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International Law of Development at Edinburgh: Methodology, Content, and Salient Issues

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INTERNATIONAL LAW OF DEVELOPMENT AT EDINBURGH: METHODOLOGY, CONTENT AND SALIENT ISSUES

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In this paper, the author gives a short account of the teaching of International Law of Development in the Faculty of Law, University of Edinburgh, Scotland, identifies some of the major issues in its teaching and gives the substantive content of the course, which is taught within the discipline of Public International Law.

Elements of International Law of Development have been taught, for several years, as progressive parts of a course in International Economic Law and Organisations which is offered for the LL.B. Degree. More recently a separate course in International Law of Development has been introduced for the LL.M. Degree. The substantive contents of the course comprise the Law of World Trade, including International Commodity Organisations, the Bretton Woods Institutions, Foreign Investment, Transfer of Technology, including International Law of Intellectual Property, and International Shipping, in particular the Liners' Conferences. Before the substantive topics, the issues of law-creating in the international legal system and the status of International Law of Development in that discipline, are also discussed.

1. *Law-creating Processes*

The question of law-creating processes in the international legal system, unlike other legal systems, has acquired a substantive importance. The reason for this, which stems from the nature of the international legal system, is that there is as yet no comprehensive and centralised legislative authority in this system and Public International Law in general, emanates from the consent of states. The question in what forms and to what extent in a particular case states have given consent to the creation of a particular rule thus often merges into the substantive controversy. In

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relation to International Law of Development the controversy on the "sources" of International Law has acquired an added dimension. There is a considerable divergence between the traditional school and the progressive, or what might be described as development, school of International Law. The controversy is largely pivoted to Article 38 of the Statute of the International Court of Justice. The Court, it may be noted, is a principal organ of the United Nations. This fact in itself has certain legal implications. The case of the two schools may now be briefly stated.

The traditional school, largely prevalent, with some notable exceptions, in the West, maintains: The only legitimate sources of International Law are treaties, customs, general principles of law recognised by civilised nations, and as subsidiary means for the determination of rules of law, judicial decisions and writings of internationally recognised publicists;[1] and that these are the *only* recognised forms in which the rules of international law come into being. Anything else, hence, is mere agenda for negotiation, political statements, pre-legislative phenomenon or, at best, "soft" law.[2] Since most of the development norms are evolved by the General Assembly, the Economic and Social Council, the United Nations Conference on Trade and Development (UNCTAD) and other organs of the UN System, these norms in the form of Resolutions and Decisions, are therefore, according to this school, excluded from the above recognised sources. Apart from Article 38 of the ICJ this contention is further supported by reference to the provisions of the Charter of the United Nations, which, it is argued, do not confer any treaty-making power to the General Assembly and other related organs of the UN.[3]

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1. Art 38 of the International Court of Justice (ICJ):

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting parties;

b. international custom, as evidence of a general practice accepted as law;

c. general principles of law recognised by civilised nations;

d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of the rules of law.

2. There are numerous writings on this subject, from which the following may perhaps be cited as illustrative of this view. Cheng, *United Nations Resolutions on Outer Space: Instant Customary International Law?*, 5 INDIAN J. OF INT'L L. 1965. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 34 BRIT. Y.B. OF INT'L L. 1951 (1958), H. KELSON, THE LAW OF THE UNITED NATIONS (1951), G. SCHWARZENBERGER, WORLD ECONOMIC ORDER? (1970), E. MCWHINNEY, THE WORLD COURT AND THE CONTEMPORARY INTERNATIONAL LAW-MAKING (1979).

3. Articles 10-12 empower the General Assembly to make recommendations.

The case of the progressive development school,[4] on the other hand, is this. First, assuming that Article 38 of the Statute of the ICJ—the mainstay of the case of the traditional school—contains an exhaustive list of sources, it does not preclude us from taking into account the practice of states and international organisations in order to give substance to the terms, obligations, objectives and functions contained in the Charter of the United Nations. In determining the functions and interpretation of a constituting treaty of an international organisation, the practice of the organs is important material to rely on. For example, the clause of the Charter, "higher standards of living, full employment and conditions of economic and social progress and development" (Art. 55 (a)) provides, in itself, little operational meaning. It is only the subsequent *practice* of the relevant organs of the United Nations which gives substance to this objective of the Charter.

