

5-1-2004

## Monterrey Consensus on Financing for Development: Response Sought from International Economic Law

Inaamul Haque

Ruxandra Burdescu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [International Law Commons](#), and the [Law and Economics Commons](#)

---

### Recommended Citation

Inaamul Haque and Ruxandra Burdescu, *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law*, 27 B.C. Int'l & Comp. L. Rev. 219 (2004), <http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/4>

This Symposium Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# MONTERREY CONSENSUS ON FINANCING FOR DEVELOPMENT: RESPONSE SOUGHT FROM INTERNATIONAL ECONOMIC LAW

INAAMUL HAQUE\* & RUXANDRA BURDESCU\*\*

**Abstract:** The Monterrey Conference held in Mexico in March 2002 was an exceptionally significant event, qualitatively different from any other U.N. conference. It was characterized by the inclusion of all the stakeholders; preparations were marked by constructive interaction between developed and developing countries; and it was free from polemics and usual acrimony between rich and poor nations. The Consensus Document is profoundly different from other landmark U.N. documents. Developing countries have become more realistic, responsible, and mature, while developed countries—having witnessed the tragic events of September 11 and becoming cognizant of the indivisibility of development and security—exhibited a new spirit of accommodation. Faithful implementation and sustaining of the Monterrey spirit is now critically important. In the context of this Article, the Monterrey Conference represents demand, and a supply response is expected from international economic law. Much good is expected from the synergy between the Conference and international economic law.

*Recognizing that peace and development are mutually reinforcing, we are determined to pursue our shared vision for a better future, through our individual efforts combined with vigorous multilateral action.<sup>1</sup>*

—The Monterrey Consensus Document

---

\* Inaamul Haque, Former Executive Director, World Bank; Adjunct Professor, Washington College of Law, American University, Washington, D.C. The author is thankful to the *American University International Law Review* for drawing upon his paper on the Doha Development Agenda. This Article contains personal views of the authors, and these views do not necessarily reflect the views of the World Bank or of the governments Mr. Haque represented at the Board of the Bank.

\*\* Dr. Ruxandra Burdescu, PS Specialist, World Bank; Teaching Assistant, “N. Titulescu” Law School, University of Craiova, Romania.

<sup>1</sup> REPORT OF THE INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT, MONTERREY MEXICO, 18–22 MAR. 2002, para. 9, at 3, U.N. Doc. A/CONF.198/11, U.N. Sales No. 02.11.A.7 (2002), available at <http://www.un.org/esa/ffd/aconf198-11.doc> [hereinafter MONTERREY CONSENSUS].

## INTRODUCTION

The International Conference on Financing for Development held in Monterrey, Mexico in March 2002 is a significant event that has been described as “signal[ing] a turning point in the approach to development cooperation by the international community.”<sup>2</sup> The purpose of convening this Conference was to address

national, international and systemic issues related to financing for development in a holistic manner in the context of globalization and interdependence, and, by so doing, will also address development through the perspective of finance . . . [and] the mobilization of financial resources for the full implementation of the outcome of major conferences and summits organized by the United Nations during the 1990s and the implementation of the Agenda for Development, in particular with regard to poverty eradication.<sup>3</sup>

### A. Significance of the Monterrey Consensus

#### 1. Focus on Measurable Improvements

The Monterrey Conference focused on certain concrete and specific dimensions of development instead of dealing with the concept in an abstract and general fashion.<sup>4</sup> The intention was “to

---

<sup>2</sup> *Outcome of International Conference on Financing for Development, Report of the Secretary General*, U.N. GAOR, 57th Sess., Supp. No. 344, Agenda Item 95, para. 1, at 2, U.N. Doc. A/57/344 (2002) [hereinafter *International Conference*].

<sup>3</sup> *High-Level Intergovernmental Consideration of Financing for Development*, G.A. Res. 9694, U.N. GAOR, 54th Sess., Supp. No. 49, 87th plen. mtg., para. 3, at 2, U.N. Doc. A/Res/54/196 (1999). Since this Resolution predates the Millennium Summit, there is no mention of the Millennium Development Goals in it.

<sup>4</sup> There are a number of definitions for the term “development” and various, often competing, development theories. Some scholars have accorded great importance to the precise meaning of the term. For example, Denis Goulet points out: “It matters little how much information we possess about development if we have not grasped its inner meaning.” STEPHEN C. SMITH & MICHAEL P. TODARO, *ECONOMIC DEVELOPMENT* 110 (8th ed. 2002) (citing DENIS GOULET, *THE CRUEL CHOICE: A NEW CONCEPT IN THE THEORY OF DEVELOPMENT* (1971)). The scholarly quest for the meaning of the term continues. However, the variety of definitions can prove to be problematic when a concrete strategy needs to be evolved to achieve the goal of development. Hence, the Monterrey Conference very wisely concentrated on certain measurable and concrete goals. Paul Streeten, the Former Director of the World Development Institute, presents a similar conceptual approach, stating that “[d]evelopment must be redefined as an attack on the chief evils of the world

achieve measurable improvements in sustainable growth and poverty reduction.”<sup>5</sup> For realizing the overarching goal of poverty reduction and associated welfare goals, such as universal literacy and reduction of infant mortality, mobilization of domestic and foreign resources was chosen as a matter of high priority and importance for all countries—developing and developed.<sup>6</sup>

## 2. The Monterrey Consensus: A New Global Partnership

The Conference evolved a truly global consensus, known as the “Monterrey Consensus,” which unveiled the blueprint of a new partnership that focused on a shared responsibility between developed and developing countries. It sought to build an alliance for development for all “premised on full ownership by developing countries of their development and a renewed commitment on the part of the international community to support the development efforts of developing countries.”<sup>7</sup> The Monterrey Consensus does not constitute an end point but marks the beginning of an important process.

Evidently, developing countries have a vital stake in a successful, forward movement of the process and meaningful implementation of the Monterrey Consensus (which explicitly includes the Doha Accord), with sustained and lasting outcomes for the poor of the world.

---

today: malnutrition, disease, illiteracy, slums, unemployment and inequality.” *Id.* (quoting Paul P. Streeten).

<sup>5</sup> *Development Committee Communiqué*, International Monetary Fund, para. 2 (Sept. 28, 2002), available at <http://www.imf.org/external/np/cm/2002/092802a.htm> [hereinafter *Development Committee Communiqué*].

<sup>6</sup> In the 1990s, many international conferences identified a number of goals for the international community. The process culminated in the adoption of the “United Nations Millennium Declaration,” at the turn of the twentieth century, in September 2000, which contained clear commitments to make the right to development a reality for everyone. The summit agreed on a set of international development goals, known as the Millennium Declaration Development Goals (MDGs), to be achieved by 2015. The eight MDGs included: (1) resolving to cut in half the proportion of people living in extreme poverty (i.e., with income of less than US\$1 a day and those who suffer from hunger); (2) guaranteeing primary education to all children; (3) promoting gender equality and empowering women; (4) cutting child mortality by two-thirds (5) improving maternal health; (6) combatting HIV/AIDS, malaria, and other diseases; (7) ensuring environmental sustainability; and (8) developing a global partnership for development. *United Nations Millennium Declaration*, G.A. Res. 55/2, U.N. GAOR, 55th Sess., 8th plen. mtg., Agenda Item 60(b), paras. 19–21, U.N. Doc. A/RES/55/2 (2002), available at <http://www.un.org/millennium/declaration/ares552e.htm> [hereinafter *Millennium Declaration*]; see also World Bank Group, *About the Goals*, at [http://www.developmentgoals.org/About\\_the\\_goals.htm](http://www.developmentgoals.org/About_the_goals.htm) (last visited Apr. 27, 2004).

<sup>7</sup> *International Conference*, *supra* note 2, para. 5, at 2.

It is thus critically important to ensure dynamic, participatory, and sustained implementation and follow-up; without this, the Monterrey Consensus will only add to the already bloating number of elegant, eloquent, and solemn declarations adopted at high-level Conferences and routinely consigned to the limbo of oblivion.

### 3. Implementation of the Consensus

The Consensus Document, cognizant of the critical importance of faithful implementation, has declared: "To build a global alliance for development will require an unremitting effort. We thus commit ourselves to keeping fully engaged, nationally, regionally and internationally, to ensuring proper follow-up to the implementation of agreements and commitments reached at the present Conference . . . ."<sup>8</sup> The Monterrey Consensus specifically called for a follow-up international conference to review its implementation and mandated that modalities of that conference be decided upon no later than 2005.<sup>9</sup> The Development Committee,<sup>10</sup> in its meeting on September 28, 2002, has also highlighted the importance of follow-up action in these words:

The global community must now convert the ideas and the shared approaches agreed in Doha, Monterrey and Johannesburg into concrete action and measure ongoing progress. Experience has repeatedly shown that progress will only be made through implementation of sound and sustainable country-driven strategies. To make existing and new aid commitments more effective, these strategies must also be supported by better coordination and cooperation amongst development partners and by effective alignment of donor support with country strategies.<sup>11</sup>

---

<sup>8</sup> MONTERREY CONSENSUS, *supra* note 1, para. 68, at 15.

<sup>9</sup> *Development Committee Communiqué*, *supra* note 5, para. 3.

<sup>10</sup> The Development Committee, established in 1974, can be regarded as an authentic voice of both developed and developing countries. It was set up "to advise the Boards of Governors of the [World] Bank and the [International Monetary] Fund on critical development issues and on the financial resources required to promote economic development in developing countries." World Bank Group, Development Committee, at <http://web.worldbank.org/WBSITE/EXTERNAL/DEVCOMMEXT/0,,menuPK:60001650~pagePK:60000303~piPK:64000842~theSitePK:277473,00.html> (last visited Feb. 19, 2004).

<sup>11</sup> *Development Committee Communiqué*, *supra* note 5, para. 3.

## B. *Relevance of International Law*

### 1. Consolidating Legal Foundations of the World Community

This Article endeavors to articulate the nature and dimensions of the response sought by developing countries, in the context of Monterrey Consensus, from international economic law. One may legitimately ask whether implementation of the Consensus “should not fall within the exclusive province of the economists, diplomats, and statesmen.”<sup>12</sup> A lawyer’s craft, it is contended, can never supply the wanting social and political basis for an effective legal system.<sup>13</sup> These arguments are apparently convincing; but given the enormous challenge of poverty reduction, such a diffident concept needs to be given up. The positive, pro-active role of international law in the contemporary world would be to “exploit empirically the opportunities afforded by political, social, economic and technological developments and changes, and deep-rooted moral forces, which do afford the basis for an effective international legal system, in such a manner as to consolidate the legal structure and foundations of the world community”<sup>14</sup> in the post-Monterrey world. International law—or, more appropriately, international economic law—faces an enormous challenge today and developing countries expect a befitting response from it.

### 2. Development as a Theme in International Law

International law and development are no strangers to each other. In fact, with the possible exception of international peace and security, global economic development has been the dominant theme in international law and international relations since the end of World War II, with variable tone and strength but focusing on the same international arrangements and programs.<sup>15</sup> Even the distinction between these two categories is becoming academic because, today, both international peace and security and global economic development constitute a seamless web. World Bank President, James Wolfensohn, addressing the Monterey Conference, aptly highlighted

---

<sup>12</sup> PERCY E. CORBETT, *LAW IN DIPLOMACY* 273 (1959).

<sup>13</sup> *Id.*

<sup>14</sup> C. WILFRED JENKS, *LAW, FREEDOM AND WELFARE* 64 (1963).

<sup>15</sup> See EVAN LUARD, *THE UNITED NATIONS: HOW IT WORKS AND WHAT IT DOES* 8 (2d ed. 1994).

this reality: "Here at Monterrey we must recognize the link between progress in development and progress in peace."<sup>16</sup>

### 3. Needs and Concerns of Developing Countries

Against the backdrop of deliberations in Monterrey, one may profitably identify principal needs and major expectations of developing countries in this era of globalization. These countries want strong international institutions, a favorable external environment, and effective instruments with firm legal foundations. These elements will provide poor nations with the necessary protection and enabling means to ensure that the economic integration will reduce poverty and close gaps within and between nations. Developing countries are particularly concerned with issues of attracting private capital flows, gaining unrestricted access to markets, receiving adequate development assistance, benefiting from technology transfers, improving global economic governance, and enhancing the coherence and consistency of the international systems in support of development.<sup>17</sup> In short, they need a supportive world economic environment. Developing countries seek these changes because they are expected to help alleviate abysmal poverty, which, at present, is the fate of many of their inhabitants.

---

<sup>16</sup>James D. Wolfensohn, Remarks to the Plenary Meeting at the Conference on Financing for Development in Monterrey, Mexico, World Bank News Release No. 2002/ 251/S (Mar. 21, 2002), at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20043623~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html> [hereinafter Wolfensohn, Remarks].

<sup>17</sup>"Developing countries are hungry for foreign direct investment (FDI) and are reforming their markets to attract it," as revealed by a survey conducted by the European Round Table of Industrialists (ERT), with help from the International Chamber of Commerce (ICC). International Chamber of Commerce, Market Reform Attracts Foreign Investment in Developing Countries, Survey Reveals, at [http://www.iccwbo.org/home/news\\_archives/2000/ert\\_survey.asp](http://www.iccwbo.org/home/news_archives/2000/ert_survey.asp) (July 10, 2000). The report, stemming from two years research, showed continuous improvement in the investment conditions of thirty-three developing countries. *Id.* The survey included countries in Latin America, Asia, and Africa. *Id.* "Citing examples set by countries formerly closed such as Syria, Iran and Vietnam, the survey found many countries have pressed ahead with reforms to attract FDI despite events such as the Asian financial crisis and the failure of multilateral talks on investment at the OECD [Organization for Economic Co-operation and Development]." *Id.* The survey pointed to several benefits resulting from FDI: knowledge disseminates more quickly between global markets; consumers have improved choices as a result of more support for competition; and emphasis on best business practices and good corporate governance lead to increased environmental awareness. *Id.*

#### 4. Expectations of Developing Countries from International Economic Law

From the perspective of developing countries, international economic law has a key role in addressing the critical issues set out above. Specifically, developing countries expect it to:

- (a) Help gain and consolidate better access to markets and expand international trade through multilateral agreements, based on the rule of law;
- (b) Play an important role in transforming Official Development Assistance (ODA) from an unpredictable, charitable gesture from individual nations into a predictable, voluntary, and binding obligation of the world community;
- (c) Contribute to developing a supportive and fair legal environment (to investors as well as source and host countries) to encourage a greater flow of private foreign direct investment (FDI) to a larger number of developing countries;
- (d) Assist in creating a better system to resolve external debt problems and developing an international debt workout mechanism for restructuring unsustainable debt in a timely, efficient, and fair manner; and
- (e) Lead to improvements in global economic governance.<sup>18</sup>

#### I. THE CONTEXT OF CHALLENGES POSED TO DEVELOPING COUNTRIES

Before further elaborating on the expectations of developing countries, it would be helpful to delineate the contextual contours within which challenges are posed to developing countries and the responses that are sought by them from international economic law. In this section, we will address the following two themes: (a) poverty in the contemporary world, and (b) globalization.

---

<sup>18</sup> See e.g., Terre des homes, *The Appeal to Governments from European NGOs on Our Minimum Expectations for the Outcome of the Monterrey Financing for Development Conference*, at [http://www2.weed-online.org/ffd/EU\\_NGOs\\_on\\_Monterrey.htm](http://www2.weed-online.org/ffd/EU_NGOs_on_Monterrey.htm) (last visited Apr. 27, 2004).



## A. Poverty in the Contemporary World

### 1. Co-Existence of Deprivation and Plenty

Poverty in the midst of affluence is a colossal tragedy of our times. In today's world, enormous hunger and unprecedented plenty co-exist. Out of the six billion people who presently inhabit this planet, 2.8 billion live on less than US\$2.00 a day and 1.2 billion live on less than US\$1.00 a day.<sup>19</sup> A fifth of the developing world's population goes to bed hungry every night, 1.5 billion people do not have access to even a basic necessity such as safe drinking water, 2 billion lack safe sanitation, and 73 out of every 1000 children born do not see their first birthday.<sup>20</sup>

Eighty percent of global GDP of about US\$30 trillion accrues to 20% of the world's population, and the remaining 80% of the world's citizens have only a 20% share in the total GDP.<sup>21</sup> "The average income in the richest 20 countries is 37 times the average in the poorest 20—a gap that has doubled in the past 40 years."<sup>22</sup>

Poverty involves multiple deprivations and is indeed a denial of the most basic human rights: the right to freedom from hunger and malnutrition, the right to healthcare and education, the right to make ones own choices, and the right to development. Undeniably, the persistence of abysmal poverty offends the notion of human decency and, at the same time, poses a real threat to the world's security. It has been rightly described as a malady "like a cancer—weakening the whole of the body, not just the parts that are directly affected."<sup>23</sup>

In the last five decades, developing countries have, no doubt, made noticeable economic progress. The pace of their development has been much faster than that of industrialized countries a century ago. Improvements have occurred on various fronts, including rising

---

<sup>19</sup> WORLD BANK GROUP, WORLD DEVELOPMENT REPORT 2000/2001, ATTACKING POVERTY: OPPORTUNITY, EMPOWERMENT, AND SECURITY 3 (2001), available at <http://www.worldbank.org/poverty/wdrpoverty/report/overview.pdf> [hereinafter ATTACKING POVERTY].

<sup>20</sup> See World Bank Group, Water Supply and Sanitation, at <http://www.worldbank.org/watsan/> (last visited Apr. 27, 2004).

<sup>21</sup> See James D. Wolfensohn, The Challenges of Globalization: The Role of the World Bank, Speech Before the Public Discussion Forum (Apr. 2, 2001), at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20025027~menuPK:34472~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

<sup>22</sup> ATTACKING POVERTY, *supra* note 19, at 3.

<sup>23</sup> James D. Wolfensohn, Partnership for Development and Peace, Address at the Woodrow Wilson International Center (Mar. 6, 2002), in WORLD BANK, A CASE FOR AID: BUILDING A CONSENSUS FOR DEVELOPMENT ASSISTANCE 5 (2002).

life expectancy, failing infant mortality, increasing literacy, and improved nutrition.<sup>24</sup> Industrial countries have also continued to make phenomenal progress in recent times. As a consequence, given their increased will and wisdom, they now have ample means to eradicate the existing colossal misery from the disadvantaged parts of the world.

Despite this capacity to change the world for the better, one is still confronted with a somber situation: life expectancy in poor countries is just fifty-nine years, while in rich countries it is almost eighty years.<sup>25</sup> Mortality among children under five years in low income countries is around 115 and in rich countries it is just seven.<sup>26</sup> While more than 120 million children in the developing world lack access to primary education, the industrial countries have universal enrollment in their schools.<sup>27</sup> The starkness of these contrasts attests to the continuing toll of human deprivation.

