of harmonisation obliges states acceding to a new treaty to verify the compatibility of the new treaty provisions with those of earlier treaties, adopting – when necessary – conflict clauses to regulate the relationship between such treaties, with the objective to ensure the fulfilment of both. In all the aforementioned characteristics, the WTO differs substantially and voluntarily from the original Keynes project of the establishment of an International Trade Organisation (ITO), whose Charter (the Havana Charter, 1948) recognized and incorporated principles and norms of the UN Charter.<sup>9</sup>
- c) International law treaties are and have to remain a substantial and direct means to develop conditions of general prosperity and reciprocal benefit: that is the only way to secure peaceful relations among nations. Current WTO rules have demonstrated their likeliness to undermine some principles of the UN Charter, among them the principles of (substantial) equality, self-determination of peoples and non-interference in the domestic affairs of states, thus contributing to economic social injustices.

<sup>8</sup>Notwithstanding, WTO rules can't but interplay with general international law because it is general international law that necessarily applies to any special regime in accordance to the VCLT [particularly Article 31.3 (c)] and consolidated ICJ and international jurisprudence.

<sup>9</sup>See the text of the ITO Charter in <http://www.yale.edu/lawweb/avalon/decade/decad057.htm>

d) Heads of States, Ministries of Foreign Affairs are States representatives with full powers<sup>10</sup> to engage a State with an international agreement - such as the UN Charter, the European Convention of Human Rights, the Convention on Biological Diversity – who have been representing the general interest of their citizens. The situation is slightly different with trade ministers. Trade ministers at the WTO see global policies and international law through a blinkered and narrow lens, rather than a fully comprehensive, long-term perspective. Trade ministers might have the legal capacity to represent their States in accordance with article 7.2 (c) of the VCLT. However their factual will to have considered and represented general interests before the WTO remains questionable.

This evident gap existing between positive law and natural law, that is between codified legislation and a universal, rational and common concept of social justice, protecting the rights of the majority of people in a long-term perspective and plan, brings our discussion to a four-fold consideration:

1°) The need of coincidence between legitimacy and legality, between people priority concerns and political responses: at present, there are several issues that are legal but not legitimate. Legitimacy is a dynamic concept related to the ethics and moral concept of a society in a certain moment. Legality is a static concept related to the conformity of a procedure of law. All legal facts have to be legitimate; if not (reflecting and embodying current values of society), they have to be overruled, reformed or emended. Today, we have to overcome legalized financial speculation and fiscal paradise, legalized child labour and exploitation, legalized immunities and lack of accountability of political and economic actors, legalized pollution and environmental over-exploitation.

2°) Sooner or later, both international and national institutions will have to adapt to the emerged concept of participatory or multi-stakeholder democracy, formed by transparent and accountable institutions. In a complex and interrelated society such as ours, the traditional model of democracy and representativeness has become inadequate and obsolete. International decision-making processes need mechanisms which allow all stakeholders and subjects likely to be affected by future decisions to have a voice and be heard.

3°) Among international institutions, the power between the IMF, the World Bank and WTO on the one side and UN Agencies on the other side has to be rebalanced. Each one of these institutions must work openly and be accountable and responsive for its decisions.

In all global institutions, decision-making procedures must be democratic and according to the criteria that each country casts one vote, with a turnover between states seated at the decision-making table; criteria of vote allocation and decision-making powers based on the state's economic power and financial contribution need to be overhauled. Additionally, stakeholders and civil society's interests must be at the decision-making table, since trade is not an aseptic science: it affects the economic and social interests of the whole society, not only traders, bankers and creditors.

<sup>10</sup> See Article of the VCLT

4°) The efficiency of WTO procedural rules should be exported to human rights conventions and Multilateral Environmental Agreements (MEAs). The easy way to initiate the WTO dispute settlement process through a simple state's allegation that a WTO treaty is affected, as well as the principle of "negative consensus" establishing predetermined rapid procedural deadlines unless the parties agree otherwise, are efficient procedural instruments to make rapid and effective rulings. At present, the WTO jurisdiction's efficiency, in contrast with the lengthy and inefficient procedures of other treaties, contributes to the non implementation of human and environmental rights and counterbalanced by the enforcement of trade law rules. There is no blame accorded to the WTO system. WTO adjudicating bodies do not have the competence to enforce norms other than WTO covered agreements. Each international treaty refers to a different set of obligations and rights, binding all members simultaneously. It is a duty of the states bound by different treaties to ensure the respect and fulfilment of each one as well as their obligations and rights simultaneously. Therefore, when two or more conflicting norms of different treaties are all applicable but only one treaty's dispute settlement body resolves the issue by applying its rules, the result can be an imbalance between existing rights being implemented and rights existing but not being enforced. Consequently, the inertia or inefficiency of Human Rights and Environmental Law in comparison with International Trade Law constitutes another important factor of the current imbalance between compliance with human and environmental rights and accomplishment of trade law norms.