Secondly, the main purpose of Article 38 of the Statute is to give an authoritative direction to the World Court as to what law it should apply. It is not the aim of this article to state what is, or ought to be, the law-creating process in the international legal system. It cannot take away the prerogative of states to consent to the creation of new rules in the form they choose. What is the law-creating process at a given time very much depends on the level of growth and integration in international society. In an unorganised state of the international society—the stage which prevailed with the exceptions of certain specific sectors[5] right up to the formation of the United Nations in 1945—states alone were international persons and retained almost the sole monopoly of the law-creating process. International organisations—essential instruments of the contemporary international system—now have a significant role and participate with

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4. The writers in this group adduce various reasons and support the legal competence of the General Assembly in varying degrees. But they do recognise that General Assembly and other related organs do contribute to the law-creating in the United Nations System. Among these writers, the following may be noted. O.Y. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966), J. CASTANEDA, LEGAL EFFECTS OF THE UNITED NATIONS RESOLUTIONS (1969), R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS of International Law Through the Political Organs of the United Nations (1963), Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97 (1955-56), LEGAL ASPECTS OF THE NEW INTERNATIONAL ORDER (K. Hossain ed. 1980).

5. The International River Commissions in Europe, some technical institutions, such as the Universal Postal Union, the International Telegraphic Union, the Paris Union 1883, the Berne Union 1886, both dealing with intellectual property, industrial and literary property respectively, and the International Labour Organisation 1920 may be cited as some of these exceptions.

states in that process. For this development there are several reasons. International organisations, in particular the UN system, are entrusted with specific functions in the field of development including the progressive evolution of the development norms. In discharge of these functions, the international organisations are competent to take certain measures and act independently or in co-operation with their members. The law-creating processes in international law are thus shared. This means that often the stages preceding the ratification of a treaty are accomplished by or within these organisations. The development norms are thus evolved within the UN System, and international agreements are often negotiated within the fora of this system. The quasi-legislative functions of international organisation are recognised features of contemporary international organisations.[6] The working of the UN System in the development field has simply provided added impetus to this phenomenon.

Furthermore, there seems to be a confusion between the law-creating processes and the treaty-making process. While there is some convergence between the two, they cannot be treated as synonymous. In the unorganised state of international society the policies and precepts were often implicit in and masked by the treaties. Contemporary International Economic Law is based on certain recognised economic precepts, assumptions and philosophy. Major controversies often rage in these areas rather than that of formal treaty-making. These precepts and principles are developed independently and precede the formal negotiations of the treaty which eventually incorporate them. Thus the development norms affirmed and reiterated by UNCTAD and subsequently consolidated in the Declaration on New International Economic Order[7] and the Charter of Economic Rights and Duties of States[8] provide the essential elements of international economic and development policy.

At present the law-creating processes in International Law of Development are largely truncated. The development norms evolve generally within the United Nations, and their implementation is largely the pre-

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6. The ILO and other specialised agencies of the United Nations, for example the International Civil Aviation Organisation (ICAO) and the World Health Organisation (WHO) have such powers. The decisions of some of the other organisations have similar quasi-legislative effects. THE EFFECTIVENESS OF INTERNATIONAL DECISIONS (S.M. Schwebel ed. 1971). *See also* the excellent and pioneering work of EGON SCHWELB, HUMAN RIGHTS AND INTERNATIONAL COMMUNITY; THE ROOTS AND GROWTH OF UNIVERSAL DECLARATION OF HUMAN RIGHTS (Chicago, 1964), *passim*.

7. G.A. Res. 3201 (S-VI) of 1 May 1974. *See* in P. MUTHARIKA, 1 INTERNATIONAL LAW OF DEVELOPMENT 615 (1978).

8. G.A. Res. 3362 (XXIX) of 12 December 1974, Mutharika, *supra* note 7, at 627.

rogative of states, or international organisations such as GATT and the Bretton Woods Group. This statement, however, needs two qualifications. First, there are areas, admittedly limited, in which the UN organs themselves have power to implement the agreed development norms, for example through financial and technical assistance by the United Nations Development Programme (UNDP).[9] Secondly, in the UN system, there are several agencies and organisations which among their functions include what may be described as development objectives. Implementation of these objectives is within the competence of these organisations, e.g.the Bretton Woods Institutions and GATT. These organisations have substantive functional links with the UN.