## 2. Consensus on Assault on Poverty

A definite consensus exists today, most recently reiterated in the Monterrey Conference,<sup>28</sup> on the need for mounting a truly serious assault on global poverty. The alleviation of poverty is not only a demand of basic ethical principles but is dictated by the elementary self-interest of affluent nations. It has now become self-evident that, in the long run, an orderly world is unlikely if great affluence exists in one part of the world and abject poverty exists in another. Citizens and governments of the industrialized countries are quickly realizing that they can no longer afford the luxury of insulation.

The planet Earth has indeed acquired the vulnerability of a spaceship. If there was a doubt as to the reality of this vulnerability, it stands dispelled by the tragic events of September 11th. A clear sense of obligation to eradicate poverty is felt not only by NGOs and other members of civil society in industrialized countries but also by influential and enlightened political leaders such as Chancellor Gordon Brown of the United Kingdom, who recently declared: "We

---

<sup>24</sup> *Id.* at 6–7.

<sup>25</sup> World Bank Group, Data on Poverty, Social Indicators, Health: Life Expectancy, at <http://www.worldbank.org/poverty/data/trends/mort.htm> (last visited Apr. 27, 2004).

<sup>26</sup> WORLD BANK GROUP, THE LITTLE DATA BOOK 16–22 (4th ed. 2002).

<sup>27</sup> World Bank Group, Data on Poverty, Social Indicators, Education: Primary Enrollments, at <http://www.worldbank.org/poverty/data/trends/educ.htm> (last visited Apr. 27, 2004).

<sup>28</sup> Wolfensohn, Remarks, *supra* note 16 ("And for perhaps the first time in an international meeting there is greater consensus than ever before about what needs to be done.").

have in our hands the power and obligation, never given to any other generation at any other time in human history, to banish ignorance and poverty from the earth."<sup>29</sup>

### B. *Globalization*

Globalization is the defining attribute of our times. Societies and economies are becoming increasingly integrated. Centripetal impulses have received strong impetus from, inter alia, "reduced costs of transport, lower trade barriers, faster communication of ideas, rising capital flows, and intensifying pressure for migration."<sup>30</sup> The resulting integration is a highly complex process, affecting almost all aspects of our everyday lives. A highly interdependent world is no longer an elegant phrase but has become a reality. The option today for developing countries is not whether they should embrace globalization; rather, it is how to manage the process, respond to challenges posed by this mighty force, and derive optimum benefit from the immense opportunities offered by it. While doing so, it would be appropriate to acknowledge that globalization is an irreversible process, at least in regard to its key dimensions, such as information, ideas, and communications.<sup>31</sup> It would be pertinent to bear in mind that globalization is manifested in a variety of ways both positive and negative:

The terrorist attacks on the United States on September 11 were one aspect of globalization. Rapid growth and poverty reduction in China, India, and other countries that were poor 20 years ago is another. The development of the internet and easier communication and transportation around the world is

---

<sup>29</sup> Chancellor Gordon Brown, Speech Given at the Commonwealth Parliamentary Association's Conference (Mar. 12, 2002), at [http://www.hm-treasury.gov.uk/newsroom\\_and\\_speeches/press/2002/press\\_19\\_02.cfm](http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2002/press_19_02.cfm).

<sup>30</sup> WORLD BANK GROUP, GLOBALIZATION, GROWTH, AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY 1 (2002), available at <http://econ.worldbank.org/prt/globalization/text-2857/> [hereinafter GLOBALIZATION, GROWTH, AND POVERTY].

<sup>31</sup> Even though globalization is most commonly defined through increased cross-border trade and FDI, it is far more than economics. It may also involve discourse on human rights or the territorial notion of state sovereignty. Of course, the gains from trade (between nations and firms) increase global welfare by having products made where they can be produced cheaply and by allocating them to the people who want them more. See generally Mark A.A. Warner, *Globalization and Human Rights: An Economic Model*, 25 BROOK. J. INT'L L. 99 (1999). Indeed, states and other legal actors—for example, international organizations—facilitate the process of globalization by legitimizing or legalizing its effects upon the international community. In conclusion, globalization has a broad significance and transforms the economies of specific parts of the world, as well as politics, culture, and religion. It encompasses multifaceted, multi-layered, and often disjunctive processes.

a third. The spread of AIDS is part of globalization, as is the accelerated development of life-extending technologies.<sup>32</sup>

## 1. Complexity of Globalization

As globalization is a highly complex phenomenon, not surprisingly it is simultaneously praised and berated. Nevertheless, most of its features are warmly welcomed almost universally. Globalization has proven to be a beneficial and positive force in many ways. It has led to "faster growth, higher living standard[s], [and] new opportunities."<sup>33</sup> It has substantially opened international trade, enabling many developing countries to grow faster.<sup>34</sup> It has also given unprecedented access to

<sup>32</sup> GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 30, at ix.

<sup>33</sup> Secretary General Kofi A. Anan, Message to the Baur International Model United Nations (Apr. 6, 2001), at <http://www.carolbaur.edu.mx/bimun2003/presentation.htm>.

<sup>34</sup> See The World Bank Group, Questions and Answers with David Dollar, at <http://www.worldbank.org/economicpolicy/globalization/dollarqa.htm> (last visited Apr. 27, 2004) (noting that "the more globalized" developing countries that, in the 1980s and 1990s, sought FDI and opened up their markets experienced increases in their per capita growth rates) [hereinafter Questions and Answers with David Dollar].

The World Bank strongly argued that the round of trade talks launched in November 2001 in Doha, Qatar, marked the first time that developing country interests were placed at the center of a multilateral round of trade negotiations. The World Bank favors lifting the protectionist measures that have locked low-income countries out of rich-country export markets. A World Bank Report outlines the benefits that would flow to developing countries and the world's poor from a liberalization of trade. It estimates that substantially lowering agricultural manufacturing tariffs and ending agricultural subsidies could cut the number of people living in poverty by eight percent by 2015. THE WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2004: REALIZING THE DEVELOPMENT PROMISE OF THE DOHA AGENDA, at xxix (2003), available at <http://www.worldbank.org/prospects/gep2004/full.pdf>.

There is a growing consensus in empirical studies that greater openness to international trade has a positive effect on country per capita income. A study by Jeffrey Frankel and David Romer estimates that increasing the ratio of trade to GDP by one percentage point raises per capita income by between one-half and two percent. See Jeffrey A. Frankel & David Romer, *Does Trade Cause Growth?*, 89 AM. ECON. REV. 379, 379-99 (1999), available at <http://home.hio.no/~ivar-br/fag/intecon/Tradeandgrowth.pdf>.

Numbers of other studies reach similar conclusions, though the estimated size and statistical significance of the effects vary. See, e.g., Sebastian Edwards, *Openness, Productivity and Growth: What Do We Really Know?*, 108 ECON. J. 383-98 (1998). For a more skeptical assessment, see generally DANI RODRIK, THE NEW GLOBAL ECONOMY AND DEVELOPING COUNTRIES: MAKING OPENNESS WORK (1998).

Moreover, the idea that greater openness to international trade has a positive effect on country per capita income is not new but dates back to economic theories from at least 200 ago. World Bank Group, *Does More International Trade Openness Increase World Poverty?*, at <http://www1.worldbank.org/economicpolicy/globalization/ag02.html> (last visited Mar. 18, 2004). The most widely-known and oldest of such theories holds "that trade lets an economy make better use of its resources by allowing imports of goods and services at a lower cost than they could be produced at home." *Id.*

knowledge and information to many citizens of developing countries, which were "well beyond the reach of even the wealthiest in any country a century ago."<sup>35</sup> Notwithstanding all these advantages, one comes across anti-globalization protests often. Today, no international economic summit can be imagined without a sideshow of anti-globalization activists.<sup>36</sup> One encounters this strong backlash because the benefits of globalization are not being equally distributed and the global market is not underpinned by rules based on shared and equitable objectives. Prosperity, despite the increasing integration of national economies, continues to elude many, and the actual number of extreme poor in the world—excluding China—increased by almost 100 million between 1987 and 1998.<sup>37</sup> This occurred, as Stiglitz pertinently pointed out, at the same time when global world income actually increased by 2.5% annually. In short, for "many in the developing world, globalization has not brought the promised economic benefits."<sup>38</sup>

Developing countries accuse the industrial countries of adopting double standards in matters of international trade. They contend that while developed countries are pressuring developing countries to liberalize trade, they have not effectively dismantled their own barriers to imports of labor-intensive industrial goods and agricultural produce from poor countries. On the contrary, in violation of principles of free trade, rich countries continue to subsidize their farmers by paying up to one billion dollars a day in subsidies.<sup>39</sup> Objectively seen, industrial

---

<sup>35</sup> JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 4 (2002). The anti-globalization protests themselves are the result of this interconnectedness. Links between activities in different parts of the world, particularly those links through Internet communication, have greatly strengthened these activities.

<sup>36</sup> Such protests occurred, for example, at the WTO meeting in Seattle (1999), World Bank and IMF Spring Meetings in Washington (April 2000), Annual Meetings in Prague (2000), and Annual Meetings in Washington (September 2002).

<sup>37</sup> World Bank Group, *Data on Poverty, Income Poverty, The Latest Global Numbers*, at <http://www.worldbank.org/poverty/data/trends/income.htm> (last visited Apr. 29, 2004) (reporting that, although the percentage of the world's population living on less than \$1 per day decreased during the 1987–1998 period, the number of actual extreme poor has increased with population growth).

<sup>38</sup> See STIGLITZ, *supra* note 35, at 5.

<sup>39</sup> As one study notes:

Ours is a world out of balance. Of the six billion people living in the world today, one billion receive 80 percent of global income, while more than one billion barely survive on less than a dollar a day. And, while developed countries spend \$600 billion a year on defense, and incur \$300 billion in direct and indirect agricultural subsidies, they offer only \$56 billion a year in aid to developing countries. Over the next 25 years, 50 million people will be added to the population of rich countries. But over the same period, about one and

countries indeed drive the process of globalization. The developed world has managed to ensure that it “garners a disproportionate share of the benefits, at the expense of the developing world.”<sup>40</sup>

## 2. Globalization and Poverty Reduction

Against this backdrop of conflicting forces and perspectives, the most critical questions posed by developing countries are (1) whether globalization helps in poverty reduction, and (2) if so, then how can we enhance the effectiveness of the process? Research recently conducted by the World Bank has yielded three relevant findings concerning trends of the last twenty years:<sup>41</sup>

- (a) Poor countries with populations of around three billion have been able to break into global manufacturing and services markets. This has resulted in decreased poverty, for example, in regions of China and India and in Bangladesh and Vietnam.
- (b) With decreased income and increased poverty, countries with populations of around two billion that have lowered their participation in international trade risk becoming marginalized in the global economy.
- (c) According to surveys, countries worry that “cultural or institutional homogenization” will be sacrificed with increased economic integration.

As to apprehensions about threats to cultural diversity, the study notes that societies that are fully integrated into the global economy differ enormously.<sup>42</sup> Nonetheless, the report admits that some recent

---

a half billion people will be added to the population of poor countries. Today, more than 2.9 billion people—nearly half the world’s population—are under the age of 25. Many of these young people will experience poverty and unemployment. Disillusioned with what they will see as an inadequate global system, many will leave their homes, and often their countries, to find work.

World Bank Group, *The Challenge: Reducing Poverty*, at [http://www.worldbank.org/progress/reducing\\_poverty.html](http://www.worldbank.org/progress/reducing_poverty.html) (last visited Feb. 21, 2004); see also Thalif Deen *Rich Nations Fail Aid Pledge to Poor*, DAWN/THE INTERPRESS NEWS SERVICE, Nov. 7, 2003, available at <http://www.ipsnews.net/interna.asp?idnews=20996>.

<sup>40</sup> STIGLITZ, *supra* note 35, at 7.

<sup>41</sup> See generally SHAHID YUSUF, *GLOBALIZATION AND THE CHALLENGE FOR DEVELOPING COUNTRIES* (2001), available at <http://www1.worldbank.org/economicpolicy/globalization/documents/wps2168.pdf> (last visited Apr. 29, 2004); Questions and Answers with David Dollar, *supra* note 34; Nicholas Stern, *Foreword* to *GLOBALIZATION, GROWTH, AND POVERTY*, *supra* note 30, at x.

<sup>42</sup> Stern, *supra* note 41, at x.

developments within global trading and investment are forcing countries towards an undesired standardization.<sup>43</sup> It concludes: "It is important that global trade and investment agreements respect countries' freedoms in a range of areas from intellectual property rights, cultural goods, and environmental protection to social policies and labor standards."<sup>44</sup>

Overall, it can be claimed that globalization is a positive force for development and poverty reduction, though there are specific measures that countries should earnestly take to make it more effective and poor-friendly. To realize the great potential from globalization, countries need complementary institutions and policies, which can be strengthened through involvement in international markets. (This raises issues of sequencing, such as which kinds of openings can be undertaken if one wants to minimize the risks associated with globalization.) Lastly, there are concrete measures that both developing and developed countries can undertake to ensure that poor people participate in globalization and benefit from it.<sup>45</sup>

#### 4. Relevance of Globalization to the Response Expected from International Law

Owing to the importance of the subject of globalization, no study or report on any contemporary theme, regardless of its nature or purpose, can afford to ignore the reality and endemic character of this momentous phenomenon. Whether it is within the economy, politics, or culture, globalization touches all areas of life, even if it is often used in confusing, overlapping, or even contradictory ways.<sup>46</sup> Globalization indeed creates parameters for action and determines the context within which both developed and developing countries must function in the world at this juncture in time. Recognizing the reality and force of globalization is clearly germane to the response expected and desired by the developing world from international economic law, particularly with respect to issues of trade barriers, private capital flows, volume and quality of ODA, debt relief, and systemic issues of global economy.

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at x-xi.

<sup>45</sup> *See id.* at xi.

<sup>46</sup> *See* Kenneth Anderson, Public International Organizations, NGOs, and Democratic Sovereignty in the Era of Globalization: An Essay on Contested Legitimacy (Sept. 27, 2000) (unpublished manuscript, on file with author) (citing MALCOLM WATERS, GLOBALIZATION 7-8 (1995)).

## II. INTERNATIONAL ECONOMIC LAW: CONCEPT, SCOPE, AND POTENTIAL

### A. *Classical Law of Nations*

The classical law of nations has been a product of the European Christian civilization (arguably up to the founding of the United Nations). The creators of international law were a few European powers that came to dominate the rest of the world. Not surprisingly, international law did not accept many people under colonial domination as the “subjects” of the system, but merely treated them as objects of the law.<sup>47</sup> Further, despite a palpable increase in the significance of economic activities in the wake of industrial revolution, international law remained preoccupied with laws of peace and war, diplomacy, sovereignty, immunities, and similar themes.

### B. *Change of Paradigm: Two Important Events*

The concept and scope of international law has been changing since the latter half of the twentieth century. Two catalytic events occurred, putting into motion a variety of developments and initiating a multitude of processes. The first event was the establishment of the United Nations, which virtually coincided with the dawn of decolonization. The second event was the emergence of global economic interdependence coupled with a quest for development on the part of the newly independent states and a willingness on the part of some formerly affluent colonial powers to support such aspirations.

#### 1. Birth of the United Nations

The United Nations was born in 1945 with fifty-one Member States, but only thirteen of them were situated in Asia or Africa.<sup>48</sup> Since then, 140 new nations have joined, raising its current membership to 191.<sup>49</sup> The universality of the United Nations’ composition is

---

<sup>47</sup> See Inaamul Haque, *From Charity to Obligation: A Third World Perspective on Concessional Resource Transfers*, 14 TEX. INT’L L.J. 389, 394 (1979). Many leading scholars of the nineteenth century subscribed to the view that international law applied only between “the civili[z]ed and Christian people of Europe or to those of European origin.” R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT’L & COMP. L.Q. 55, 59 (1966) (quoting HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 17–18 (8th ed. 1866)).

<sup>48</sup> See United Nations, *Growth in UN Membership, 1945–2003*, at <http://www.un.org/Overview/growth.htm> (last visited Apr. 29, 2004).

<sup>49</sup> With the exception of Switzerland, the new entrants are developing or transitional economies.



indeed unique in history. International society has become for the first time a true world society. International law, which constitutes the foundation of any international order, has moved away from its initial occidental exclusiveness and has come to embrace all "peace-loving states which accept the obligations contained in the [U.N.] Charter and . . . are able and willing to carry out these obligations."<sup>50</sup>

## 2. Impact of Globalization

The second event (which is still unfolding and very much in the works) is manifested in two waves<sup>51</sup> of globalization affecting integration of economies into a seamless web. International law, in order to remain relevant in a world where economic issues among countries dominate life, has responded by evolving into a separate branch, which can truly be called "international economic law" (IEL).

### C. Definition of International Economic Law

#### 1. Two Approaches

There can really be no dispute about the existence of IEL in its own right. However, there are different opinions as to what the nature and precise definition of the subject are, whether a precise and concrete identification of the topic can be made, or whether it is "merely a loose designation for a variety of sub-topics of international law which have some connection with economic affairs."<sup>52</sup>

Two approaches have been adopted with respect to the definition of IEL.<sup>53</sup> One approach opts for a narrow connotation while the other approach defines it widely (sometimes too widely). For example, rele-

---

<sup>50</sup> U.N. CHARTER art. 4, para. 1.

<sup>51</sup> On the second wave of globalization, see Questions and Answers with David Dollar, *supra* note 34.

<sup>52</sup> PETER VERLOREN VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* 21 (1981). One of the difficulties of defining the concept of IEL springs from the fact that many scholars do not use the expression as such, but instead prefer to talk about parts of the subject rather than about the subject as a whole. There are numerous scholars and writers who address the subjects of trade law, investment, monetary law, developing states, and economic sanctions, but they do not refer to the phrase "international economic law." Historically, it can be claimed that there are authors who pointed to the origins of IEL as early as the twelfth century. *Id.* at 22. Recently, of course, there has been an explosion of articles, journals, books, and theories addressing various facets of IEL. See, e.g., *id.*

<sup>53</sup> See *id.*

vant to the latter category, a French jurist gives the following definition:

*cette branche du droit international qui régleme, d'une part l'installation sur le territoire des Etats des divers facteurs de production (personnes et capitaux) en provenance de l'étranger et, d'autre part, les transactions internationales portant sur les biens, les services, et les capitaux.*<sup>54</sup>

According to this definition, IEL embraces the following sub-topics: law of establishment, law of investment, law of economic relations and economic institutions, and law of regional economic integration.<sup>55</sup> Yet there are others who would include additional topics, such as the international law of development or law of human rights.<sup>56</sup>

In its widest connotation, IEL refers to those rules of public international law that directly concern economic exchanges between the subjects of international law;<sup>57</sup> thus, this broadest definition covers an important part of the discipline of public international law. If one were to extend its ambit by including all those aspects of international law affected by economic activities, then the discipline of public international law would be completely engulfed by IEL.<sup>58</sup> Generally, the role expected from IEL is what determines preference for which particular definition of IEL to use.