## **Conclusion**

An all-encompassing overview of the international legal and political scenario should make us realize that, for the first time in the history of humanity, we have the tools to set up a transparent participatory and competent international institutional governance, dealing with international issues for the interest and well-being of all people; likewise we have the tools to develop capacities, instruments and institutions at national and local levels capable of maintaining and strengthening local identities, cultures and small-scale markets. Sustainability in its broad meaning - a long-term forward-looking project for the general benefit and the protection of human and natural diversities within an international interrelated community - is not a vision but rather a possible future scenario in which we could live just by the will<sup>11</sup> to choose, among many, the right tools. Globalization, built on economic, political and social communication and interrelation, is not a reversible process. It can only be just or unjust. States have the responsibility to act to redress market imbalances as well as to intervene wherever international institutions have no power, competence or better capacity to operate. On the other hand, international institutions must always act in strict adherence to the paramount objectives of the continuing development of human values and prosperity for which they have originally been created, adopting all those painful but necessary reforms that the current challenges and global population demand.

<sup>11</sup>Where individual drive and the will to behave in a responsible and compassionate way comes from, is a related but separate issue, which pertains more to motivational psychology (dealing with emotional health, empathy, social expectations) than law and policy.

# NEWSLETTER *FEBRUARY 2007*

## *DIARY OF CONVENTIONS*

<u>TIME</u>	<u>EVENT</u>	<u>INFORMATION</u>
<b>FEBRUARY</b>		
5-9 February Nairobi, Kenya	24th Session of the Governing Council/ Global Ministerial Environment Forum (GC-24 /GMEF)	<a href="http://www.unep.org/gc/gc24/">http://www.unep.org/gc/gc24/</a>
12 - 14 February, Berlin	Time to Adapt - Climate Change and the European Water Dimension Vulnerability - Impacts – Adaptation	<a href="http://www.climate-water-adaptation-berlin2007.org/index.htm">http://www.climate-water-adaptation-berlin2007.org/ index.htm</a>
12-15 February, Gland, Switzerland	35th meeting Ramsar Standing Committee	<a href="http://www.ramsar.org">www.ramsar.org</a>
15-16 February, Oisterwijk, the Netherlands	European conference 'Biodiversity and Regions'	<a href="http://www.biodiversitybrabant.nl">www.biodiversitybrabant.nl</a>
26 - 28 February, Birchwood Conference Centre, Johannesburg, South Africa	Enviro Summit 2007 Integrated Environmental Management	<a href="http://www.igpc.co.za/cgi-bin/templates/singlecell.html?topic=466&amp;event=11856">http://www.igpc.co.za/cgi-bin/templates/singlecell.html? topic=466&amp;event=11856</a>
26 Feb - 2 Mar, New York, USA	CSD-15 Intergovernmental Preparatory Meeting	<a href="http://www.un.org/esa/sustdev/csd/csd15/csd15_ipm.htm">http://www.un.org/esa/sustdev/csd/csd15/ csd15_ipm.htm</a>
<b>MARCH</b>		
12 - 14 March, Lille, France	Water Status Monitoring under the Water Framework Directive	<a href="http://www.wfdlille2007.org/">http://www.wfdlille2007.org/</a>
12 to 21 March Buenos Aires, Argentina 2007	Convention to combat desertification. Fifth session of the CRIC	<a href="http://www.unccd.int/cop/cric5/menu.php">http://www.unccd.int/cop/cric5/menu.php</a>
14-17 March, Bonn, Germany	14th Meeting of the Convention on the Conservation of Migratory Species (CMS) Scientific Council	<a href="http://www.cms.int">www.cms.int</a>
21-24 March, Seville, Spain	Fifth European Conference on Sustainable Cities and Towns	<a href="http://www.sevilla2007.org">www.sevilla2007.org</a>
22 March	World Water Day IRC International Water and Sanitation Centre	<a href="http://www.worldwaterday.org/page/124">http://www.worldwaterday.org/page/124</a>
<b>APRIL</b>		
22 April	Earth Day	<a href="http://www.earthday.org/">http://www.earthday.org/</a>
16-17 April, New York	UNFF	<a href="http://www.un.org/esa/sustdev/calendar/apr2007.htm">http://www.un.org/esa/sustdev/calendar/apr2007.htm</a>
16 to 20 April, UN-HABITAT headquarters in Nairobi, Kenya	21st Session of the Governing Council of the United Nations Human Settlements Programme, (UN-HABITAT)	<a href="http://www.unhabitat.org/categories.asp?catid=528">http://www.unhabitat.org/categories.asp?catid=528</a>
30 April - 11 May, New York	15th Session of the UN Commission on Sustainable Development	<a href="http://www.un.org/esa/sustdev/csd/policy.htm">http://www.un.org/esa/sustdev/csd/policy.htm</a>



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