Another question relevant to the study of the course is: Is there a Right to Development in International Law? If so, what are its bases? It is tempting to treat Public International Law within the traditional perspectives as merely a collection of rules, prescribing rights and obligations of states. But contemporary international law is more than mere prescriptive rules. There is a superstructure of international organisations through or within which major rights and obligations are exercised, and in relation to these rights and obligations the international organisations themselves have specific functions. Secondly, the legal rules develop by stages and within the framework of international co-operation. Thirdly, underlying these prescriptive rules and the legal framework of international co-operation, there are certain basic principal rights: sovereign equality and the right to peaceful existence; right of people and nations to self-determination; right of individuals to the protection of their human rights; and more recently it has been suggested and adumbrated that states, people and individuals similarly have a right to development.[10]

An examination of this issue—the right to development—is thus an important part of the course in International Law of Development. Several bases have been suggested for this right. One suggestion is based on the principle of sovereignty which simply requires putting more substance to sovereignty as to enable the states to utilise the fruits of their recognised sovereignty.[11] The well-known declaration of the General Assembly entitled

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9. See the Annual Reports of the Administrator of the UNDP.

10. De Vey Mestdagh, *The Right to Development: From Evolving Principle to the "Legal Right": In Search of Substance*, in INTERNATIONAL COMMISSION OF JUSTICE, DEVELOPMENT OF HUMAN RIGHTS AND THE RULE OF LAW, Report of a Conference held in The Hague 143-174 (1981). *See also*, Brietzke, *Development as a Human Rite*, 1984 THIRD WORLD LEGAL STUD. 25.

11. In 1937, Judge Hudson, emphasising the substantive aspects of sovereignty, observed that

Permanent Sovereignty over Natural Resources[12] substantiates this contention. The second assertion is that it is an extension and materialisation of the principle of self-determination. This view inter alia finds support in the UN Covenant on Economic, Social and Cultural Rights, 1966.[13] Article 1 of this Covenant states:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. . . . In no case may a people be deprived of its own means of subsistence.[14]

Thirdly it is said that the right to development is an integral part of human rights. This view in part is based on the Universal Declaration on Human Rights 1948[15] and the International Covenant on Civil and Political Rights 1966. Article 25 of the Universal Declaration states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family. . . ."[16] The reliance on human rights has opened up controversy whether the right to development as a specie of human rights is the right of an individual, people or state and how it is to be implemented. If it is the former, is it the primary responsibility of the state to implement it? This controversy is to some extent abated by Article 28 of the Universal Declaration which makes the existence of an international order a prerequisite to the achievement of the specific

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independence of a state when shorn of the last vestige of power was 'a ghost of a shallow sovereignty.' *The Light House Case*, 1937 P.C.I.J. (ser A/B) No. 71, at 127. For a further discussion of this point, see K.R. KHAN, THE LAW AND ORGANISATION OF INTERNATIONAL COMMODITY AGREEMENTS 17 (1982).

12. G.A. Res. 1803 (XVII) of 14th December 1962. Mutharika, *supra* note 7, at 571. For a discussion on the legal effects of this see Schwarzenberger, *supra* note 2, and Hossain, *supra* note 5, Part IV. See also PROGRESSIVE DEVELOPMENT OF THE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER, UNITAR, UNITAR/DS/5 (1982).

13. See P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS (1983).

14. I. BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS, (2d ed. 1981).

15. The discussions on the right to development have been pursued in the United Nations for several years. One of the earliest reports entitled THE INTERNATIONAL DIMENSIONS OF THE RIGHT TO DEVELOPMENT AS A HUMAN was produced in 1979, E/CN.4/1334. Since then a Working Group of Governmental Experts on the Right to Development has been considering the issue. See an interesting and useful paper by P.J.I.M. de Waart, AN OUTLOOK FOR THE FUTURE: EMBEDDING DEVELOPMENT IN A RIGHT UNDER INTERNATIONAL LAW (1981) E/CN.4/AC.34/WP.12. The UN General Assembly has now affirmed the right to development. See UN GA RES. 39/145 (1984) and more recently, Res.41/128 (1986).

16. Brownlie, *supra* note 14.

human rights.[17] In other words, individual human rights for their implementation require a conducive international order. Furthermore, even assuming that the right to development is an individual right, states are, as with the property claims of their citizens *vis-a-vis* another state, competent to espouse and implement this right.

Fourth, and lastly, it is suggested that the right to development is an independent treaty right based on and developed from the Charter of the United Nations, in particular Articles 1, 55 and 56.[18] Out of the four propositions, this one has perhaps more arguments in its favour. The principles of sovereignty, self-determination and even human rights can perhaps largely be fulfilled by recognition of these rights and by the exercise of restraint on the part of states. The implementation of development norms, on the other hand, necessitates positive acts of cooperation on the part of the members of the international community. Without a framework of international cooperation and the undertaking to act positively, the right of development would remain, at best, an unrealised right. The right to development based on the Charter comprises not only the norms but the framework of joint and separate acts within the UN system.