## 2. Expansive View as to the Scope of International Economic Law

One can appropriately define IEL as a branch of international law that consists of the rules, customs, principles, and processes applicable to all international economic relations. The modern approach favors this expansive view of IEL, to which the authors also subscribe. The conceptual foundation of this definition is reflective of current

---

<sup>54</sup> *Id.* at 21 (citing D. CARREAU ET AL., *DROIT INTERNATIONAL ÉCONOMIQUE* 11 (2d ed. 1980)). The authors provide the following translation: "That branch of international law, which regulates, on one hand, the establishment, on the territory of a State, of different means of production (persons and capital) from abroad, and, on the other hand, the international transactions of goods, services and capital."

<sup>55</sup> VAN THEMAAT, *supra* note 52, at 20–22.

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 26.

<sup>58</sup> One author considers that ninety percent of international law work relates to IEL. John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1, 8 (1998). There are others who maintain that IEL is or should be a discipline on its own, separate from public international law. *See id.* at 8–9; COLLOQUE D'ORLÉANS, ASPECTS DU DROIT INTERNATIONAL ÉCONOMIQUE 29–31 (1952).

academic thinking and political trends. It acknowledges that globalization of the world economy is resulting in increasing transactions between various economic forces and policies that involve structure, macroeconomics, trade, finance, and development.<sup>59</sup> It equally recognizes that to extend the scope of international law to all economic phenomena would be too broad, inexact, and unwieldy. Therefore, it would be appropriate to approach the subject with the assumption that there is a general outline, which has a core and a penumbra. In essence, the terrain comprises the economic phenomena, which are or should be of international concern, while the economic phenomena are demarcated by the international system of values.<sup>60</sup>

### 3. International Economic Law and International Development Law

Another related concept is that of international development law, which emerged immediately after World War II. It represented an attempt to find a more equitable legal approach to the core issues of IEL, namely international trade relations and state responsibilities towards foreign investors and their home countries.<sup>61</sup>

International economic relations of developing countries, including issues relating to their development, clearly fall within the province of IEL. In view of this, international development law, regarded by many scholars as a distinct branch of international law, is itself a subset of IEL. In this Article, the authors choose to treat IEL as the pivot because it is more comprehensive and has a wider scope. Doing so also addresses the problem arising out of yet another distinction sometimes made between development law and international law of development.<sup>62</sup> IEL subsumes all these categories.

---

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 14.

<sup>61</sup> *Id.* at 2. Under the pressure of the problems that arose in the 1970s and 1980s, the general understanding of concept of development became strained. See Daniel D. Bradlow, *Development Decision-Making and the Content of International Development Law*, 27 B.C. INT'L & COMP. L. REV. 195, 196-99 (2004). As a consequence "the consensus [on the content of international development law] has broken down." See *id.* at 199.

<sup>62</sup> See RUMU SARKAR, DEVELOPMENT LAW AND INTERNATIONAL FINANCE 47 (Rosa M. Lastra & J.J. Norton eds., 1999) ("Further, development law should also be distinguished from the tradition of the international law of development popularized during the 1970s as part of the NIEO Agenda.").

### D. *Dynamic Development of the Scope of International Law*

#### 1. Cooperative Law of Nations

The purpose and instrumental role of the law is well recognized in the domestic setting. After all, "ends of the economist become policy only through the means provided by the law."<sup>63</sup> Likewise, it is only through instrumentality of international law that orderly changes in the structure and processes of international economic relations can be brought about. More importantly, there has been a conceptual shift in the role of international law following decolonization. In the post-colonial world, we must develop rules and institutions to address problems faced by the enlarged international community.<sup>64</sup> Wolfgang Friedmann invited attention, as far back as 1970, to emergence of the "cooperative law of nations,"<sup>65</sup> which binds countries "not in the international rules of abstention and respect, but in positive principles of cooperation for common interests."<sup>66</sup> It would be only in the fitness of things if this "cooperative law of nations" brings within its fold implementation issues of the Monterrey Consensus, which are indeed critical for international economic cooperation in the world of today.<sup>67</sup>

#### 2. Alterations in the Sociological Structure of the Community of Nations

Although architects of modern international law no longer enjoy numerical majority and dominant position, this fact is yet to be fully reflected in the structure and processes of international law. The law created by prosperous nations was conceived in terms of liberty for sovereign states. New nations have a different order of priorities and requirements, and they seek protection against the strong. A community in which the majority of the members are poor needs a law that expresses the responsibility of the whole for the part. Therefore, the alteration in the sociological structure of the community of nations

---

<sup>63</sup> EUGENE V. ROSTOW, *PLANNING FOR FREEDOM: THE PUBLIC LAW OF AMERICAN CAPITALISM* 362 (1959).

<sup>64</sup> *Id.*

<sup>65</sup> W. Friedmann, *The Relevance of International Law to the Process of Economic and Social Development*, in 2 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 4 (Cyril E. Black & Richard A. Falk eds., 1970).

<sup>66</sup> *Id.*

<sup>67</sup> See SARKAR, *supra* note 62, at 49 ("Indeed, development law is meant to respond to the pressures being exerted by the entire globalization process, and the need to articulate, promulgate and implement organizing legal principles around those needs.").

should be accompanied by a corresponding change in substantive norms of law. International law has, to some extent, accorded recognition to these changing needs by keeping the social and economic development of the world community as its legitimate concern. But much more indeed needs to be done to achieve full concordance between sociological realities and normative structures governing the relations of nations.

### 3. Duty to Cooperate

In fact, progressive jurists discern the firm foundation of international welfare in Article 55 of the United Nations Charter, which states that the United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development.<sup>68</sup> Article 56 reinforces this by declaring that all members pledge themselves to take joint and separate action in cooperation with the organization to achieve the purposes set forth in Article 55.<sup>69</sup> These provisions of the Charter, read with relevant resolutions of the General Assembly and declarations at the highest political level from international conferences and summits—particularly the agreement on Millennium Development Goals (MDGs)<sup>70</sup>—leave no doubt as to the moral and legal validity of treating international development as the shared objective of all countries. Even those in developed countries who dispute the legal entitlement of developing countries to preferential treatment cannot deny the existence of a mutual duty to cooperate in development efforts. As Ramu Sarkar aptly elaborates: “More importantly, the act of cooperating with each other is more than joint or simultaneous action, it is the unity of action to a com-

---

<sup>68</sup> U.N. CHARTER art. 55.

<sup>69</sup> Whatever may be differences in the interpretation of these articles, it is relevant to remember what Judge Azevedo aptly observed: “The Charter is a means and not an end. To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind. Whatever might have been the intention, or more appropriately in this case, the lack of intention at the time of the establishment of the United Nations, its Charter now creates obligations for the well-being of ‘humanity.’” Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 3, 23 (Mar. 3) (dissenting opinion). Judge Alvarez stated that “[an institution] must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.” Advisory Opinion on the Admission of a State to Membership in the United Nations, 1948 I.C.J. 56, 68 (May 28).

<sup>70</sup> See *supra* note 6 (discussion on MDGs).

mon end or common result. The common end result is the development of all nations."<sup>71</sup>

Evolution of the obligation to cooperate for development marks a significant milestone. The international legal system must now be seen as serving the interests of the whole community of nations and not just those of its affluent and powerful segment. Thus, the emergence of a customary law norm, which makes it obligatory for the affluent countries to assist the poor nations in their development, is a logical and wise culmination of the various developments since the establishment of the United Nations.

International law can become a major force for change only if it effectively relates to the major issues that currently confront the world. It must bear upon the problems of global poverty in order to find a viable solution to the unfortunate situation that exists today. The future of international law depends upon the allegiance it commands from those subject to it. The allegiance that any legal system commands is, in turn, dependent to a great extent upon its content.

The fight against universal poverty, deprivation, and backwardness is now being recognized as a collective international responsibility. Whereas international forums (the latest being the Monterrey Consensus) are now occupied with this theme, some jurists in developed countries continue to remain frozen in time and show undue attachment to the outmoded rules of international law, which are still disproportionately concerned with old questions of war and peace. These attitudes and perspectives need to be changed. Dynamics of life make it imperative to evolve new norms and institutions in response to changing circumstances.

### *E. Historical Logic for Evolving New Foundations*

#### 1. Westphalia Model

From a historical perspective, one finds a compelling case for putting in place a new legal foundation for more sustainable economic arrangements among nations in the world. In Europe, a new international religious order emerged with the Peace of Augsburg

---

<sup>71</sup> SARKAR, *supra* note 62, at 57 n.17 ("Co-operate: To act jointly or concurrently toward a common end. Co-operation: In patent law, unity of action to a common end or a common result, not merely joint or simultaneous action.") (citing BLACK'S LAW DICTIONARY 334 (6th ed. 1990)).

(1555 A.D.), which formalized the doctrine of *cuius regio eius religio*.<sup>72</sup> Religious warfare, nevertheless, continued with unabated fury, coming to an end only with the Peace of Westphalia (1648 A.D.), which not only consolidated a new international religious order but also inaugurated a new international legal order.<sup>73</sup>

## 2. Post-Westphalia Model

The Westphalia model has endured to this day, but it is now necessary to move on to a new stage of development, because phenomenal changes have occurred in the world and should be properly reflected in the law of nations. The establishment of the United Nations, the triumph of the anti-colonial struggle, breaches in the citadel of racism, and the increasing acceptance of the principle of self-determination all point to the emergence of a new international moral order. In fact, the demand for a more just economic dispensation acquires validity only in the context of such a moral order. As in an earlier era, when the emergence of a religious order by itself was insufficient, the new moral order and economic dispensation dictated by it could not achieve real fulfillment without the evolution of a supportive legal order. Developing countries have been fully aware of this need, which was expressly articulated by President Luis Echeverría of Mexico in 1972 (while initiating the drafting of the Charter of Economic Rights and Duties) when he declared that the purpose of the effort would be to "strengthen the precarious legal foundations of international economy" and to remove "economic co-operation out of the realm of goodwill and put it into the realm of law. . . [by] transfer[ring] the concrete principles of solidarity among men to the area of relations among countries."<sup>74</sup> Echeverría further stated that, without rights and obligations to protect weaker nations, "[a] just order and a stable world will not be possible."<sup>75</sup>

---

<sup>72</sup> See Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 32 (Cyril E. Black & Richard A. Falk eds., 1969).

<sup>73</sup> *Id.*

<sup>74</sup> *Provisional Verbatim Record of the Two Thousand Three Hundred and Fifteenth Meeting*, U.N. GAOR, 29th Sess., at 67, U.N. Doc. A/PV.2315 (1974).

<sup>75</sup> *Id.*

### III. THE MONTERREY CONSENSUS

#### A. *Pre-Eminent Moral and Humanitarian Challenge*

##### 1. Expectations of Developing Countries

The Monterrey Conference<sup>76</sup> gave world leaders a great opportunity to make real progress in coming up with an appropriate response to the “pre-eminent moral and humanitarian challenge of our age”<sup>77</sup>—alleviating poverty. On the eve of the Conference, expectations of developing countries were aptly summed up by Vicente Fox, the President of Mexico and co-host of the event, in these words:

This week in Monterrey we have the duty to take steps to ensure that future generations in the developing world can be spared the poverty and suffering that until now have been their inevitable destiny. We also have an opportunity to build a bridge between what we promise developing countries to do and what we can accomplish tomorrow. It is not a matter of becoming our brother’s keepers, but simply their partners.<sup>78</sup>

The participants in the Conference thus came to Monterrey with an explicit objective to establish a framework for development cooperation based on a solid international consensus.

##### 2. Emerging Framework for Poverty Reduction

The Consensus reached in the Conference emphasizes at the outset that while each country has primary responsibility for its own economic and social development, national efforts need to be supported by an enabling international economic environment. Under the emerging framework, both developing and developed countries

---

<sup>76</sup> The fact that efforts made thus far have not resulted in a significant reduction of worldwide poverty clearly indicates the need for a new partnership concept based on a framework of mutual obligations between developed and developing countries designed to eradicate poverty. Fortunately, there are signs that the international community is moving towards such a partnership. In particular, the Monterrey Consensus and the Millennium Declaration have provided the blueprint of a partnership based on shared responsibilities between rich and poor nations. See MONTERREY CONSENSUS, *supra* note 1; Millennium Declaration, *supra* note 6.

<sup>77</sup> See Letter Dated 25 June 2001 from the Secretary-General to the President of the General Assembly, U.N. High-Level Panel on Financing for Development, U.N. GAOR, 55th Sess., Agenda Item 101, U.N. Doc. A/55/1000 (2001).

<sup>78</sup> Vicente Fox, *Monterrey: A Turning Point*, WASH. POST, Mar. 19, 2002, at A21.



are to provide the necessary means to attack poverty. On their part, developing countries are required to mobilize resources for sustainable pro-poor growth, formulate sound macroeconomic policies, promote a good investment climate, design and implement effective and coherent poverty reduction strategies, and provide a voice to the poor—all with “sound policies, good governance at all levels and the rule of law.”<sup>79</sup> In return, affluent countries must be willing to provide an enabling environment for development, enhance market access (including phasing out of agricultural subsidies), support the flow of private capital to the developing countries, accelerate effective debt relief, and provide a substantial increase and sustainability in development assistance. The Monterrey Consensus embodies a bold and timely attempt to establish a new system of shared global rules anchored on a framework of mutual obligations and accountability between developed and developing countries.<sup>80</sup>

## B. *Mobilizing Resources for Meeting MDGs*

### 1. Partnership for Eradication of Poverty

At Monterrey, leaders of both poor and rich countries of the world have entered into a qualitatively different partnership dedicated to “eradicate poverty, achieve sustained economic growth and promote sustainable development”<sup>81</sup> as the world advances to a fully inclusive and equitable global economic system. The heads of State and Government participating in the Conference made an unambiguous commitment to “mobilizing and increasing the effective use of financial resources and achieving the national and international economic conditions needed to fulfill internationally agreed development goals, including those contained in the Millennium Declaration, to eliminate poverty, improve social conditions and raise living standards, and protect our environment.”<sup>82</sup> These commitments were regarded by the participants of the Conference as their first step to ensuring that the twenty-first century becomes the century of development for all.<sup>83</sup>

---

<sup>79</sup> MONTERREY CONSENSUS, *supra* note 1, para. 4, at 2.

<sup>80</sup> *Id.* para. 1, at 2.

<sup>81</sup> *Id.* paras. 1–9, at 2–3.

<sup>82</sup> *Id.* para. 3, at 2.

<sup>83</sup> *Id.*

## 2. Combination of National and Multilateral Efforts

The Monterrey Consensus recognizes that peace and development are mutually reinforcing.<sup>84</sup> It has expressed the determination of leaders of the international community to pursue their shared vision for a better future through individual efforts combined with vigorous multilateral action.<sup>85</sup> Upholding the United Nations Charter and building upon the values of the Millennium Declaration, they committed themselves to promoting national and global economic systems based on the principles of justice, equity, democracy, participation, transparency, accountability, and inclusion.<sup>86</sup>

The development agenda agreed upon in Monterrey is based on a clear recognition of the mutual responsibilities of rich and poor countries.<sup>87</sup> James Wolfensohn perceived this to be “an understanding that leaders of the developing and developed world are united by a global responsibility based on ethics, experience and self-interest. It is a recognition that opportunity and empowerment—not charity—can benefit us all.”<sup>88</sup> One can see in this historic consensus a potential for flowering an international social contract to further common and mutual global interests. Mutuality has been the essence of the process. It represents a significant change from the New International Economic (NIEO) movement in the 1970s, where developing countries in their quest for economic equity were noticeably influenced by their historical experience, essentially wishing reparations for past colonial wrongs.<sup>89</sup>

### C. Themes of the Monterrey Consensus

The Monterrey Consensus contains six elements: (1) domestic resource mobilization, (2) mobilizing international resources (private capital flows) for development, (3) trade, (4) international financial cooperation for development (official development assistance), (5) debt, and (6) systemic issues.<sup>90</sup> If one were to adopt a more thematic approach, the following four themes emerge:<sup>91</sup>

---

<sup>84</sup> MONTERREY CONSENSUS, *supra* note 1, para. 9, at 3.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* paras. 1–9, at 2–3.

<sup>88</sup> Wolfensohn, Remarks, *supra* note 16.

<sup>89</sup> See SARKAR, *supra* note 62, at 73.

<sup>90</sup> MONTERREY CONSENSUS, *supra* note 1, ch. II, at 3–15.

<sup>91</sup> *Report on the G-24 Workshop on Financing for Development*, Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development, at 3 (Sept. 6–7, 2001),

- (a) Bringing about a substantial increase in the volume and effectiveness of foreign resource flows (private, bilateral, and multilateral) in support of development, with a clear focus on poverty eradication;
- (b) Setting up a fair, transparent, and ethical procedure and institutional framework for resolving external debt problems;
- (c) Improving global economic governance to make it more participatory and accountable to a broader community of nations; and
- (d) Creating an international trading environment that is more supportive of growth, in general, and the development of the poor, in particular.

#### IV. MOBILIZING DOMESTIC FINANCIAL RESOURCES FOR DEVELOPMENT

*In our common pursuit of growth, poverty eradication and sustainable development, a critical challenge is to ensure the necessary internal conditions for mobilizing domestic savings, both public and private sustaining adequate levels of productive investments and increasing human capacity.*<sup>92</sup>

—The Monterrey Consensus Document

##### A. Mobilizing Domestic Resources

The Monterrey Consensus rightly stresses the importance of mobilizing domestic resources. This source of finance has always played a key role in the development of any country. National savings and investment propel economic growth. No amount of external resources can really become a substitute for national efforts. A number of “leading actions,”<sup>93</sup> in this regard, have been identified in the Consensus Document, including enhancing the efficiency, coherence, and consistency of macroeconomic policies; increasing productivity, reducing capital flight, encouraging the capital sector, and attracting and making effective use of international investment and assistance; building good governance and fighting corruption; and fostering a dynamic and well-functioning business sector.<sup>94</sup> The Consensus Document also regards the presence of a number of mutually reinforcing elements as essential for fostering a pro-growth environment. These include free-

---

available at <http://www.g24.org/ICFDRep.pdf> (last visited Apr. 29, 2004) [hereinafter *Report on the G-24 Workshop*].

<sup>92</sup> MONTERREY CONSENSUS, *supra* note 1, para. 3, at 2.

<sup>93</sup> *Id.* ch. II, at 3.

<sup>94</sup> *Id.* paras. 10–19, at 3–5.

dom, peace and security, domestic stability, respect for human rights, rule of law, gender equity, market-oriented policies, and commitment to just and democratic societies.<sup>95</sup>

### B. *Supportive Actions by the International Community*

The leading actions mentioned above are critically important but essentially fall within the domestic purview of individual countries. Of course, in the interdependent world of today, an enabling domestic environment requires supportive action from the international community. Even so, IEL hardly has a direct role to play in this regard. Therefore, we turn to the next element in the Consensus.

## V. MOBILIZING INTERNATIONAL RESOURCES FOR DEVELOPMENT: FOREIGN DIRECT INVESTMENT (FDI) AND OTHER PRIVATE FLOWS

*Private international capital flows, particularly foreign direct investment along with international financial stability are vital complements to national and international development efforts.*<sup>96</sup>

—The Monterrey Consensus Document

### A. *Importance of Private Capital Flows for Development*

Private capital flows have assumed great importance for developing countries during the last fifteen years. Developing countries see securing and sustaining private cash flows as imperative if they expect “to emerge from the poverty trap and to catch up with the richer countries[,] for there is never likely to be enough concessional finance to support investment needed for accelerated growth.”<sup>97</sup> Developing countries often experience chronic shortage of resources. Both national saving rates and export revenues are low.<sup>98</sup> Foreign inflows under these conditions are indeed critical for growth to reduce the heavy burden of external debt, augment domestic savings,

---

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* para. 20, at 5.

<sup>97</sup> *Report on the G-24 Workshop, supra* note 91, at 6.

<sup>98</sup> See WORLD BANK GROUP, WORLD DEVELOPMENT INDICATORS (2002); see also International Finance Corporation, Annual Report 1995: The Climate for Private Investment, at <http://www2.ifc.org/PUBLICAT/ANNREP/1995/CLIMATE.HTM> (last visited Apr. 29, 2004).

and increase the rate of investment.<sup>99</sup> Many developing countries have relied in the past upon ODA for filling in their financing gaps. However, this source of resources has been shrinking for many years.<sup>100</sup>

One can gauge the quantum of reduction in ODA's share in flows by the fact that, if humanitarian assistance is not taken into account, annual official flows to developing countries have hovered around US\$15 billion per year, compared to private flows of US\$150 billion, the average during the 1995–2000 period according to one estimate.<sup>101</sup> There have been, of course, fluctuations in private flows between a peak of US\$235 billion in 1996 to a trough of only US\$109 billion in 2000.<sup>102</sup> The share of developing countries in global FDI flows reached 38% in 1997 but came down to 24% in 1999. However, it is pertinent to note that, despite these fluctuations, the amount of FDI has increased almost threefold from US\$58 billion in 1993 to US\$163 billion in 2001. These figures show the evident importance of private capital flows for the developing world.

Private capital flows, however, have been bypassing the majority of the developing countries, particularly the least developed countries. These flows are selectively destined to a limited number of countries such as Brazil, China, India, and Malaysia, which all have good credit ratings. The degree of concentration can be judged by the fact that just ten countries received eighty percent of total FDI flows to the developing world.<sup>103</sup>

## B. *The Need for Efforts by Developing Countries*

### 1. Improving the Investment Climate

Given the increasing importance of private capital flows for development, the Monterrey Consensus calls for the creation of necessary domestic and international conditions to facilitate momentum and wider geographical coverage.<sup>104</sup> It emphasizes the importance of

---

<sup>99</sup> Shahid J. Burki, *Foreign Direct Investment: Has Pakistan Missed the Boat or Could It Play Catch Up* (Dec. 2001) (paper presented at the Center for Strategic and International Studies).

<sup>100</sup> See GLOBALIZATION, GROWTH, AND POVERTY, *supra* note 30, at 10.

<sup>101</sup> See *Report on the G-24 Workshop*, *supra* note 91, at 6–7. There are, however, different sets of figures, but the fact remains that private flows exceed ODA flows by a very wide margin. *Id.*

<sup>102</sup> See Burki, *supra* note 99, at 2.

<sup>103</sup> *Id.*

<sup>104</sup> See MONTERREY CONSENSUS, *supra* note 1, para. 20, at 5.

continuing efforts on the part of developing countries for achieving a transparent, stable, and predictable investment climate with proper contract enforcement, respect for property rights, and sound macro-economic policies and institutions.<sup>105</sup> To complement national efforts, the Monterrey Consensus pleads for increasing support from international and regional organizations and appropriate institutions in source countries for enhancing the volume of FDI, particularly in infrastructure development and other priority areas.<sup>106</sup> It highlights, inter alia, the importance for developed countries to provide export credits, co-financing, venture capital, and other lending instruments, risk guarantees, and aid resources.<sup>107</sup>

### 3. Change in Attitudes of Developing Countries

Developing countries have come a long way in their attitudes towards private flows. They recognize that the world is moving towards an increasingly liberal international investment regime, where states permit the market to determine allocations of capital, ensure the proper functioning of the market, and provide legal protection for investment against wrongful injury by private or public agents.<sup>108</sup> The so-called “phenomenal shift toward[s] liberalization”<sup>109</sup> was largely driven by a perception that private investment would promote economic development. Few, if any, developing states have embraced liberalization as an end in itself; they are adherents to the liberal faith only to the extent that practicing it leads to economic salvation.<sup>110</sup>

---

<sup>105</sup> *Id.* para. 21, at 5.

<sup>106</sup> *Id.* para. 22, at 6.

<sup>107</sup> *See id.*

<sup>108</sup> Kenneth J. Vandeveld, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373, 399 (1998).

<sup>109</sup> According to NEIL F. GREGORY ET AL., FOREIGN DIRECT INVESTMENT: EXECUTIVE SUMMARY 2 (Int'l Fin. Corp., Lessons of Experience Series No. 5, 1997):

Recent trends toward globalization of production and consumption patterns have led to a sharp increase in global FDI. At the same time, trade and investment liberalization has brought more developing countries into the globalized economy. This has led to a dramatic surge in FDI flows to developing countries, which increased fivefold from 1990 to 1995, and exceeded \$100 billion in 1996. This increase went mainly to 12 large developing countries, in part reflecting their economic size. Thus, China alone received \$167 billion between 1990 and 1996 (1996 prices). Already a significant part of the economy in many developing countries, FDI is likely to continue at high levels for the foreseeable future.

*Id.*

<sup>110</sup> Vandeveld, *supra* note 108, at 390.

Reservations and suspicion of the past have been replaced by a keen desire to attract foreign investment. Developing countries have been converted to the idea of such investments playing a crucial role in development of their countries. As a consequence, “[a] growing number of countries are putting in place the twin pillars of pro-poor growth: the climate for investment, entrepreneurship, and jobs; and the empowerment of and investment in poor people to participate in the process of development.”<sup>111</sup>

The proposition that developing countries must build and sustain a supportive and favorable environment for foreign investment is apparently axiomatic. However, if seen in correct perspective, it must be admitted that many of the things that developing countries are expected to do are a result of development. The process takes a long time. In the interim period, there is a real danger (already materialized) that most of the countries might compete for foreign investment by “offering incentives, which would simply divert investment from one location to another.”<sup>112</sup> One can already see evidence of a “race to the bottom” whereby excessively generous incentives result in substantial reductions in net benefits of FDI to the host country. Further, both investors and officials of host countries sometimes resort to corrupt practices, which also detracts from the advantages of FDI.

### B. *Salient Features of the Current Investment Regime*

Investment is a complex subject. Its scope encompasses a variety of different categories,<sup>113</sup> such as FDI,<sup>114</sup> portfolio investment,<sup>115</sup> and even licensing agreements for technology transfers.<sup>116</sup> Notwithstanding the evident importance of the subject and positive achievements

---

<sup>111</sup> Nicholas Stern, *Making the Case for Aid*, in WORLD BANK GROUP, A CASE FOR AID: BUILDING CONSENSUS FOR DEVELOPMENT ASSISTANCE 21 (2002) [hereinafter Stern, *Making the Case*].

<sup>112</sup> *Report on the G-24 Workshop*, *supra* note 91, at 7.

<sup>113</sup> Stephen Zamora, *Economic Relations and Development*, in THE UNITED NATIONS AND INTERNATIONAL LAW 251 (Christopher Joyner ed., 1997) (“Under the rubric of the Bretton Woods system, specialized agencies affiliated with the United Nations have adopted regimes covering the major categories of international economic relations. An important gap exists in the Bretton Woods system, though: no multilateral treaty either UN sponsored or otherwise, sets forth a regime for foreign investment.”) (footnote omitted).

<sup>114</sup> FDI controls interests in productive enterprises.

<sup>115</sup> Further complicating the matter of investment is that certain portfolio investments, such as purchases of stock or securities and bank deposits, do not carry majority control of an enterprise.

<sup>116</sup> Again, adding to the complexity of investment is that such agreements may involve control over the production of goods and services produced by the licensee.

in other major categories of international economic relations, so far there has been no multilateral investment treaty creating a regime for foreign investment.<sup>117</sup> Many attempts have been made, but none has succeeded. This has been primarily attributed to a lack of international consensus in the matter, as rich and poor countries have widely divergent views.<sup>118</sup>

## 1. Regulation by Laws of Host Nations

In the absence of a multilateral treaty, foreign investments are primarily regulated by domestic laws of host nations. Under customary international law, principles of sovereignty support a state's clear right to regulate commercial activities within its borders.<sup>119</sup> This

---

<sup>117</sup> See Zamora, *supra* note 113, at 251.

<sup>118</sup> There are many such subjects for which there are no internationally agreed rules due to the divergence in interests and perspectives between developed and developing countries, including expropriation of foreign-owned property, guarantees of and limitations on repatriation of investments, remedies for breaches of investment agreements, operations of multinational corporations, liability of parent companies for the acts of the subsidiaries, and licensing of technology.

From 1995 to 1998, a Multilateral Agreement on Investment ('MAI') was under negotiation within the Organization for Economic Cooperation and Development ('OECD'), a group of thirty of the world's largest and most developed countries . . . . [M]any . . . developing states raised vocal objections to the negotiations. Human rights and other non-governmental organizations ('NGOs') mounted a massive coordinated attack on the MAI. Over the course of 1998, the negotiations were suspended, and finally terminated, in the face of these objections but primarily because of critical differences between negotiating partners.

Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 484 (2001) (footnotes omitted).

<sup>119</sup> International law can be created from international agreements, customary practice, or general principles of common legal systems. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 102 (1987). Stephen D. Krasner, in SOVEREIGNTY: ORGANIZED HYPOCRISY 3-4 (1999), has most eloquently presented the development of the concept of sovereignty:

The term sovereignty has been used in four different ways—international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty. International legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence. Westphalian sovereignty refers to political organization based on the exclusion of external actors from authority structures within a given territory. Domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity. Finally, interdependence sovereignty refers to the ability of public authorities



power is extensive and encompasses such issues as capacity to engage in business, forms of business enterprises, conditions of continuance of a business, and regulations of capital markets as well as those of foreign capital inflows and outflows. A country also has the right to terminate or expropriate any business.<sup>120</sup>

The exclusive sway of domestic law is, however, mitigated to an extent in practice due to commitments made by a country under the investment-related regime of the World Trade Organization (WTO) and the bilateral investment treaties entered into by the host and source countries.

### 3. Trade-Related Investment Measures

The Uruguay Round of multilateral negotiations led, *inter alia*, to the adoption of the "Agreement on Trade-Related Investment Measures."<sup>121</sup> These rules, commonly known as TRIMs, implement a national treatment principle and seek to eliminate measures that are considered inconsistent with GATT/WTO obligations. An annex to the Agreement lists such measures, including performance requirements laying down minimum domestic content, limitations on imports or mandatory exports, and restrictions on access to foreign exchange that limit imports for use in foreign investment based facilities.<sup>122</sup>

### 4. Bilateral Investment Treaties

Currently, bilateral investment treaties (BITs) dominate the international investment scene. By the end of 1999, more than 1850 BITs had been signed.<sup>123</sup> By the end of 2001, "almost 200 countries [had] signed at least one BIT, and a total of approximately 2099 BITs

---

to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.

*Id.*; see also Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, 9 *CARDOZO J. INT'L & COMP. L.* 253, 263 (2001).

<sup>120</sup> RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS: IN A NUTSHELL* 543 (1st ed. 1995).

<sup>121</sup> Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND*, 33 *I.L.M.* 1125 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf).

<sup>122</sup> RALPH H. FOLSOM ET. AL., *INTERNATIONAL BUSINESS TRANSACTIONS: IN A NUTSHELL*, 783 (2d ed. 2001).

<sup>123</sup> UNCTAD, *WORLD INVESTMENT REPORT 2000: CROSS-BORDER MERGERS AND ACQUISITIONS AND DEVELOPMENT 1* (2000), available at <http://www.unctad.org/en/docs/wir00ove.en.pdf> (the number increased from 181 at the end of 1980 to 1856 at the end of 1999).

[were] in place worldwide.”<sup>124</sup> During 1991–1999, this coincided with more than 1000 changes effected in laws, rules, and regulations in various countries to increase the attractiveness of developing countries to foreign investors.<sup>125</sup>

Frequently referred to as treaties for the “Promotion and Protection”<sup>126</sup> of investment, BITs seek to facilitate and safeguard FDI. They spell out rights and obligations of both the host country and the foreign investor.<sup>127</sup> A BIT provides comfort to investors and strong motivation for a host country to honor its obligations under international law and its agreements with investors.<sup>128</sup> Violation of any obligations guaranteed to the investor by the treaty<sup>129</sup> means not only a breach of

<sup>124</sup> Jessica S. Wilste, *An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 *BUFF. L. REV.* 1145, 1153 (2003). Wilste further states that “this represents a significant increase from the approximately 1300 BITs in place worldwide by the end of 1998.” *Id.* at 1153 n.39 (citing Joel C. Beauvais, Note, *Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts*, 10 *N.Y.U. ENVTL. L.J.* 245, 252–53 (2002)). Continuing to detail such statistics, Wilste includes that “even just between 2000 and 2001, the number of total BITs in effect worldwide increased by 158 from 1941.” *Id.* (citing UNCTAD, *Developing Countries Further Liberalize Their FDI Regime in 2001*, at [http://r0.unctad.org/en/subsites/dite/bit\\_dtt.htm](http://r0.unctad.org/en/subsites/dite/bit_dtt.htm)); see also Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 *COLUM. J. TRANSNAT'L L.* 123, 124 (2003).

<sup>125</sup> Wilste, *supra* note 124, at 1153–56.

<sup>126</sup> See F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 *BRIT. Y.B. INT'L L.* 241, 244 (1981).

<sup>127</sup> See, e.g., *Agreement Concerning the Promotion and Protection of Investments*, Nov. 17, 1992, *Austl.-Indon.*, 1770 *U.N.T.S.* 301 (1994) (*Austl.-Indon. BIT*); *Agreement for the Promotion and Protection of Investments*, Apr. 27, 1976, *U.K.-N.Ir.-Indon.*, 1074 *U.N.T.S.* 195 (1978) (*U.K.-Indon. BIT*). For a comprehensive discussion on BIT contained rights, indirect expropriation, and breaches of fair and equitable treatment claims involving an allegation of improper interference with a foreign investment by the host States, see generally Stuart G. Gross, *Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study*, 24 *MICH. J. INT'L L.* 893 (2003).

<sup>128</sup> Jack J. Coe, Jr., *International Commercial Arbitration: Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 *VAND. J. TRANSNAT'L L.* 1381, 1414 (2003) (“Like their European counterparts, U.S. BITs in increasing numbers contemplate that a tribunal composed exclusively or partially of foreign lawyers (typically holding no judicial rank in their home countries) will be empowered, for the single dispute in question, to award damages to an investor, subject to little or no judicial review, perhaps based on state conduct that was perfectly lawful as a matter of domestic law.”).

<sup>129</sup> These treaties often contain provisions limiting expropriation to public purposes only, in a nondiscriminatory fashion, and only upon the payment of prompt, adequate, and effective compensation. See *id.*; MALCOLM N. SHAW, *INTERNATIONAL LAW* 516–21 (3d ed. 1991).

a treaty with the investor's home state,<sup>130</sup> but also a violation of customary international law with many consequences that a wise country should avoid.

Apart from the evident need to resolve problems, a dispute between an investor and host country can easily escalate into one between the host and home country. Therefore, provisions of BITs related to the dispute settlement procedures are deemed very important even though various alternatives exist. These alternatives include resolving disputes by direct negotiations between the parties, applying host country administrative and judicial procedures, or using international arbitration centers.<sup>131</sup>

### 3. Stabilization and International Arbitration Clauses

In many cases, BITs also seek to provide protection against changes in the host country's political regime that could result in renegeing on contractual stipulations as well as reversal of policies to the detriment of investors. Since international law considers FDI matters as traditionally falling under the jurisdiction and discretion of the host country, investors would normally only have recourse to domestic judicial forums. The problem is compounded by the fact that many developing countries have not yet developed an independent judiciary to serve as an effective check on exercise of power by the executive and legislature. As a consequence, the investor is left with no standing to appeal to an international tribunal and must obey the ruling of the domestic courts of justice, even if these are patently unjust.<sup>132</sup>

Therefore, BITs sometimes require a host country to give assurances against substantial changes in the investment regime that would be detrimental to foreign investors. This may include providing dispute settlement in a neutral forum and/or a promise that no domestic legislation will be passed to alter existing agreements to the detri-

---

<sup>130</sup> Paul E. Comeaux & N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 6 (1994).

<sup>131</sup> Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 654. (1995).

<sup>132</sup> Recent trends in international law indicate that these principles would not apply when there is a human rights violation against the investor. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 94 (1994); Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, in 176 RECUEIL DES COURS 259-355 (1982).

ment of the investors.<sup>133</sup> International arbitration and stabilization clauses preventing a host country from unilaterally changing its policies, or subjecting it to a neutral jurisdiction for dispute resolution, thus provide much needed protection to investors.<sup>134</sup> However, host countries may be unreasonably burdened. This is particularly true in cases where policies were formulated by a previous regime for corrupt motives. Likewise, costs of an international dispute resolution mechanism may be too great for a poor country to afford.

#### 4. Political Risk Insurance

Independent of BIT framework, FDI in developing countries is facilitated by a system of political risk insurance, which provides coverage against various eventualities, including confiscation, nationalization, expropriation, and repossession of equipment (forms of asset coverage), or loss from contract repudiation, currency inconvertibility, and contract cancellation due to political violence (forms of contract coverage).<sup>135</sup> Investors can obtain such insurance from nationally

---

<sup>133</sup> The assurance should include a solemn undertaking by host countries that they will not abuse the process of law in order to prevent the specified forum from exercising jurisdiction. See generally DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS: THE NEW YORK CONVENTION OF 1958 (2001).

<sup>134</sup> See Comeaux & Kinsella, *supra* note 130, at 15–32. To prevent the host country from unilaterally changing the terms of a concession agreement or similar grant, the international arbitration clause would assure that any dispute arising in relation to the concession is settled before an international tribunal. This would provide investors with a neutral forum where they may best protect their rights and secure compliance of host countries' obligations in the matter. At the same time, a stabilization clause is equally important since it prevents the state from imposing new laws on investors that would change the terms of the agreement and detrimentally affect the rights conferred by the agreement. A stabilization clause affirms the fact that the law in force in the state at a given date (usually, when the agreement takes effect) is the law that will apply to supplement the terms of the contract, regardless of future legislation, decrees, or regulations issued by the government. Therefore, the state alienates its right to unilaterally change the regime and rights as set forth in the agreement. See *id.* When an investor considers investing in a developing country that has a controversial track record on protecting private property, and the state's domestic laws are less likely to give the investor protection under international law, investors may successfully protect their interests by inserting the above-described clauses in any negotiating contracts with the host country. However, this is not the only solution that investors have in order to reduce the risk faced when investing in developing countries. Ultimately, the investors may procure investment insurance, but there are costs attached to this course of action. See *id.* at 33.