2. *World Trade and International Commodity Organisations*

Among the substantive topics in the course, the law of world trade including primary commodities has a major place. The threshhold is formed by a brief discussion of the principles of the GATT;[19] cardinal among these are reciprocity and most-favoured-nations (MFN) treatment. These principles, it is worth noting, assume certain comparable bargaining positions among states and a more or less developed economy. That all members of the GATT, highly industrialised states and the states with

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17. See E/CN.4/1334.

18. Article 55: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

> (a) higher standard of living, full employment, and conditions of economic and social progress and development;
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> . . .
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> Article 56: All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

19. The major operational principles of the GATT are: Reciprocity, Most-Favoured-Nation (MFN) Treatment, and subsidiary principles are Equitable Treatment and that of Good Neighbourliness. See J.H. JACKSON, WORLD TRADE AND THE LAW OF THE GATT (1969).

subsistence economies have the capability of benefitting from reciprocal multi-lateral trade negotations is no longer the accepted premise of the GATT. Relating to primary products, the Havana principles similarly provide the basis of the discussion.[20] Basic premises of the former and the restrictive objectives of the latter are identified.[21] The following assumptions are examined: that the GATT is largely based on free-market economy precepts, that it assumes that its declared objective of the expansion of world trade can be achieved by tariff reductions through reciprocal and mutually advantageous bases and that every member has a more or less equal bargaining position to benefit from multilateral trade negotiations. How these assumptions are gradually jettisoned, modified and supplemented is the next stage of the enquiry into this topic. The relationship between these economic postulates and the resulting legal and functional rules is also examined.

Next, the developments in the GATT, starting from the Haberler Report 1958,[22] the parallel emergence of the development norms at the UNCTAD 1964,[23] and the eventual adoption of a new section—Part IV entitled Trade and Development—to the GATT are discussed. That international trade has now certain recognised development objectives[24] is noted, and the legal significance of this internationally accepted principle is explored.

That the principles of reciprocity and non-discrimination (one part of the principle of Most-Favoured Nation treatment) did not bring desired or anticipated benefits to the developing members of the GATT has now been formally recognised. This recognition eventually led to the addition of Part IV to the General Agreement which now reiterates specific development objectives and for the achievement of these objectives, institutes a framework for the Generalised System of Preferences,[25] dispenses with the rigid application of the principle of reciprocity and the Most-

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20. UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT, FINAL ACT AND RELATED DOCUMENTS, Havana, Cuba, 21 November 1947 to 24 March 1948 (New York: United Nations, 1948), UN Doc ICITO/1/4 (1948). For a discussion of the Havana Principles, see Khan, *supra* note 11, at 66-73.

21. See Khan, *supra* note 11.

22. Jackson, *supra* note 19, at 673.

23. *Proceedings of the United Nations Conference on Trade and Development*, Geneva 23 March - 16 June 1964 *Vol. I Final Act and Reports* (1964).

24. GATT, Article XXXVI(e) recognises international trade as a means of achieving the development objectives.

25. See Part IV of the GATT, and for the development and discussion of the GSP, see the UNCTAD Documents Series: TD/B/GSP.

Favoured Nations treatment[26] and facilitates a framework of cooperation for development among developing countries.[27]

The development norms which largely emanate from the United Nations and the implementation of these norms by the GATT raise some interesting legal and institutional issues. The GATT is not, strictly speaking, a specialised agency of the UN. In the absence of a firm legal relationship between the UN and the GATT, the latter, it may be contended, has no obligation to implement the relevant norms and provisions of the New International Economic Order. If so, what is the legal mechanism by which the development norms of the UN are, or may be, transformed into legal norms for the GATT? The case for the acceptance of the development norms by the GATT can thus be made largely within the context of the General Agreement itself. This also obviates the necessity of having to decide on the controversy of the legal effects of the development norms.

The General Agreement includes, among its objectives that [international economic relations] should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.[28]

This objective is almost identical to, and an elaboration of, the provisions of Article 55 of the Charter of the United Nations.[29] The membership of the GATT converges with the membership of the UN. The members who have subscribed to the development norms within the United Nations have an obligation to act, in good faith, towards their implementation. And the GATT has a functional relationship with the UN system.[30] These reasons have provided the bases for the implementation of the development norms in the GATT.