<sup>135</sup> The following provides an example of how the World Bank's Multilateral Investment Guarantee Agency has provided a developing country with political risk insurance:

In its first project in Côte d'Ivoire, MIGA issued two guarantees totaling more than \$16 million to Touton SA of France for its equity investment and share-

sponsored insurance agencies, such as United States' Overseas Private Investment Corporation (OPIC), private insurers, or the World Bank's Multilateral Investment Guarantee Agency (MIGA).<sup>136</sup>

### C. *Evolving System of FDI and Proposals for the Future*<sup>137</sup>

#### 1. Desired Changes in the Existing System

Developing countries, including the new "globalizers," expect that the FDI system will positively evolve with reforms at bilateral, regional, and global levels.<sup>138</sup> They would like, among other things, distinctions to be made in respect of dispute settlement procedures between inter-government and inter-firm or firm-government disputes.<sup>139</sup> They also expect other improvements—such as convenient location of international arbitration centers, reduction in arbitration costs (or a system of subsidizing such costs), and capacity building—to enable them to fend for themselves in sophisticated dispute resolution forums located in foreign countries.

---

holder loan to Touton Côte d'Ivoire. The project involve[d] the acquisition and rehabilitation of three cocoa plantations and the construction of a factory to clean and bag cocoa beans. Once the rehabilitation is complete, the plantations are expected to produce more cocoa per hectare than the national average, partly due to the use of high quality seedlings and plant sheltering techniques. In addition, each plantation would be equipped with modern fermentation, drying, and packaging units. MIGA insurance covers the investments against the risks of expropriation and war and civil disturbance.

WORLD BANK GROUP, MULTILATERAL INVESTMENT GUARANTEE AGENCY, POLITICAL RISK INSURANCE 1-2 (2000), available at <http://www.miga.org/screens/pubs/factsheet/Sector.pdf> (last visited Apr. 29, 2004).

<sup>136</sup> See *id.* at 32-48. In a rapidly growing investment insurance market, private insurers (for example, Lloyd's of London, American International Group, Citicorp International Trade Indemnity, Chubb Group, Pool d'Assurance des Risques Internationaux et Speciaux of Paris, etc.) started competing with government-subsidized insurance programs. Private insurance is, in some cases, more flexible (easily customized and can be kept in strict confidence), but government-sponsored insurance or MIGA has other advantages. For example, it is less expensive, has better facilities for covering currency inconvertibility risks, and can be issued for terms of up to twenty years. See *id.*

<sup>137</sup> See generally Michael A. Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 673 (1995).

<sup>138</sup> See World Trade Organization, Cancún WTO Ministerial: Briefing Notes, Dispute Settlement: Force of Argument, Not Argument of Force, at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/brief\\_e/brief13\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief13_e.htm) (last visited Apr. 29, 2004).

<sup>139</sup> See *id.*

## 2. Preferred Multilateral Investment Regime

In the current seller's market for investment, there is a strong likelihood of increasingly unequal and asymmetrical arrangements. The present investment regime that relies solely upon the network of BITs and focuses on securing an agreement on a set of legal rules for the protection of foreign investment—without giving any thought to the legitimate interests and priorities of host countries—is inadequate for changing needs and does virtually nothing to address market failures. Further, many BITs do not even have transparency provisions.

Developing countries would therefore like to see the evolution of a multilateral investment regime that is comprehensive, balanced, and fair. They expect IEL to inform the resulting Convention and Multilateral Treaty, which should not be driven by wishes and priorities of OECD countries, but should give proper weight to the perspectives of host countries. This regime should also include core principles regarding the conduct of transnational corporations and technology transfers. A multilateral regime will have to take care of the interests of investors and ensure sustainability of a liberal investment environment.<sup>140</sup>

In light of the partnership concluded at Monterrey and the new shared vision of the world, it should be possible to structure a multilateral agreement on investment and universalize the legal framework for a liberal investment regime in the same way that the GATT/WTO has universalized liberal trade policy. Such a multilateral agreement could be accompanied by a set of codes addressing a range of problems, such as environmental protection, restrictive business practices, and tax policies.<sup>141</sup>

---

<sup>140</sup> While advocating the establishment of legal norms for transnational corporations (TNCs), developing countries have, in the past, been averse to similar norms for host countries. This has been an unfair and unrealistic approach. The new effort for a viable and widely acceptable regime should be built on lessons learned from past failures, both from attempts to adopt a binding code of conduct for TNCs and OECD's initiative for a Multilateral Investment Agreement. A new multilateral convention is both desirable and possible, but it will have to be balanced, fair, and realistic.

<sup>141</sup> To ensure that a multilateral treaty commands acceptance of a maximum number of states, it would be necessary to address such concerns felt by developed countries. Developing countries will be well advised to show greater flexibility with respect to subjects deemed important by industrial countries.

#### D. *Problem of the Concentration of Flows*

Even a universally accepted investment regime by itself will not bring about a wider geographical dispersal of capital flows. As already stated, with the exception of a handful of developing countries, most of the developing world fails to attract FDI on account of perceived high risks. In this regard, it would be very helpful if both general and project-specific schemes for risk sharing were redesigned with greater risk sharing by multilateral and government risk insurance organizations in source countries. However, even if countries that presently do not attract FDI have the possibility of insuring their risks, the fact that any risk can be theoretically insured does not mean that insurance is affordable. Multilateral institutions and source countries should, therefore, seriously consider picking up a share of the cost of the risk in order to encourage wide geographical coverage of investments.

The Monterrey Conference was cognizant of the need to enhance the number of countries that receive private capital flows, and the Consensus Document emphasized that: “[a]dditional source country measures should also be devised to encourage and facilitate investment flows to developing countries.”<sup>142</sup> The measures suggested above are thus in line with the thinking expressed in Monterrey.

Developing countries also believe that partial risk guarantees of the World Bank and risk insurance by MIGA have only limited impact in encouraging private capital flows.<sup>143</sup> They feel that a study should be undertaken if the Articles of Association of the World Bank and Charters of MIGA and the International Centre for Settlement of Investment Disputes (ICSID) need to be amended to bring about a special momentum to private capital flows.

A related issue is that of private financial flows, including foreign portfolio investment. The Monterrey Consensus, while underscoring the need to sustain private financial flows, calls for “[m]easures that mitigate the impact of excessive volatility of short-term capital flows.”<sup>144</sup>

---

<sup>142</sup> MONTERREY CONSENSUS, *supra* note 1, para. 22, at 6.

<sup>143</sup> See *Report on the G-24 Workshop*, *supra* note 91, at 7-8.

<sup>144</sup> MONTERREY CONSENSUS, *supra* note 1, para. 25, at 6.

## VI. INTERNATIONAL TRADE AS AN ENGINE FOR DEVELOPMENT

*A universal, rule based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially stimulate development world wide, benefiting countries at all stages of development.*<sup>145</sup>

—The Monterrey Consensus Document

### A. Multilateral Rule-Based Trading System

#### 1. Benefits of Multilateral Systems and Liberalization

By reaffirming commitment to trade liberalization and reiterating the importance of a rule-based, nondiscriminatory multilateral trading system, the Monterrey Consensus has pointed out a very important route to worldwide prosperity and poverty eradication—liberalizing trade in areas particularly important to poor countries. This will not only significantly help developing countries to grow and achieve MDGs but will also add to the welfare of the developed countries, leading to a better allocation of resources and aiding consumers and tax payers in these countries through lower prices for food and other goods, and lower public expenditures on subsidies.<sup>146</sup>

#### 2. Role of International Economic Law

The goal of multilateralism, however, is not just a matter of form.<sup>147</sup> The spirit of multilateralism, which springs from a philosophy of cooperation, equity, and nondiscrimination, is expected to inform the entire process and lead to a better trading dispensation.<sup>148</sup> Multi-

---

<sup>145</sup> *Id.* para. 26, at 7.

<sup>146</sup> The case for free trade is too well known to require much amplification. Restrictions on flow of goods and services incontestably lead to distortion in allocation of resources and prevent maximization of welfare. Agricultural subsidies exceeded US\$300 billion in 2000. See WORLD BANK GROUP, DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK, at xxvii (Bernard M. Hoekman et al. eds., 2002).

<sup>147</sup> See Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 423 (2001) (explaining that the 1982 Ministerial Declaration supported multilateralism but failed to establish any real obligations).

<sup>148</sup> See Kevin C. Kennedy, *Why Multilateralism Matters in Resolving Trade-Environment Disputes*, 7 WIDENER L. SYMP. J. 31, 68 (2001) (suggesting that, since multilateralism is rule-based, it will be helpful to developing countries because such nations need rules-based



lateralism is intended to foster a sense of real and substantive symmetry,<sup>149</sup> which envisions meaningful participation in the process by all actors, irrespective of their size or weight in global trade.<sup>150</sup> Mere adherence to the formal component is not sufficient.<sup>151</sup> Needs and concerns of developing countries have to be meaningfully addressed through concrete action before any claim can be made about adoption of a true multilateral trading system.<sup>152</sup>

The multilateral trading system enshrined in the GATT/WTO Charters is an important manifestation of IEL in the contemporary world. Developing countries therefore look to IEL to assist them in further translating their vision into a viable legal framework with additions to and improvements of existing structure. Developing countries expect that principles of IEL will be embodied in the agreement to prevent, in particular, the misuse of legal processes as manifested in currently unjustified use of trade remedy procedures, such as anti-dumping, countervailing measures, and mala fide prescription of excessively stringent import standards by industrial countries. It is indeed extremely critical to bring about a meaningful liberalization and enforce formal agreements on market access.

## B. *Accord at Doha*

### 1. Implementing the Outcome of the Doha Accord

To ensure that trade becomes a real engine for development, the Monterrey Conference called upon the members of the WTO to implement the outcome of its Fourth Ministerial Conference held in Doha, Qatar, in November 2001.<sup>153</sup>

---

regimes to help resolve disputes with developed nations in a predictable and consistent manner).

<sup>149</sup> See Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT'L L.J. 419, 421–22 (explaining that the global trading system requires a new paradigm that is capable of overcoming deficiencies and outdated elements of earlier trade agreements).

<sup>150</sup> See Cann, *supra* note 147, at 418–19 (stating that the GATT was designed to improve international trade by creating arrangements that were reciprocal and mutually advantageous to the nations involved but concluding that the GATT's true goal was to create additional global wealth).

<sup>151</sup> See *id.* (detailing how the GATT/WTO sought to encourage free trade as a means to a more comprehensive end—that of increasing wealth on a global scale).

<sup>152</sup> See John O. McGinnis, *World Trade Agreements: Advancing the Interests of the Poorest of Poor*, 34 IND. L. REV. 1361, 1362 (2001) (arguing that multilateralism is beneficial to poor and developing nations and acts as attractive bait to leaders of despotic regimes).

<sup>153</sup> See MONTERREY CONSENSUS, *supra* note 1, para. 29, at 7.

After protracted negotiations, the Doha Ministerial (to which the Monterrey document refers) reached a productive consensus encapsulated in the Doha Declaration. WTO members also decided to open a new round of trade talks focused on the needs of developing countries, the so-called “development round.”<sup>154</sup> The Declaration acknowledges the positive contribution of the “multilateral trading” system in fostering economic growth and development,<sup>155</sup> articulates the determination to maintain the process of reform and liberalization of trade policies, and contains a pledge to reject the use of protectionism.<sup>156</sup>

## 2. Concerns of Developing Countries on the Eve of the Doha Conference

After their experience with the Uruguay Round and the Seattle fiasco, many developing countries came to Doha with a lot of skepticism. In evaluating the Doha Accord, it is helpful to recall the concerns and priorities of these countries at the beginning of the Ministerial Conference. Developing countries wanted, above all, enhanced market access for their goods and services.<sup>157</sup> They also sought the faithful implementation (both in letter and spirit) of commitments made in the Uruguay Round and increased flexibility in the application of WTO rules.<sup>158</sup> They wanted meaningful action for liberalizing trade in agriculture and phasing out subsidies (though some food-importing developing countries wanted special exemptions due to non-trade concerns).<sup>159</sup>

---

<sup>154</sup> See generally Ministerial Conference, 4th Sess., *Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001) (acknowledging the many areas that the Doha conference attempted to address) [hereinafter Doha Declaration].

<sup>155</sup> *Id.* para. 1.

<sup>156</sup> *Id.* (announcing the ideals of the declaration as agreed upon by the participants).

<sup>157</sup> See A.V. Ganesan, *Seattle and Beyond: Developing-Country Perspectives*, in *THE WTO AFTER SEATTLE* 85 (Jefferey Schott ed., 2000) (stating that the central element to the developing countries' strategy is now to gain access to markets and compete in the world marketplace).

<sup>158</sup> See *id.* at 87 (arguing that increased flexibility in the application and definition of rules would help developing countries create plans that satisfy their particular needs). Critical implementation issues relate to textiles and clothing, anti-dumping, and the TRIPS Agreement, but developing countries were equally interested in the built-in agenda sectors of agriculture, services, and intellectual property. See World Trade Organization, *Doha WTO Ministerial 2001: Briefing Notes, Implementation Issues Central to WTO Future Work Programme*, at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief07\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief07_e.htm) (last visited Apr. 29, 2004) (stating that, for many developing nations, “capacity constraints have been a major obstacle to the full implementation of Uruguay Round agreements”).

<sup>159</sup> Mr. Eugenio Diaz-Bonilla, a Senior Fellow at the International Food Policy Research Institute, addresses how trade liberalization affects the agricultural sector of developing

Regarding services, developing countries pleaded for greater movement of natural persons.<sup>160</sup> Under the TRIPS Agreement, they sought both correction of imbalances and substantial review of the existing accord.<sup>161</sup> They were apprehensive about incorporating non-trade issues, such as environmental and labor standards, within the WTO.<sup>162</sup>

### C. Doha Work Program: Covering Three Kinds of Issues

The work program agreed to at Doha is contained in three separate documents: (1) the Main Declaration; (2) the Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Public Health; and (3) a Decision on Implementation. Negotiations under the work program must conclude by January 2005 (except in case of dispute settlement, for which the deadline is earlier).<sup>163</sup> However, due to a lack of progress at the Cancún Conference, this deadline is likely to be missed.

---

countries in the short term. He discusses that the effects of trade liberalization are debated, with disagreement as to whether it causes or reduces hunger. Indeed, though calories per capita may have increased since the 1960s, needs are still not met for around twenty-five percent of the developing world, including sub-Saharan Africa and parts of Asia. Description to Global Dialogues on Sustainable Development Series: Food Security: The Impact of Climate Change and Trade Liberalization Part 1 (B-Span Video, Oct. 23, 2001), at <http://info.worldbank.org/etools/bspan/PresentationView.asp?PID=234&EID=121> (also pointing out that increases in food imports have been accompanied by increases in food exports).

<sup>160</sup> See World Trade Organization, Doha WTO Ministerial 2001: Briefing Notes, Trade in Services: The Work Programme and the Current Negotiations, at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief06\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief06_e.htm) (last visited Apr. 29, 2004) (stating that the negotiating countries wanted to liberalize sections of the General Agreement on Trade in Services, including the annexes that cover the movement of natural persons who engage in services in another country).

<sup>161</sup> See *Like Minded Group Sets Out Positions Before Doha*, BRIDGES WKLY. TRADE NEWS DIG., Jul. 10, 2001 (stating that developing countries believe that the problems and imbalances with private profits and public policies should be redressed along with certain technology transfer obligations).

<sup>162</sup> See Ganesan, *supra* note 157, at 87 (noting that developing nations are concerned about including environmental and labor issues in the agenda).

<sup>163</sup> World Trade Organization, Dispute Settlement, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last visited Apr. 29, 2004) (noting that the dispute settlement deadline was extended from May 2003 to May 2004); World Trade Organization, How the Negotiations Are Organized, at [http://www.wto.org/english/tratop\\_e/dda\\_e/work\\_organ\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm) (last visited Apr. 29, 2004).

## 1. Recognition of Developing Countries' Needs

Developing countries can indeed draw comfort from the following part of the Declaration:

We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multi-lateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. . . . In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.<sup>164</sup>

The Monterrey Consensus reaffirmed a commitment "to trade liberalization and to ensure that trade plays its full part in promoting economic growth, employment and development for all."<sup>165</sup> It also welcomed WTO decisions "to place the needs and interests of developing countries at the heart of its work programme, and commit to their implementation."<sup>166</sup>

## 2. Chances of Operational Fulfillment

Brave words and noble sentiments in the Doha Declaration, fully echoed in the Monterrey Consensus, are assuringly full of references to a concrete plank of intended actions in the Declaration. The critical question, however, is whether this eloquent articulation will remain confined to the preamble to Doha Declaration or whether it will see a reasonable operational fulfillment. Only the course of negotiations will furnish a definitive answer. However, a positive development has occurred regarding the specific issue of implementation of the Uruguay Round Agreements. The decision on implementation issues raised by the developing countries indicated that a number of these problems had been resolved or were near resolution.<sup>167</sup> As for the

---

<sup>164</sup> See Doha Declaration, *supra* note 154, para. 2 (pledging that the Declaration seeks to protect the interests of the developing countries and, most importantly, the least developed countries around the world).

<sup>165</sup> MONTERREY CONSENSUS, *supra* note 1, para. 26, at 7.

<sup>166</sup> *Id.*

<sup>167</sup> The difference in perspectives of industrial and developing countries on the implementation issue persists. Most of the developing countries probably would have preferred more definite and stronger language in the Declaration.

rest, nearly fifty issues were transformed from unilateral requests into multilateral commitments to negotiate.