Relating to primary commodities, historical development of commodity organisation, the evolution of international commodity policy from the

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26. GATT: Art XXXVI(8):

> The developed contracting parties do not expect reciprocity for the commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.

27. GATT, Art XXXVIII.

28. GATT, Preamble.

29. See *supra* note 18.

30. For example, the International Trade Centre is jointly sponsored by the UNCTAD and GATT. See Document ITC/AG/TC.1 series.

first International Sugar Convention, 1909, the Anglo-Dutch phase of the 1920s, the World Monetary and Economic Conference, 1933 and the basic elements of the Havana Principles provide starting points for the discussion.[31] There is a conflict between the negative formulation of the Havana objectives and the UNCTAD principles which recognise international commodity regulation as a positive instrument for development.[32] The Havana Principles made a distinction between bi-partite international commodity agreements (in which consumer countries and producer countries as groups are equal partners with equal votes and a distributed and weighted voting system) and others, in particular, single interest intergovernmental producers commodity associations, such as the International Bauxite Association. Under those principles only the former receive legitimacy and recognition. This is reflected in the GATT, Art.XX(h) as well.[33] This selective recognition of international commodity regulation now conflicts with the UNCTAD principles and the Integrated Programme for Commodities.[34] The legal position of the Inter-governmental Producers Associations is thus an integral part of the present debate. How is the Integrated Programme for Commodities being implemented? The principle of joint responsibility of consumer countries has been recognised. The recognition of this new principle has produced some tangible results, for example the institution of the Common Fund for Commodities and the participation by the consumer members in the financing of international stock in tin. These advances are however somewhat illusory, as on the insistence of the consumer countries greater reliance is placed on stock mechanism, and consequently, the regulatory machinery of the International Commodity Agreements is enfeebled.

3. *Bretton Woods Institutions*

(a) *International Bank for Reconstruction and Development (IBRD)*

Both the organisations, the IBRD (World Bank) and the International Monetary Fund are, formally, specialised agencies of the United Nations.[35]

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31. Khan, *supra* note 11.

32. See *supra* note 24.

33. Art XX(h) of the GATT, allows the contracting parties, subject to certain specific safeguards, to adopt and enforce certain measures: . . . in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not so disapproved.

34. UNCTAD Res 93(IV) of 30 May) 346; UN-IMF Agreement of 15 Nov. 1947, 16 U.N.T.S. 328.

Consequently, the recognition of the development norms by these organisations, in legal terms, is easier to establish. But these organisations present their own problems. Both the institutions, in their agreements with the United Nations, have asserted their "independence" and consequently have curtailed the legal competence of the UN to address direct and specific recommendations to them.[36] The recognition and transmission of the development norms by the Bretton Woods institutions is thus largely on similar lines as in the case of the GATT.

In dealing with the World Bank, its financial structure, institution and functions are examined with a view to assessing its capacity and role as a development institution. While providing assistance to its members for their development is a primary function of the World Bank, its financial structure and its role in international financing restrict that function. The World Bank was not envisaged as a principal organ, or an organ of first resort, for development financing. Instead, it was designed largely as a facilitator of private financing and investment. It was intended to be a bridgehead between capital-importing members and private investors.[37] Because the World Bank obtains most of its funds from private sources, commercial considerations play a dominant part in its functions and in setting the terms of its loans. The establishment of the International Development Agency has to some extent mitigated that constraint. How a balance is achieved between the commercial considerations and the need

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36. Art 1(2) of the UN-IBRD agreement states: . . . By reason of the nature of its international responsibilities and the terms of its Articles of Agreements, the Bank is, and is required to function as, an independent international organisation.

Art. IV.

3. The United Nations recognises that the action to be taken by the Bank on any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement.

The United Nations recognises, therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to terms or conditions of financing by the Bank. The Bank recognises that the United Nations and its organs may appropriately make recommendations with respect to the technical aspects of reconstruction or development plans, programmes or projects.

16 U.N.T.S. 348-49.

37. Art I The purposes of the Bank are:

(ii) To promote private foreign investment by means of guarantees or participation in loans and other investments made by private investors; *and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its capital, funds raised by it and its other resources* (Emphasis added).

to be a genuine development institution is an interesting topic for discussion.

On the substantive side, the practice of the World Bank and its affiliates, The International Financial Corporation (IFC)[38] and The International Development Agency (IDA)[39] is examined, and in particular, the concepts of "project," "creditworthiness" and "development" are discussed in the context of that practice and the development norms of the New International Economic Order. The role of the World Bank Group in the promotion of foreign investment is also discussed. Here the functions of the IFC, the Centre for the Settlement of Investment Disputes and the increasing role of the World Bank Group as an instrument of international financial discipline are also discussed, and the quasi-judicial *cum* financial contributions in cases such as the Suez Canal, and the Indus Waters dispute are relevantly covered.

(b) *International Monetary Fund* (IMF)

The IMF is an essential element of the contemporary World Economic Order. Its importance has not diminished even after the breakdown of the fixed exchange rates system in 1971.[40] The membership in the Fund is a prerequisite to membership in the World Bank[41] and in substance to that of the GATT.[42] In the absence of a monetary order, national currencies can be manipulated as instruments of dumping, hence, of unfair competition. Monetary stability is essential to the working of all these organisations. There are three main functions of the IMF: maintenance of a fixed exchange rate system, provision for convertibility of the currencies of member countries and provision of funds to deal with temporary disequilibrium in the balance of payments of the member countries.[43]

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38. For the Articles of Agreement of the IFC, see 264 U.N.T.S. 117, and 439 U.N.T.S. 318.

39. For the Articles of Agreement of the IDA, see 439 U.N.T.S. 249.

40. J. WILLIAMSON, THE FAILURE OF WORLD MONETARY REFORM, 1971-74 (1977).

41. *IBRD, Art II (a)*: The original members of the Bank shall be those members of the International Monetary Fund which accept membership in the Bank before [31 December 1945].
(b) Membership shall be open to *other members of the Fund*, at such times and in accordance with such terms as may be prescribed by the Bank.

42. The IMF has an important function in the operation of the GATT provisions relating to Exchange Arrangements. The contracting parties are required to conform with Art VIII (Sec. 5) of the IMF. See GATT Art XV.

43. IMF Art I.

Several questions relating to the functioning of the IMF are raised in the course: Is there any monetary order after the collapse of the fixed exchange rate system? What are the nature and effects of the so-called managed flexible rate system? Has the much-heralded surveillance mechanism developed into an effective instrument? What are the consequences of unsettled exchange rates on the economies of the developing countries? Major attention in this section of the course is given to the financing by the IMF and more recently its increased role in the present debt crisis. Special facilities, for example, Compensating Financing and Buffer Stock Financing extended to developing members, are noted; the scope of the Fund's conditionality, its justification and criticism are examined. The IMF role, in this field, has significantly expanded. The original objective of merely providing resources to enable its members to tackle temporary disequilibrium in the balance of payments has now escalated to dealing with "economic adjustment."[44] The latter, by its very nature, is a long-term phenomenon. Characteristics, contents and the legal significance of the stand-by arrangements are relevantly discussed.[45] The question of duration of stand-by arrangements particularly in relation to "economic adjustment loans" is also raised.

Taking the two institutions of the Bretton Woods Group together, some institutional questions are also discussed, in particular the decision-making provisions. The rationale for the proportionate voting, its application and its compatibility with the development norms and almost total digression from the principle of equality of states are also considered. In this connection, the equitable pattern of decision-making incorporated in the International Fund for Agricultural Development,[46] is brought in.

3. *Foreign Investment*

Historically, the discussions on foreign investment in Public International Law have largely been confined to the question of jurisdiction, criteria for legitimate taking and of compensation in the event of such a

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44. For example, see recent stand-by arrangement with Mexico. The objective of the arrangement was described by the Managing Director of the IMF, as "to help Mexico deal with its *economic imbalance*, which has been intensified as a result of the oil price drop." 28 IMF SURV. July 1986, at 225.

45. See International Monetary Fund, *Selected Decisions of the International Monetary Fund and Selected Decisions, Ninth Issue* (1981).

46. See 15 INT'L LEGAL MATERIALS 922 (1976).

taking, in short, with the protection of foreign investment.[47] In dealing with such questions the principle of sanctity of contract and the general principle of state responsibility are invoked, and in pursuit of claims for compensation, diplomatic protection by the national state is relied upon. But in contemporary international law, foreign investment is seen in a wider context of the development needs of capital importing countries. The need to protect foreign investment—the main concern of traditional International Law—is now coupled with the public interest in productive utilisation of such investments.[48] This rectification of balance between capital exporting and capital importing countries' interests necessitates some modifications in the terms of existing concessions and other investment contracts. Thus the principle of sanctity of contract, it is argued, should now be qualified by another principle of International Law, the doctrine of changed circumstances. How these two principles operate and are reconciled makes an interesting subsidiary topic of this unit.