### 3. Uruguay, Doha, and Cancún: One Step Forward, Two Steps Back

The Uruguay Round negotiations attempted to reduce subsidies and protections in the agricultural sector. In November 2001, at its Fourth Ministerial Conference in Doha, Qatar, the WTO's declaration mandated negotiations on several trade issues—including agriculture and those services delineated in the General Agreement on Trade in Services—and aimed to finish negotiations by January 2005. Progress should have been assessed at the September 2003 Fifth Ministerial Conference in Cancún, Mexico, but negotiations collapsed. In view of this breakdown, Timothy Josling, Senior Fellow at the Stanford Institute for International Studies, emphasizes the growing role of developing countries, especially in the period between the Uruguay Round and the Doha meetings.<sup>168</sup>

Following the Doha conference, countries were to start negotiating modalities for which subsidies and tariffs to cut (and by how much); these modalities, which would evolve into obligations, were to be determined by March 2003. The deadline was not met, however, and Josling notes that this may have resulted in the eventual failure of the Cancún meetings.<sup>169</sup> Two different proposals were then made at the Cancún meetings: one was agreed upon by the EU and the United States, and a counter proposal was agreed upon by Brazil, China, India, and the G-21 (a group of twenty other developing countries).<sup>170</sup>

As for the resulting General Council draft, objections from many groups prevented any agreement from being finalized. The United States viewed the draft as unbalanced, because it permitted developing countries to avoid opening their markets. Other countries considered the tariff cuts as too extensive, and the G-21 countries, thinking that their ideas had been diluted, were not pleased either.<sup>171</sup> Josling's opinion, however, is that the ultimate cause of the Cancún breakdown was "the inclusion of the 'Singapore Issues' regarding trade and com-

---

<sup>168</sup> Description to Overview of the Current WTO Agricultural Negotiations (B-Span Video, Sept. 16, 2003), at <http://info.worldbank.org/etools/bSPAN/presentationView.asp?EID=452&PID=862>.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

petition, trade and investment, trade facilitation, and transparency in government procurement."<sup>172</sup>

## VII. OFFICIAL DEVELOPMENT ASSISTANCE (ODA)

*We recognize that a substantial increase in ODA and other resources will be required if developing countries are to achieve the internationally agreed development goals . . . .*<sup>173</sup>

—The Monterrey Consensus Document

### A. ODA: A Core Element of the Monterrey Consensus

#### 1. Largest Source of Financing for Many Countries

ODA forms one of the core elements of the Monterrey Consensus. Its role in supporting sectors such as education, health, public infrastructure, rural development, and food security—which are crucial for improving the welfare of the recipients—is fully acknowledged.<sup>174</sup> It is also accepted that for many developing countries, ODA is still the largest source of external financing.<sup>175</sup> Even more importantly, it is critical to achieving the MDGs as well as other internationally agreed development targets. Thus, a clear nexus has been established between ODA and poverty alleviation, and its adequacy and efficacy should be judged on the basis of its contribution to the realization of specific goals.<sup>176</sup>

---

<sup>172</sup> *Id.* Josling's view is that the negotiations will probably not be completed on time, partly because of the "lack of political will" and approaching elections that many countries face. He also states that the Cancún breakdown revealed, among other things, that "emphasis on a European Union-United States deal as key proved misleading, developing countries have become convinced that they can have an impact, and developed countries are still tied to domestic constituencies." *Id.*

<sup>173</sup> MONTERREY CONSENSUS, *supra* note 1, para. 41, at 9.

<sup>174</sup> *Id.* para. 39, at 9.

<sup>175</sup> *Id.*

<sup>176</sup> Nicholas Stern, Trade, Aid and Results: Can We Make a Difference?, Address to the Annual Bank Conference on Development Economics in Europe (May 15, 2003), available at [http://econ.worldbank.org/files/27367\\_Trade\\_Aid\\_and\\_Results-ABCDE\\_Europe\\_Speech.pdf](http://econ.worldbank.org/files/27367_Trade_Aid_and_Results-ABCDE_Europe_Speech.pdf) ("In addition, the poverty-reduction effectiveness of ODA has grown rapidly as well. In 1990, another \$1 billion allocated to ODA would have lifted 105,000 people permanently out of poverty; by 1997–98, the same increment would have lifted 284,000, a near tripling in aid 'productivity.' The Bank's IDA funds are especially well-targeted towards poverty reduction. Even in 1990, more IDA funds went to countries with good policies (\$4.7 per capita versus \$2)—by the late 1990s, good-policy countries received 3 times as much per capita as countries with inadequate policies.").

## 2. Effectiveness of ODA

The absence of a clear link between ODA and poverty alleviation was viewed with deep concern in the past. Motivation for extending ODA had been, at least during the Cold War era, predominantly political—for winning friends and influencing governments—and not primarily for helping the disadvantaged in recipient countries.<sup>177</sup> Poverty alleviation, if achieved, was essentially incidental. There is, however, some ground of comfort in a recent research study by the World Bank:

[P]roblems and disappointments notwithstanding, aid has generally helped poor countries in their efforts to reduce poverty. Moreover, aid is more effective at reducing poverty today than ever before, due to improvements in poor countries' policies, institutions, and governance (changes that aid has helped to support), and due to better allocation of aid since the end of the Cold War.<sup>178</sup>

### B. *Shrinking Volumes and the Impact on Poverty*

#### 1. Substantial Decline in ODA

Despite this positive scorecard, there will not be a significant difference in outcomes unless much is done to correct disturbing trends and negative features of ODA as it stands today. The last fifteen years have witnessed a substantial decline in international aid. Net ODA declined from US\$58.5 billion in 1994 to US\$48.5 billion in 1999.<sup>179</sup> Between 1992 and 1997, it declined from 0.33% of the donors' GNP to 0.22%.<sup>180</sup> Even though the trend stabilized in 1998, (due to some emergency provision of aid for the East Asia crisis), it is still stagnating

---

<sup>177</sup> See ANNE BOSCHINI & ANDERS OLOFSGÅRD, FOREIGN AID: AN INSTRUMENT FOR FIGHTING POVERTY OR COMMUNISM? (2001), <http://info.worldbank.org/etools/docs/vodocs/155/336/olofsgard.pdf>.

<sup>178</sup> Stern, *Making the Case*, *supra* note 111, at 17.

<sup>179</sup> ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE DAC JOURNAL, DEVELOPMENT CO-OPERATION REPORT: EFFORTS AND POLICIES OF THE MEMBERS OF THE DEVELOPMENT ASSISTANCE COMMITTEE 60 (2001).

<sup>180</sup> See IAN GOLDEN ET AL., WORLD BANK, THE ROLE AND EFFECTIVENESS OF DEVELOPMENT ASSISTANCE: LESSONS FROM WORLD BANK EXPERIENCE (2002), [http://econ.worldbank.org/files/13080\\_The\\_Role\\_and\\_Effectiveness\\_of\\_Development\\_Assistance.pdf](http://econ.worldbank.org/files/13080_The_Role_and_Effectiveness_of_Development_Assistance.pdf) (paper presented at the U.N. International Conference on Financing for Development, Monterrey, Mexico, Mar. 18–22, 2002).

around 0.23% of donors' GNP per capita.<sup>181</sup> Moreover, concessional resource flow to the developing world fell by nearly one third in the 1990s.<sup>182</sup> In 1990, US\$32.27 was the amount of aid per developing country resident, and this figure fell to US\$22.41 per resident in 1997.<sup>183</sup> With the Monterrey Conference, it seems that the downward cycle in ODA flows has been reversed though commitments made that are yet to be translated into deeds. Developing countries hope that announcements made by the United States and the European Union at the Conference represent abiding commitments and signify lasting change in their policies.<sup>184</sup>

The apprehension of developing countries should be understood in this context because the least developed countries have suffered the most from the severe decline in ODA in terms of per capita.<sup>185</sup> While

---

<sup>181</sup> See Elizabeth Lule, Resource Mobilization for NGOs, Presentation at the EuroNGOs Annual Meeting (Oct. 2–4, 2003).

<sup>182</sup> Joseph E. Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in from the Cold*, in DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA 7 (2001) (citing the World Bank's Statistical Information and Management Analysis database).

<sup>183</sup> *Id.*

<sup>184</sup> The most fruitful short-term result was the unofficial bidding contest between the United States and the European Union (EU) on to increase their ODA commitments. Before Monterrey, during a meeting in Barcelona, the EU countries committed themselves to reach an average ODA equivalent to 0.39% of national output by 2006, with individual countries reaching at least 0.33%—a commitment representing at least an extra \$7 billion by 2006 and some \$20 billion during 2000–2006 (total EU ODA was \$25.4 billion during 2000). In what was considered an abrupt change in policy, U.S. President George W. Bush pledged to increase ODA by 50%, also by 2006, to \$15 billion per year, with some of the extra funding becoming available within the next year. See OXFORD ANALYTICA LTD., BRIEF ON MONTERREY CONSENSUS (2004).

<sup>185</sup> James D. Wolfensohn, President of the World Bank Group, states:

Current levels of aid [directed towards LDCs in Africa, for example], at 0.22 percent of annual GDP, fall far below the 0.7 percent target OECD countries pledged to meet. It is ironic that when African leaders are putting the right policies in place and showing results, overseas aid to Africa has fallen from \$34 per person in 1990 to \$18 per person in 1998. . . . [Meeting the 0.7 target] would make a difference [o]f \$100 billion a year. It could make a profound difference in the number of people who die each year of preventable or treatable diseases. It is the right thing to do, for LDCs, for donor countries and for the world. Some advanced countries have met their ODA commitments of 0.7 percent of GDP; the rest must now step up and meet theirs

A New Compact to Meet the Challenge of Global Poverty, Speech at the Third United Nations Conference on the Least Developed Countries (May 14, 2001), at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/PRESIDENTEXTERNAL/0,,contentMDK:20023997~menuPK:232083~pagePK:159837~piPK:159808~theSitePK:227585,00.html>.



the income gap between affluent countries has continued to widen, the generosity of donor countries has continued to shrink. From 1960 to 1990, ODA provided by major donors decreased from 0.5% of their gross national income to 0.34%—falling to 0.22% by 2001—and the promise made by high-income countries in the Monterrey Consensus was to increase ODA to 0.26% by 2006.<sup>186</sup> Ironically, this overall decline occurred at a time when ODA should have increased, considering, for example, the sustained focus on poverty reduction at several recent U.N. conferences. Further, an increasing number of developing countries were attempting to improve economic and political governance, which should have improved the prospects of better utilization of aid.

## 2. Estimates for Required Poverty Reduction

According to data provided by the World Bank, about 1.1 billion people (or twenty percent of the world's population) live on less than US\$1.00 per day.<sup>187</sup> The only MDG that might be met by 2015 is the goal of halving income poverty; however, under current poverty growth rates, by that time, half of the world's poor may be found in Sub-Saharan African countries.<sup>188</sup> In order to help alleviate poverty in developing countries and meet the MDGs, richer countries will thus have to be more generous in increasing aid and liberalizing global trade. Poverty includes not only a lack of money but also other harsh consequences: "Poor people lack control over their lives; they are vulnerable to economic shocks, natural disasters, violence and crime. They are often denied access to an education, adequate health services and clean water and sanitation."<sup>189</sup>

Doubling the amount of ODA is not an unachievable goal. Resources can be mobilized provided that there is the will to find them. Industrialized countries spend nearly US\$360 billion a year on agricultural subsidies alone, not including huge defense expenditures.<sup>190</sup> As Jeffrey Sachs pertinently points out: "If the world, and the United

---

<sup>186</sup> See DevNews Media Center, Poverty, at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20040961~menuPK:34480~pagePK:34370~theSitePK:4607,00.html> (last modified Mar. 2004).

<sup>187</sup> See *id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See James D. Wolfensohn, Remarks at the Conference on Making Globalization Work for All, (Feb. 16, 2004), at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20169719~menuPK:34472~pagePK:34370~piPK:34424~theSitePK:4607,00.html> ("A thousand billion dollars military expenditure, fifty billion dollars for hope.")

States and other industrialized countries in particular, allocated a small share of their military expenses to easing the needs of the world's poorest populations, our generation could free mankind from poverty's iron stronghold."<sup>191</sup>

As things stand, even after the Monterrey Conference, there remains a significant gap between the aid pledged by rich countries and what is needed. The imperative now is, "as aid dollars are invested more wisely, to close that gap."<sup>192</sup> Whatever qualitative changes and reforms are implemented, particularly to increase productivity and effectiveness of aid (changes advocated continuously by the United States), a substantial quantitative increase is essential. Quantity or quality cannot be substitutes for each other. Improvements in both of these aspects are required. In recognizing that a substantial increase in ODA and further improvement in national and international policies and development strategies will be required, the Monterrey Consensus urged developed countries that have not done so to make efforts towards the target of 0.7% of GNP as ODA to developing countries.<sup>193</sup>

### C. *Issues of Focus and Predictability*

#### 1. Greater Allocation to Poorest Countries

The overarching goal of poverty reduction should determine the quantum of ODA flows and their destination. ODA should be allocated more equitably and responsively to the poorest nations. "The international community has come a long way in understanding what makes aid more effective, focusing on the selection of recipient countries. . . . [A]long with selectivity, the way donors provide their aid matters a lot."<sup>194</sup>

---

<sup>191</sup> Jeffrey D. Sachs, *LES ECHOS, Les nantis devraient tenir parole*, Mar. 11, 2002.

<sup>192</sup> *Forging the Monterrey Consensus*, N.Y. TIMES, Mar. 24, 2002, § 4, at 14.

<sup>193</sup> MONTERREY CONSENSUS, *supra* note 1, para. 42, at 9.

<sup>194</sup> WORLD DEVELOPMENT REPORT 2004: MAKING SERVICES WORK FOR POOR PEOPLE 203 (2003), <http://econ.worldbank.org/wdr/wdr2004/text-30023/>. The effectiveness of ODA can be also increased even more through untying. This process has already started, with the recent OECD agreement to untie all financial aid to the least developed countries. See Organization for Economic Co-operation and Development, *Untying Aid to the Least Developed Countries: The OECD/DAC Recommendation*, at [http://www.oecd.org/document/24/0,2340,en\\_2649\\_34643\\_2068440\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,2340,en_2649_34643_2068440_1_1_1_1,00.html) (last visited Apr. 29, 2004).

## 2. Predictability, Continuity, and Certainty of Flows

It is also very important to make resource flows “predictable, continuous and increasingly assured.”<sup>195</sup> Resource transfers from rich to poor nations should not remain manifestations of periodic voluntary generosity, but should be automatic. There should be a framework based on internationally accepted needs of the poor rather than on the uncertain generosity of the rich.<sup>196</sup> Continuity and predictability of aid flow is indeed imperative to sustain poverty reduction efforts. Many poor countries will require assistance for a long time before they will be able to effectively eradicate poverty, and they can succeed only if they receive a continuous inflow of resources from abroad.<sup>197</sup>

### D. *Recipients' Role in Aid Effectiveness*

#### 1. Importance of Institutions, Governance, and Policies

Experience has shown that, in the ultimate analysis, aid effectiveness largely depends on strong institutions, good governance, and sound policies of the recipient countries. In countries with sound economic management, aid has led to higher private investment, more rapid growth, and a faster decline in poverty. The policies adopted by developing countries thus contribute significantly to aid effectiveness and strong economic performance.<sup>198</sup> Therefore, the impact of aid has been very different across countries. Incomes still fall in some countries that receive a lot of aid but increase in other countries. There is a strong case for directing aid flows to countries with policies and institutions conducive to reducing poverty. It has been estimated that an across-the-board US\$10 billion increase in aid

---

<sup>195</sup> RUBEN P. MENDEZ, *GLOBAL TAXATION: THE RISE, DECLINE AND FUTURE OF AN IDEA AT THE UNITED NATIONS 4* (Institut du développement durable et des relations internationales, Working Paper, 2002), <http://www.iddri.org/iddri/telecharge/fiscalite/mendez.pdf> (quoting G.A. Res. 3362 (S-VII) of 16 September 1975).

<sup>196</sup> MAHBUB U. HAQ, *THE POVERTY CURTAIN: CHOICES FOR THE THIRD WORLD* 204 (1976).

<sup>197</sup> These countries suffer from an acute paucity of resources and thus cannot invest in infrastructure (to aid stimulation of growth) or in the social sector for human resource development. Inflow of concessional resources must be fairly long-term before these countries can stand on their own feet. *WORLD BANK ASSESSING AID* 44 (1998).

<sup>198</sup> Seiichi Kondo, Statement at the International Conference on Financing for Development, Monterrey, Mexico (Mar. 18, 2002) at <http://www.un.org/ffd/statements/oecdE.htm> (“Certainly money will be needed to turn the tide against poverty and achieve the goals of the Millennium Declaration, but good policies and sound institutions are equally important.”).

would lift seven million people out of poverty, while a targeted increase would lift twenty-five million people out of poverty.<sup>199</sup>

## 2. Accord on Recipients' Responsibilities

Fully recognizing the importance of improvements on the part of developing countries, the Monterrey Consensus contains a commitment by them to work for sustained economic growth, achieve good governance, adopt sound macroeconomic and prudent fiscal policies, improve infrastructure, fight corruption at all levels, and build solid democratic institutions that are responsive to the needs of the people.<sup>200</sup> It has thus called upon all the stakeholders—both developed and developing countries—to make ODA more effective and identifies various concrete measures for achieving this objective.<sup>201</sup>

### E. A New Paradigm for ODA

#### 1. Building Blocks for a New ODA Architecture

The call for substantial increase in the quantity of aid coupled with a plea for enhancing its effectiveness (and elaborated with very sound concrete suggestions), embodied in a historic consensus document, augur well for ODA. The Monterrey Consensus contains building blocks for a new ODA architecture. It has crystallized a new understanding shared by developing and developed countries, which has made it possible for the world leaders who attended the historic Monterrey Summit to “promise to work together in a deeper partnership for development.”<sup>202</sup> Moreover,

[d]eveloping countries declared their determination to continue to strengthen their policies, institutions, and governance, in order to improve their investment climates and invest in their people, thereby providing the framework necessary for rapid, sustained, poverty-reducing growth. Rich countries reaffirmed their willingness to open their markets further to exports from poor countries and to increase

---

<sup>199</sup> Janet Bush, *Stability is the Key to a Third World Aid*, TIMES (London), Nov. 11, 1998.

<sup>200</sup> MONTERREY CONSENSUS, *supra* note 1, paras. 10–19, at 29–35.

<sup>201</sup> *Id.* para. 42, at 44–48.

<sup>202</sup> Stern, *Making the Case*, *supra* note 111, at 17.

financial assistance to poor nations that have shown that they can use it well.<sup>203</sup>

## 2. Transformation of ODA into a Binding Obligation

The ODA architecture finalized in Monterrey represents remarkable progress. However, there are some vital, conceptual parts missing that need to be imported in order to construct a durable structure that will be able to withstand winds and storms caused by changing fads and priorities. What is required is a new paradigm for ODA that will transform it from an uncertain, inadequate, shrinking, and unfocused charity of nations into an adequate, predictable, long-term, focused, and binding obligation of the world community, embedded in international law and aimed at poverty reduction. For rich countries, this obligation would require, *inter alia*, providing adequate development assistance to the poor countries. For developing countries, this obligation would require, for example, fulfilling international conditions and meeting performance criteria to ensure the most productive and honest use of development assistance to achieve poverty reduction.