On a wider span of this topic, the legal significance of the Principle of Permanent Sovereignty over Natural Resources[49] and more recently the Charter of Economic Rights and Duties of States,[50] in particular Article 2 of the latter[51] in relation to International Law of Foreign Investment, needs to be examined. Does the criterion of "appropriate" compensation, automatically contradict the traditional criteria of "full, prompt and effective"? Has full compensation really been a generally accepted norm?

In what ways have the developing countries themselves improved their legal machinery for productive utilisation of foreign investment? The device of domestic legislative terms on which foreign investment is accepted, and the adopting in some cases of a regional approach for receiving foreign investment, as in the Assocation of South East Asian Nations (ASEAN)[52] and the Andean Pact,[53] provide interesting areas for study. International Economic Development Agreements, their contents, methods of regulating foreign capital and the machinery for cooperation are also

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47. See, for example, G. WHITE, NATIONALISATION OF FOREIGN PROPERTY (1961), and several works of R.B. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT. SIX PROCEDURAL STUDIES (1965), and THE VALUATION OF NATIONALISED PROPERTY IN INTERNATIONAl LAW, 3 vols. (1972-75).

48. See, for example, M. RADETZKI & S. ZORN, FINANCING MINING PROJECTS IN DEVELOPING COUNTRIES (1979).

49. See Hossain, *supra* note 4, at Part IV.

50. R.F. MAEGHER, AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER, A STUDY OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES (1979).

51. See *supra* note 8.

52. TD/B/609, Vol. II, 136-140.

53. TD/B/609, Vol. I, p 118. Andean Pact.

examined.[54] The contribution of the Centre for the Settlement of Investment Disputes is also assessed.[55] The Washington Convention which established the Centre makes manifold contributions in "internationalising" the investment agreement and facilitating the harmonisation of international rules and domestic legislation. Adjudication of disputes is only one of its many functions.

4. *Transfer of Technology*

As one of the preambles to the Draft International Code on the Transfer of Technology states, "technology is the key to the progress of mankind and . . . all peoples have the right to benefit from the advances and development in science and technology to improve their standards of living."[56] The international regulation of transfer of technology is made difficult by the fact that in the capital exporting countries with dominant operation of the free market economy these questions are within the private domain. The treaty approach, which regulates inter-governmental relations, is largely unsuited to the task. For several years discussions have been taking place in the United Nations on an International Code.[57] The UN Code of Conduct on Transnational Corporations is also discussed.[58] This unit also examines the legal issues in the codes and the progress towards these so far.

5. *Intellectual Property*

The two recognised branches of intellectual property, industrial property (patents, trade marks and designs) and literary and artistic works (protected by copyright) have a recognised role in the transfer of technology and development process. Historically, the rationale of protection

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54. D.N. SMITH & L.T. WELLS, NEGOTIATING THIRD WORLD AGREEMENTS: PROMISES AND PROLOGUE (1975).

55. For the text of the agreement, see 4 INT'L LEGAL MATERIALS 524 (1965), and among many articles, see Broches, *Settling of Investment Disputes between States and Nationals of Other States*, WORLD PEACE THROUGH LAW: THE GENEVA WORLD CONFERENCE 258-261 (1969), and *The International Centre for Settlement of Investment Disputes* in HANDBOOK OF INSTITUTIONAL ARBITRATION IN INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE (1977).

56. TD/CODE TOT/33 (1981). See also, O. Schachter, *Transfer of Technology and Developing Countries*, in Hossain, *supra* note 4, 156-159.

57. See UNCTAD, TD/CODE TOT/ series and TD/B/C.6 series. See Khan, *The UN Code on Transfer of Technology*, SCIENCE, TECHNOLOGY & DEVELOPMENT (forthcoming).

58. THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS (New York, United Nations 1986).

of private property and the promotion of invention have provided the main impetus in the development of the International Law of Intellectual Property.[59] With the internationally recognised need for development, new considerations have been added, such as equitable sharing of technical knowledge, prevention of restrictive business practices and other forms of monopolistic phenomena. This requires a reexamination of the Paris Union[60] and the Berne Union,[61] subsequent developments and the works of the World Intellectual Property Organization[62] including its Model Industrial Property Laws for Developing Countries.[63]

6. *International Shipping*

International maritime transport has a significant role in world trade and particularly in relation to developing countries. It presents what developing countries consider an inequitable legal regime. The various sea routes, of direct relevance to those countries, are subject to the Liners' Conferences which inter alia limit the participation on those routes to only a few maritime nations. In several commodities, bulk commodities such as timber, sisal jute and mineral ore, a substantial portion of the price comprises transport charges.[64] It would be of more benefit if the developing countries could have their own shipping lines or have some voice in the existing legal regime. The UN Code on Liners Conferences, 1974, goes some way to rectifying the imbalance.[65] Other developments in maritime transport relevant to the development process are also examined.