## 3. Right to Development: Lending Additional Validity to Entitlement

The right of poor countries to receive ODA and the obligation of rich countries to assist them derive their validity and force from the right to development, recognized by the U.N. General Assembly in 1979, reiterated a number of times, and, ultimately, enshrined in the Declaration on the Right to Development in 1986, which proclaimed the right to development to be “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.”<sup>204</sup>

Again, the Millennium Declaration of 2000 contained a clear commitment to make the right to development a reality for everyone. The Heads of State and Government of the U.N. member countries (both from developed and developing nations) at the Millennium Summit committed to “spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme

---

<sup>203</sup> *Id.*

<sup>204</sup> *Declaration on the Right to Development*, G.A. Res. 41/128, 41st Sess., 97th plen. mtg., Supp. No. 53, Annex, Agenda Item 101, art. 1.1, U.N. Doc. A/RES/41/128 (1986).

poverty.”<sup>205</sup> It also declared that “[n]o individual and no nation must be denied the opportunity to benefit from development.”<sup>206</sup> This unequivocal recognition of the right to development (which earlier encountered some reservations) and commitment to fight poverty give rise to an obligation on the part of every country to eradicate poverty.

#### 4. Crossing the Conceptual Divide

No doubt, the proposed paradigm envisaging transformation of the purely volitional nature of ODA subventions into obligatory commitments is a challenge to the will and creativity of the international community. This also poses a challenge to IEL. In the context of converting resource transfers from charitable impulses to obligations, the role of law is not confined to the mere adoption of certain techniques, but represents the crossing of a conceptual and operational divide. However, a similar development has taken place in the past, with legal processes effectuating transfers of income from the affluent to the disadvantaged at the domestic level of many nation states. For example, in place of private philanthropy, nation states have adopted social security laws, because a system of mere charitable resource transfers would be unsatisfactory. Once such transfers are made obligatory on the international level, legal processes become indispensable, a change that has already occurred at the domestic level.

#### 5. Basis of Transformation in International Law

As to the response of international law beyond the incipient recognition of an inchoate duty of samaritanism, it is worth noting that this duty has already matured, albeit partially, at this point in time. This transformation is occurring as a consequence of:

- (a) clear norms of international law establishing a clear duty of states to cooperate for a supranational welfare system;
- (b) recognition of developing countries as special entities entitled to affirmative action on the part of the affluent countries; and
- (c) conceptual and factual acceptance of entitlement based on need.

Although the concept of “obligation to cooperate”<sup>207</sup> was discussed in Part III, a few words in amplification are necessary. Even if one re-

---

<sup>205</sup> *Millennium Declaration*, *supra* note 6, para. 11.

<sup>206</sup> *Id.* para 6.

<sup>207</sup> See discussion *supra* Part III.

gards some of the NIEO documents as controversial, it is clear that resolutions adopted unanimously prior to 1976 as well as those adopted later on—for example, the Millennium Declaration and Monterrey Consensus—reflect the recognition of an obligation to cooperate. Further, the duty to cooperate will make sense only if it is translated into concrete transfers of concessional resources from rich members of the world community to its less fortunate members for alleviation of their degrading misery.

A series of U.N. General Assembly Resolutions coupled with unanimously adopted Declarations create a certain expectation with regard to legal developments. Regarding ODA, expectations generated by the U.N. Charter and resolutions have not only remained confined to the realm of ideas, but have found a concrete expression in the practice of affluent countries. A concept of international entitlement to aid based on need has gained a measure of acceptance. What is striking about this concept is not its espousal by the large majority of poor nations, but the fact that it has been accepted by affluent countries that, alone, can provide necessary resources. Actions of rich countries in extending assistance and sustaining it for a period of several decades have convincingly established state practice. Though it may well be the case that these actions fall short of meeting actual requirements of many of recipient countries, the scale and duration of responses have been substantial enough to demonstrate the practical acceptance of a responsibility based on the entitlement of those in need and, by the same token, an obligation for those who can help.

It would be, however, relevant to note that there is a wide variety of obligations. Some of them have evolved into what may be called “hard-core”<sup>208</sup> obligations—duties entailing severe negative sanctions in the event of nonfulfillment—while others remain “soft-core”<sup>209</sup> obligations, the breach of which may give rise to sanctions that are less harsh. Developing countries do not expect that hard-core obligations will emerge in respect of ODA, but even soft-core obligations, as a follow-up to Monterrey, would represent a great milestone and would effectively mark the beginning of the paradigm shift advocated by the authors.

---

<sup>208</sup> Haque, *supra* note 47, at 421–422; see also Oscar Schacter, *Towards a Theory of International Obligation*, in *THE EFFECTIVENESS OF INTERNATIONAL DECISIONS* 30 (S. Schwebel ed., 1971).

<sup>209</sup> Haque, *supra* note 47, at 421–422.

## VII. EXTERNAL DEBT

*External debt relief can play a key role in liberating resources that can then be directed towards activities consistent with attaining sustainable growth and development . . . .*<sup>210</sup>

—The Monterrey Consensus Document

### A. *Extremely Serious Problems*

#### 1. Debt Relief for Development

External debt is an extremely serious problem faced by a large number of developing countries. Debt burden has affected their ability to access sufficient funds to invest in productive activities necessary for achieving developmental goals. Many of these countries are really trapped in the vicious cycle of poverty because a large portion of their GDP must be spent on debt servicing, leaving little for anything else. The Monterrey Consensus rightly recognizes sustainable debt financing as an important element for mobilizing resources for public and private investment, and it further states: "National comprehensive strategies to monitor and manage external debt liabilities, embedded in the domestic preconditions for debt sustainability, including sound macroeconomic policies and public resource management, are a key element in reducing national vulnerabilities. Debtors and creditors must share the responsibility for preventing and resolving unsustainable debt situations."<sup>211</sup> Therefore, debt relief measures, where appropriate, should be pursued vigorously and expeditiously, including within the Paris and London Clubs and other relevant fora.<sup>212</sup>

#### 2. Enhanced HIPC Initiative

The Monterrey Consensus welcomed initiatives undertaken to reduce outstanding indebtedness and called for further national and international measures, including, as appropriate, debt cancellation and other arrangements. It found that the enhanced Heavily Indebted Poor Countries' (HIPC) initiative had provided an opportunity to strengthen the economic prospects and poverty eradication efforts of its beneficiary countries. An earnest plea was made for

---

<sup>210</sup> MONTERREY CONSENSUS, *supra* note 1, para. 48, at 11.

<sup>211</sup> *Id.* para. 47, at 11.

<sup>212</sup> *See id.* para. 15, at 4.



speedy, effective, and full implementation of the initiative, and it was recommended that it should be fully financed through additional resources. The Monterrey Consensus further emphasized that the eligibility criteria should remain flexible and that debt relief arrangements should avoid imposing unfair burdens on other developing countries.<sup>213</sup> It also encouraged exploring innovative mechanisms to comprehensively address debt problems of other developing countries, including middle-income countries and countries with economies in transition.<sup>214</sup> It very appropriately asked donor countries to ensure that resources provided for debt relief should not detract from ODA resources intended to be available for developing countries.<sup>215</sup>

### 3. The Need for Additional Funds

Within the broad framework of achieving poverty reduction, the HIPC debt initiative is the first comprehensive approach to reduce the external debt of the world's poorest countries, which are also heavily indebted.<sup>216</sup> A major review in 1999 resulted in an enhancement of the initial plan. Developing countries, while welcoming the steady progress made in the implementation of the enhanced initiative, have been expressing their disappointment that only six out of thirty-eight countries have reached the completion point.<sup>217</sup> They are also concerned that, owing to factors largely beyond their control (overly ambitious export, target, and growth assumptions, falling commodity prices, and the global slowdown), many HIPCs are likely at the completion point to have debt ratios in excess of the initiative threshold.<sup>218</sup> Therefore, there is a need to secure additional resources

---

<sup>213</sup> See *id.* para. 43, at 10.

<sup>214</sup> See *id.* para. 51, at 12.

<sup>215</sup> MONTERREY CONSENSUS, *supra* note 1, para. 51, at 12.

<sup>216</sup> The HIPC initiative was proposed by the World Bank and IMF in 1996. It represents an important step in placing debt relief within an overall framework of poverty reduction. The HIPC approach, now improved and termed as Enhanced HIPC Debt Initiative, provides an opportunity to strengthen economic prospects and poverty reduction efforts in its beneficiary countries.

<sup>217</sup> *Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development Communiqué*, International Monetary Fund, para. 11, at 4 (Sept. 27, 2002), available at <http://www.imf.org/external/np/cm/2002/092702.htm> [hereinafter *Intergovernmental Group of Twenty-Four*].

<sup>218</sup> *Id.* ("While welcoming the steady progress being made in the implementation of the HIPC Initiative, Ministers reiterate their disappointment that only 6 out of 38 eligible countries have reached their completion point and that some creditors have not fully joined the process. Additional funding will be required to address HIPC-to-HIPC debt relief. Ministers are concerned that, owing to factors largely beyond their control, namely

for topping up debt relief funds. Concern has been specifically expressed about the financing gap in the HIPC Trust Fund.<sup>219</sup> Aside from the need to address problems in implementing this initiative, developing countries have been pleading for relief to certain countries—which may be HIPC ineligible or have not opted for the HIPC solution for some valid reasons—that find themselves in an extremely serious situation on account of huge external debt overhang.

### B. Sovereign Debt Issue

*[We] would welcome consideration by all relevant stakeholders of an international debt workout mechanism, in the appropriate forums, that will engage debtors and creditors to come together to restructure unsustainable debts in a timely and efficient manner.*<sup>220</sup>

—The Monterrey Consensus Document

#### 1. Need for Improved Restructuring of Sovereign Debt

The present system of restructuring unsustainable sovereign debt is evidently flawed and requires immediate remedial action. The Monterrey Consensus thus encouraged development of a better international debt mechanism. A welcome initiative has been taken in this regard in the form of a proposal entitled “A New Approach to Sovereign Debt Restructuring”<sup>221</sup>—authored by Anne Krueger, Deputy Managing Director of the International Monetary Fund (IMF)—which envisages a Sovereign Debt Restructuring Mechanism (SDRM). The proposal seeks to correct negative features of the current voluntary debt restructuring process, which has been found to be excessively lengthy, unpredictable, and damaging to both the debtor country and its creditors:

First, sovereigns wait too long before seeking a restructuring, leaving both their citizens and creditors worse off. Second, when they finally do opt for restructuring, the process takes

---

overly ambitious export and growth assumptions, falling commodity prices and the global slowdown, many HIPCs are likely to have debt ratios in excess of the HIPC Initiative threshold at the completion point. In this context, Ministers stress the need to secure additional resources for topping-up debt relief and to streamline conditions and retain more realistic projections associated with debt relief.”)

<sup>219</sup> *Id.*

<sup>220</sup> MONTERREY CONSENSUS, *supra* note 1, para. 60, at 14.

<sup>221</sup> See generally ANNE KRUEGER, INTERNATIONAL MONETARY FUND, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING 1–5 (2002), available at <http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf>.

longer than needed and is less predictable than debtors and creditors would like.<sup>222</sup>

The new proposal is intended to facilitate an orderly, predictable, and rapid restructuring of unsustainable sovereign debt, and to simultaneously protect asset values and creditor's rights. It is also hoped that such a mechanism would contribute to the overall efficiency of international capital markets because it would reduce restructuring costs for sovereign debtors and their creditors.<sup>223</sup> The existing mechanism, while having the international community bail out private creditors, entails the moral dilemma of making it possible for these creditors to get away free.<sup>224</sup> Krueger's proposed system addresses this concern:

Our aim would be to create a catalyst that will encourage debtors and creditors to come together to restructure unsustainable debts in a timely and efficient manner. This catalyst would take the form of a framework offering a debtor country legal protection from creditors that stand in the way of a necessary restructuring, in exchange for an obligation for the debtor to negotiate with its creditors in good faith and to put in place policies that would prevent a similar problem from arising in the future. The mere knowledge that such a framework was in place should encourage debtors and creditors to reach agreement of their own accord. Our model is one of a domestic bankruptcy court, but for a number of reasons it could not operate exactly like that. It is better to think of it as an international workout mechanism.<sup>225</sup>

---

<sup>222</sup> INTERNATIONAL MONETARY FUND, ANNUAL REPORT 2002, at 35, box 3.4 (2002).

<sup>223</sup> See KRUEGER, *supra* note 221, at 1-5.

<sup>224</sup> See MONTEK S. AHLUWALLA, THE IMF AND THE WORLD BANK IN THE NEW FINANCIAL ARCHITECTURE, in INTERNATIONAL MONETARY AND FINANCIAL ISSUES FOR THE 1990s (1999).

<sup>225</sup> Anne Krueger, International Financial Architecture for 2002: A New Approach to Sovereign Debt Restructuring, Address at the National Economists' Club Annual Members' Dinner (Nov. 26, 2001), available at <http://www.imf.org/external/np/speeches/2001/112601.HTM>. However, the idea of a bankruptcy court for sovereign entities was not heard for the first time on that occasion. In the spring of 1997, the General Counsel of the International Monetary Fund, François Gianviti, expressed his own personal view on the matter in a truly visionary way. As a remedy to the sovereign debt, he suggested the establishment of a bankruptcy court for sovereign debtors' external debt, which would determine what payments could be made to each creditor or category of creditors, probably with some rescheduling or even partial debt forgiveness. See François Gianviti, *The IMF and the Liberalization of Capital Markets*, 19 Hous. J. INT'L L. 773, 773-83 (1997).

## 2. Envisaged Legal Framework

What is envisaged is a legal framework that would allow a qualified majority of the sovereign's creditors to approve a restructuring agreement, which would be then binding on a dissenting minority. Its other features will be:

- (a) a temporary stay on creditor litigation after a suspension of payment, but before a restructuring agreement is reached;
- (b) safeguards to protect creditors' interests during the stay; and
- (c) a mechanism to include new financing by giving it seniority over pre-existing private indebtedness during the period of stay.<sup>226</sup>

It is also envisaged that an independent judicial panel would be created to arbitrate disputes and oversee the process. An amendment to the IMF's Articles of Agreement would provide the legal basis to make a restructuring agreement binding on all creditors.<sup>227</sup>

## 3. Difference of Opinion

There is difference of opinion on the merits of the proposal. Some describe it as the most favorable solution in a matter where few, if any, dare to offer viable solutions, while others view it with skepticism. Developing countries expect that a new multilateral agreement will be reached in the matter, based on the rule of law and recognizing political and economical interdependence between the members of the international community. They also expect that a more proactive role will be played by the international financial institutions. Of course, the establishment of any supranational institution will involve the difficult task of overcoming perceived threats to national sovereignty, as national financial and economic policies are perceived to be a part of the exercise of a state's sovereignty.<sup>228</sup>

---

<sup>226</sup> KRUEGER, *supra* note 221, at 10–11.

<sup>227</sup> *Id.* at 35.

<sup>228</sup> The new model envisages that the process will mainly be a legal one, but its implementation and overall recognition will undoubtedly be the result of a political compromise and involve a lot of international diplomacy and political consensus. At the same time, as all the literature on globalization unanimously argues, the concept of sovereignty has been reshaped in practice if not in theory in the contemporary world. The states should acknowledge (or could only accept) the "new definitions" of the old terms. If a new court of bankruptcy for sovereign entities is an anathema to the classical concept of "sovereignty" usually proclaimed rather vociferously by developing countries, then these countries should now recognize that the concept has changed in many other respects, and that the new approach is designed to offer a solution to the same states, while it might seem very

The proposal, as well as an interim contractual approach (envisaging the use of collective action clauses), is under active consideration. The International Monetary and Financial Committee had its meeting on September 28, 2002, reviewed the progress on the proposal, and encouraged the Fund to finalize it.<sup>229</sup> However, the IMF Committee of the Board of Governors of IMF has recently rejected the proposal (at least, for the time being). Although the Committee welcomed the work of the IMF in developing a concrete proposal for a statutory SDRM and expressed appreciation for the efforts of the IMF management and staff, it also stated the following:

[W]hile recognizing that it is not feasible now to move forward to establish the SDRM, [the Committee] agrees that work should continue on issues raised in its development that are of general relevance to the orderly resolution of financial crises. These issues include inter-creditor equity considerations, enhancing transparency and disclosure, and aggregation issues.<sup>230</sup>

## IX. INNOVATIVE SOURCES OF FINANCING FOR DEVELOPMENT

### A. *A Need for Innovation in Financing Development*

#### 1. Raising Funds Without Imposing Heavy Burdens

Given the recent declining trends in ODA flows and difficulties expected to be encountered in achieving a substantial and sustained increase, innovative sources of financing and development should be considered that would raise substantial funds without imposing heavy burden on taxpayers in donor countries. Moreover, in developing countries, while there has not been much innovation in mobilizing domestic resources, demands on public resources are increasing. Financing the provision of global public goods has further highlighted the importance of finding additional and innovative means of

---

unattractive to their creditors. However, in the doctrine it has been opined that no country is likely to go down this path unless absolutely has to. *See generally* KRUEGER, *supra* note 221.

<sup>229</sup> *See generally* *Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund*, International Monetary Fund (Sept. 28, 2002).

<sup>230</sup> *Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund*, International Monetary Fund, para. 15 (Apr. 12, 2003), available at <http://www.imf.org/external/np/cm/2003/041203.htm>.

financing.<sup>231</sup> Several proposals have been formulated to generate additional financing at national and international levels.

## 2. National Taxes Under International Agreements

There are many possible national taxes flowing from international agreements that could be or already are enforceable and that, if negotiated and accepted by the countries concerned, would result in substantial accretion to resource stream. These are to be collected by the national governments, and no international legislative body or collecting agency will be required. Three such taxes are: international air transport tax, carbon tax, and currency transaction tax.

Other forms of taxation, requiring international agreement in some cases, that are recommended by experts are: taxation of the global commons through mining of the seabed<sup>232</sup> or in Antarctica,<sup>233</sup> use of the outer space,<sup>234</sup> taxation of ocean fishing,<sup>235</sup> general levies on natural resource extraction and land,<sup>236</sup> taxation of arms exports,<sup>237</sup> a "bit tax,"<sup>238</sup> taxation of public/civil society/private partner-

<sup>231</sup> See *Review of the Inputs to the Substantive Preparatory Process and the International Conference on Financing for Development*, Note by the Secretary-General, Preparatory Committee for the International Conference on Financing for Development, 3d Sess., Agenda Item 2, pt. 2, U.N. Doc. A/AC.257/xx (2002), available at [http://www.un.org/esa/ffd/aac257\\_27a3.pdf](http://www.un.org/esa/ffd/aac257_27a3.pdf).

<sup>232</sup> There is no seabed mining at present and there is a provision to tax this activity under the Law of the Sea Convention.

<sup>233</sup> Mining in Antarctica is prohibited at present.

<sup>234</sup> The satellite use of the outer space would not, however, generate substantial revenue.

<sup>235</sup> This is unlikely to generate substantial revenue.

<sup>236</sup> The difficulty would arise because these are generally regarded as national matters, which makes them a normal source of domestic revenue.