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59. UNITED NATIONS, THE ROLE OF PATENTS IN THE TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES (1965) (E/3861/Rev.l) and THE ROLE OF THE PATENT SYSTEM IN THE TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES (1975) TD/B/AC.11/19. See also Khan, *The International Patent System: A Call for its Reform from Developing Countries*, 5 SCIENCE, TECHNOLOGY & DEVELOPMENT (Glasgow) 3-10 (1987).

60. WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO), PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 1883 201 (E).

61. WIPO, BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 1886 287(E).

62. See, for example, Proceedings of the Stockholm Conference 1967. And for further discussions on reforming the International Patents System, see TD/B/C.6/ series.

63. WIPO, WIPO MODEL LAWS FOR DEVELOPING COUNTRIES ON INVENTIONS, 841(E).

64. For example, it has been contended by the producers of jute that the freight charges on jute had risen in the 1970s by 300 percent, which was a hindrance for that commodity to compete with its synthetic rivals. TD/B/IPC/JUTE/5 para 9 (1977).

65. *United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences* (TD.CODE/13 Add 1) (1975).

7. *Patterns of International Regulations*

An interesting phenomenon of the International Law of Development is that while there are internationally recognised standards and norms of development, the modes of their implementation are diverse. This is characteristic of international cooperation. Unlike the prescriptive rules, the standards of development cannot be subjected to a uniform prescriptive legal regime. Large areas of international economic transactions have already been subject to a legal regime, for example, world trade regulated by the GATT and monetary matters by the IMF. These regimes were initially based on precepts and rationale which were oblivious of, if not adverse to, development needs. As regards shipping and transfer of technology, these are largely in the private domain. Here the international regulation has to be different from the pattern used in, say, world trade.

Some patterns may however be identified:

(1) Progressive implementation of the development norms within the UN organs;[66]
(2) Traditional inter-state conferences, e.g. the Common Fund for Commodities.[67] This provides laws and regulation in an area which is not covered by an existing institution;
(3) Amendments to, and Decisions by, an existing organisation: Addition of Part IV to the Gatt,[68] Decisions of the IMF[69] and World Bank,[70] Paris Union,[71] Berne Union;[72]
(4) Codes: To cover the matters which have been hitherto within the private domain of national and transnational corporations.[73]

The characteristics and instruments of regulation of each of these patterns are examined.

8. *Institutional Aspects*

Decision-making in international institutions, with other questions such as admission, is often relegated to procedural questions and as such is

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66. For example, the technical assistance through the regular budget of the UN or through the UNDP.

67. TD/B/IPC/CF/CONF/19. The Common Fund, having now received the required number of ratifications, is about to come into force.

68. See Section II.1 above.

69. See Section II.2 above.

70. *Id.*

71. See Section II.5 above.

72. *Id.*

73. See Section II.6.

given only subsidiary importance. It is, however, now recognised that these matters have a substantive bearing. Most of the contemporary international economic organisations are based on weighted voting—that is, on the basis of the allocation of votes in proportion to considerations or weighted strength of the members—not on the principle of equality of states. There are, of course, historical and other reasons for this. But this form of decision-making, it is argued, perpetuates economic inequality. How can the two principles, legitimate representation of interest and equality of states be reconciled? Admission to international economic organisations is often a matter of negotiations, either between the organisation and an applicant state as in the Bretton Woods Institutions,[74] or between the existing members and a new applicant, as in the GATT.[75] Is there a need for objective criteria or special terms for admission of developing countries in international economic organisations? In this connection, the trend of Group negotiations—Group of 77, Group B and Group D countries (Developing Countries, the OECD countries and the socialist countries) is also discussed.

Summary

The standards and norms of International Law of Development are examined in the context of the existing rules of International Law and within the functions of existing organisations. The various patterns of regulations are identified and their characteristics discussed. The course which is offered in the discipline of Public International Law, is not seen as a distinct, unrelated phenomenon; instead it is treated as a progression in the contemporary international legal system.

74. The conditions for the membership of the IBRD are prescribed by the Bank (Art. II Sect 1 (b)).

75. In the GATT, a new member accedes "on the terms to be agreed between such government and the Contracting Parties." Art. XXXIV.