<sup>237</sup> Governments must agree on "taxing themselves," meaning that since governments usually tax their citizens and not themselves, with these many innovative forms of taxation, governments will need to be willing to pay taxes themselves on oil, minerals, and pollution when it is not caused by a private company. As regards taxing imports or exports of arms, illegal transactions should be left untaxed. If taxed, such transactions would probably yield a considerable amount of money, but to do so would be both immoral and impracticable. Furthermore, it has been said that such a tax would contribute to increasing the illegal transfer of arms, having the opposite effect than the one desired.

<sup>238</sup> See RAGHBENDRA JHA, *INNOVATIVE SOURCES OF DEVELOPMENT FINANCE: GLOBAL COOPERATION IN THE TWENTY-FIRST CENTURY* 1, 13 (United Nations Univ., World Inst. for Dev. Econ. Research, Discussion Paper No. 2002/98, 2002) ("The base of th[e] [e-mail/Internet taxes (the bit tax)] is the amount of data being sent through the Internet. According to one proposal, a person sending 100 emails per day with a 10-kilobyte document would pay a tax of just one cent."). Experts have calculated that, for example, Internet data traffic would have generated US\$70 billion in 1996. *Id.* With the rapid expansion of the Internet, imposing such a tax would be very difficult from a technical point of view.

ships,<sup>239</sup> a general tax on international trade, a tax on selected internationally traded commodities (for example, oil and minerals), and a tax on polluters for damage caused to the environment.<sup>240</sup>

## X. SYSTEMIC ISSUES

*In order to complement national development efforts, we recognize the urgent need to enhance the coherence, governance, and consistency of the international monetary, financial and trading systems.*<sup>241</sup>

—The Monterrey Consensus Document

### A. Coherence, Governance, and Consistency

#### 1. Better Response from International Partners

In this interdependent world of ours, it is axiomatic that national development efforts cannot really achieve the goal of poverty eradication without a supportive and mutually reinforcing set of policies on the part of developed countries, regional development agencies, and international financial institutions. The Monterrey Consensus, in this regard, emphasized the need for enhancing coherence, improving governance, and increasing consistency of international monetary, financial, and trading architectures and processes. It underlined the importance of continuing to improve global governance and to strengthen the U.N.'s leadership role in promoting development.<sup>242</sup> It encouraged policy and program coordination of international institutions as well as coherence at the operational and institutional levels.<sup>243</sup> It noted with satisfaction that efforts were being made to reform the international financial architecture and demanded that progress be sustained with greater transparency and greater participation of the developing countries.<sup>244</sup>

---

<sup>239</sup> The difficulty related to this form of taxation comes from the fact that these are national arrangements that do not require international agreements for effective operation and that have been in operation for centuries, which makes them hardly innovative.

<sup>240</sup> See Tony Atkinson, *Innovative Sources for Development Finance: Global Public Economics*, Speech Given at the Annual Bank Conference on Development Economics in Europe (May 16, 2003) (discussing the possibility of taxing, for example, short-term capital and currency flows ("Tobin tax") and global environmental taxes (carbon-use tax or air transport tax)).

<sup>241</sup> MONTERREY CONSENSUS, *supra* note 1, para. 52, at 12.

<sup>242</sup> *Millennium Declaration*, *supra* note 6, para. 6.

<sup>243</sup> *Id.* para. 30.

<sup>244</sup> *Id.* para. 13.

## 2. Specific Improvements Sought

The Monterrey Consensus also called for coordination of macroeconomic policies among the leading industrial countries for achieving and sustaining global stability; prioritizing the identification and prevention of potential crises by multilateral financial institutions, particularly by the IMF; making them work on the basis of sound, nationally owned reform programs; giving due consideration to the social costs of adjustment programs; and taking decisive action to minimize their negative impact on the vulnerable segments of society.<sup>245</sup> The Consensus Document encouraged the IMF and World Bank to continue to enhance participation of all developing countries (and all countries with economies in transition) in their decision-making.<sup>246</sup> In sum, the emphasis of the Monterrey Conference was on broadening and strengthening the role of developing countries in international economic decision-making and norm setting. It also recognized that a meaningful progress in multilateral forums would require capacity building of developing countries. The Consensus Document stated: "A first priority is to find pragmatic and innovative ways to further enhance the effective participation of developing countries and countries with economies in transition in international dialogues and decision-making processes."<sup>247</sup>

### B. Prioritizing Efforts

This is undoubtedly an ambitious agenda and, when substantially implemented, it will signify great progress. However, it is a long-term process and will require sustained attention. It is thus appropriate to prioritize efforts. One area warranting early action, from the perspective of developing countries, is that of governance in Bretton Woods Institutions (BWIs)—i.e., IMF and the World Bank. Normally, things run smoothly on the executive boards of BWIs, but developing countries find themselves powerless when critical issues arise that involve a difference of views between the poor and rich countries. This is due to voting power structure where the principle of one nation, one vote does not apply. Voting power is distributed according to share holdings.<sup>248</sup> Further, the formulas for determining the vote (quotas in the

---

<sup>245</sup> MONTERREY CONSENSUS, *supra* note 1, paras. 54–56, 59, at 13.

<sup>246</sup> *Id.* para. 62, at 14.

<sup>247</sup> *Id.* para 63, at 14.

<sup>248</sup> See World Bank Group, Voting Powers, at <http://web.worldbank.org/WB SITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:50004947~menuPK:271153~pagePK:34542~piPK:>



Fund and shares in the Bank) have remained the same since their inception.<sup>249</sup>

With the passage of time, these formulas have become less and less reflective of the importance of many countries in the world economy. As a consequence, some of the largest economies, even in global terms, such as Brazil and Mexico, have less voting power than relatively small industrial economies such as Belgium, the Netherlands, and Switzerland.<sup>250</sup> Developing countries expect that the existing bias

329829~theSitePK:29708,00.html (last visited Apr. 29, 2004) (“Like all corporate organizations, each of the agencies of the World Bank Group has shareholders; these are the member countries. Every shareholder is allocated a certain number of votes linked to the size of its shareholding. The votes include a specified number of membership votes (which is the same for all members) and additional votes based on the number of shares of the stock held. The number of votes of a member expressed as a percentage of the total number of votes held by all shareholders is the member’s voting power.”).

Similarly, the Executive Board of the IMF conducts the IMF’s day-to-day business. It is composed of twenty-four Directors (appointed or elected by member countries or by groups of countries) and the Managing Director (its Chairman). The quota shares owned by a country determines the number of votes it may cast. For example, the United States owns 17.14% of the Fund and has 371,743 votes whereas Japan owns 6.15% of the Fund and has 133,378 votes. *See* International Monetary Fund, IMF Executive Directors and Voting Power, at <http://www.imf.org/external/np/sec/memdir/eds.htm> (last modified Apr. 16, 2004).

<sup>249</sup> Transcript of an IMF Economic Forum, Do Developing Countries Have a Say at the IMF? (Feb. 5, 2004) (forum between Ariel Buira, Director of the G-24 Secretariat, Carol Welch, Director of International Programs, Friends of the Earth, & Thomas Dawson, Director of External Relations of the IMF), at <http://www.imf.org/external/np/tr/2004/tr040205.htm> (“The Bretton Woods formula is still in use, with variations in weights given to these variables. It’s combined with four other formulas that use the same variables and give them somewhat different weights. There have been some changes. Instead of gross national income, now you use GDP, but very small adjustments.”).

<sup>250</sup> *Id.* Initial discussion at Bretton Woods focused on “whether every state should have the same vote because of the legal principle of equality of states or . . . whether power should be determined by contributions.” *Id.* The decision was made that every state should be given 250 basic votes and that each state would get an additional vote for each US\$100,000 contributed. Today, the number of basis votes allotted is “irrelevant . . . [since] decisions are essentially based on quotas.” *Id.* In addition, though the Bretton Woods formula is still used, it is merged with other formulas, and discretion is also a factor. The use of discretion is apparent, for example, when certain countries are compared to one another:

Canada and China have exactly the same quota. The Chinese quota was increased after the incorporation of Hong Kong to be exactly the same size as Canada’s . . . . [Note, however, that] China is a much bigger economy than Canada.

Now compare Netherlands, Belgium, and Switzerland, whose quotas are all bigger than Brazil’s and Mexico’s. But Brazil and Mexico are much bigger than the Netherlands, Belgium, and Switzerland . . . . Another amazing example: Belgium has a 74-percent bigger quota than Mexico, but Mexico’s foreign trade alone is bigger than Belgium’s GDP.

in formulas that leads to understating their economies be eliminated. It is pertinent to point out that: “as quotas have increased by some 36-fold . . . basic votes per member [have] remain[ed] unaltered since 1944, [so that] the number of basic votes should be [in all fairness] substantially increased.”<sup>251</sup>

Developing countries have also been reiterating their call “for a general allocation of SDRs, which would help alleviate pressures from the tightening of developing countries’ access to private capital markets and assist the recovery of the world economy.”<sup>252</sup> In addition, developing countries “urge those countries that have not done so to ratify promptly the equity SDR allocation under the Fourth Amendment of the IMF’s Articles of Agreement.”<sup>253</sup> These measures will help developing countries in attaining MDGs.

## CONCLUSION

### A. A Qualitatively Different Conference and Document

The Monterrey Conference was qualitatively different from the other United Nations conferences. It was characterized by the inclusion of all the stakeholders—particularly BWIs. The preparations leading to the Conference and its proceedings were marked by a very high degree of professionalism and constructive interaction between developed and developing countries. It was free from polemics and the usual acrimony between the rich and poor nations. Ideological baggage was left behind and a new spirit of cooperation and accommodation prevailed.

The Consensus Document is also profoundly different from other landmark U.N. documents, such as the Declaration and Programme of Action on the Establishment of a New International Economic Order (NIEO)<sup>254</sup> and the Charter of Economic Rights and Duties of States.<sup>255</sup> Both developing and developed countries have trav-

---

*Id.* This formula also gives Denmark a bigger quota than Korea despite Korea’s status as larger, more important economy. The most prominent comparison shows that the European quotas are larger than those in Asia, even though Asia’s purchasing power parity is 21.5% and Europe weighs in at below 3%. *Id.*

<sup>251</sup> *Intergovernmental Group of Twenty-Four*, *supra* note 217, para. 17, at 6.

<sup>252</sup> *Id.* para. 17 at 6.

<sup>253</sup> *Id.*

<sup>254</sup> See *Programme of Action on the Establishment of a New International Economic Order*, U.N. GAOR, 6th Special Sess., Supp. No. 1, at 5, U.N. Doc. A/Res/3202(S-VI) (1974).

<sup>255</sup> See *Charter of Economic Rights and Duties of States*, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/Res/3281(XXIX) (1974).

eled a long way since the era of NIEO. Developing countries, owing to a variety of reasons, have become more realistic, responsible, and mature.<sup>256</sup> Developed countries—having witnessed the tragic events of September 11th and become cognizant of indivisibility of development and security, as well as having become aware of public opinion in their countries clearly favoring visible poverty reduction in the world—have exhibited a new spirit of accommodation. All this has been manifested in the Monterrey Consensus. As a consequence, a new partnership between developing and developed countries came into existence. This partnership is anchored on mutual responsibility and accountability to achieve measurable improvements in areas that are overwhelmingly critical for the good of mankind.

What is required now and critically important is faithful implementation and sustaining of the Monterrey spirit. Implementation of the multifaceted agenda set forth in the Monterrey Consensus would require a holistic response involving a broad range of strategies, programs, and disciplines and a multitude of actors.

#### *B. Role of IEL: Going Beyond Instrumentality and Pace*

International economic law has a definite and significant role to play in the process. For one, IEL is indispensable if an edifice is to be constructed for enforcing mutual accountability between developing and developed countries. The very concept of accountability in the ultimate analysis is juridical and only makes sense if a legal mechanism is in place to ensure that the idea becomes operational. Further, there can be no difference of opinion about the role of IEL as an indispensable instrument to implement the Monterrey Consensus. It is necessary for accelerating the pace of momentum to achieve objectives indicated in Part I of this Article. However, the important point that needs to be recognized is that its role is not merely instrumental. The full role of IEL means going beyond the challenge of “pace” to that of breaking the path. It is not merely the letter, but the spirit of IEL—inspired by the right to development and the moral drive to bridge the gulf between affluence and hunger, ignorance, disease and despair—that would help in translating the vision of Monterrey into a reality.

---

<sup>256</sup> See Andrés Velasco, *Dependency Theory*, FOREIGN POL'Y, Oct.–Nov. 2002, at 44–45. Velasco argues that this has happened due to a variety of factors; for example, with the passage of time, anti-globalization sentiments weakened. Dependency doctrines and theories (both in radical and milder versions) were not proved valid in real life. Successors to first generation leaders in the Third World also became more pragmatic. Above all, the Third World discovered the futility of taking on industrial countries.

An attempt has been made below to depict relationships and interactions between the Monterrey Consensus and IEL in the form of a matrix, which readers may hopefully find of some use. This interaction between the desirable outcomes agreed upon by the international community and the capability of the international law is essentially one of demand and supply. In the context of this Article, the Monterrey Consensus represents demand and IEL represents supply. However, the process is more complex. It also involves mutual impact and enrichment. While the Monterrey Consensus has found an effective instrument, IEL has found a vital mission and a new meaning. Out of the interaction and synergy between the Consensus Document and IEL, much good is expected.

## MONTERREY CONSENSUS AND INTERNATIONAL ECONOMIC LAW MATRIX

ISSUES / ACTIONS	MONTERREY CONSENSUS	INTERNATIONAL ECONOMIC LAW	DYNAMICS OF INTERACTION AND REINFORCEMENT
<b>CORE CONCEPTUAL ISSUES</b>	<p>Accepting the concept of a new kind of partnership between developed and developing countries anchored on mutual responsibility and accountability;</p> <p>Sharing mutual responsibility: achievement of measurable improvements in sustainable growth and poverty reduction.</p>	<p>Prompting the cooperative law of nations—which binds states to adhere to principles of cooperation for common interests—to play a proactive role and realize its potential;</p> <p>Providing a legal mechanism to enforce accountability of both rich and poor nations;</p> <p>Giving a concrete expression to the well-recognized, mutual duty to cooperate in economic development.</p>	<p>Opportunities provided by international consensus, as well as by pragmatic and moral forces, should be exploited;</p> <p>IEL will immensely gain as a discipline because it will have a worthwhile mission to perform—with direct impact on welfare of mankind, enriching its contents and improving its utility—and will thus command greater loyalty of a larger number of nations.</p>
<b>CORE LEADING ACTIONS</b>	<p>Ensuring proper follow-up to implementing the agreements and commitments reached at the Monterrey Conference.</p>	<p>Facilitating transformation of commitments into operational norms and informing decision-making processes.</p>	<p>The role to be played by IEL would not be merely instrumental—concerned with the pace of implementation alone—but it would also influence and inspire the process with its concept of a world community and collective responsibilities. IEL should move beyond accelerating the “pace” to a point of “breaking the path” itself.</p>

<p><b>FOREIGN DIRECT INVESTMENT / OTHER PRIVATE FLOWS</b></p>	<p>Increasing the volume and geographical coverage of FDI and other private flows to developing countries.</p>	<p>Facilitating provision of risk guarantees at subsidized cost, more easily obtainable and more reasonably priced;</p> <p>Devising innovative legal structures and processes for more efficient, simpler, and cheaper co-financing for venture capital arrangements and other lending instruments between source countries and multilateral institutions;</p> <p>Helping developing countries to liberalize foreign investment regimes;</p> <p>Assisting in the evolution of a comprehensive, balanced, and fair multilateral investment treaty in accordance with principles of rule of law.</p>	<p>The response of IEL to the challenge of ensuring greater private capital flows and their wide dispersal among developing countries will hopefully result in universalizing a liberal investment regime in the same manner that GATT/WTO has universalized liberal trade policies.</p>
<p><b>INTERNATIONAL TRADE</b></p>	<p>Reaffirming a commitment to trade liberalization and a rule-based, nondiscriminatory multilateral trading system.</p>	<p>Helping developing countries to gain and consolidate better access to markets;</p> <p>Assisting developing countries in negotiations by providing a set of standards based on the rule of law, inter alia, to prevent the misuse of legal processes.</p>	<p>A multilateral trading system enshrined in GATT/WTO has been erected on legal foundations. The international community looks to IEL to assist it further by way of additions and improvements to the existing structure.</p>

<p><b>ODA: SUBSTANTIAL INCREASE IN ODA</b></p>	<p>Increasing ODA substantially to enable developing countries to achieve internationally-agreed development goals;</p> <p>Ensuring that recipient and donor countries and international institutions make ODA more effective, e.g., by harmonizing operational procedures, better donor coordination, improving targeting to the poor, and enhancing recipients' ownership;</p> <p>Ensuring that developing countries act on their commitments to adopt sound policies, establish good institutions, fight corruption, and promote good governance.</p>	<p>Helping to adopt a new paradigm for ODA that seeks to transform the charity of nations into a binding obligation of the world community.</p>	<p>A synergy of spirit of Monterrey and that of cooperative law of nations—based on recognition of right to development, clear duty of states to cooperate to eradicate poverty, and factual acceptance of entitlement to assist based on need—can transform voluntary charity of nations into an obligation of the world community embedded in international law.</p>
<p><b>RESOLUTION OF EXTERNAL DEBT PROBLEM</b></p>	<p>Calling for further improvement in the enhanced HIPC initiative;</p> <p>Pleading for additional resources for the HIPC Trust Fund;</p> <p>Stressing need to address external debt problems of non-HIPC countries.</p>	<p>Helping to further strengthen legal structure of debt relief providing, inter alia, debt cancellation mechanisms, debt education, and debt health swap instruments.</p>	<p>External or domestic debt, in the ultimate analysis, turns into a legal matter. Debt relief must thus take place through legal processes and mechanisms. An effective solution may break the vicious circle when there is (a) unwillingness from creditors to recognize the futility of giving new loans so that borrowers may use them to repay the old ones, and (b) a capability in the legal system for writing off such bad debts. Here, an interplay between the Monterrey Conference's keenness to find a solution to debt problems and the capacity of IEL to supply innovative and creative solutions would prove fruitful.</p>

<p><b>ADOPTION OF AN INTERNATIONAL DEBT WORKOUT MECHANISM</b></p>	<p>Calling for developing an international debt workout mechanism to restructure unsustainable debt in a timely and efficient manner;</p> <p>Promoting fair burden sharing and minimizing moral hazard.</p>	<p>Helping to establish a legal framework, allowing a qualified majority of sovereign creditors to approve a restructuring agreement that would provide for a stay on creditors' litigation, safeguards to protect creditors' interests during the stay, a mechanism to induce new financing, and a judicial panel to arbitrate disputes and oversee the process.</p>	<p>The model envisaged by the IMF for restructuring unsustainable debt is very similar to that of a domestic bankruptcy court. The international financial community's demand for a solution will be met by a response from IEL through extrapolation of domestic legal experience to the international arena.</p>
<p><b>INNOVATIVE SOURCES OF FINANCING</b></p>	<p>Exploring innovative sources of financing.</p>	<p>Setting up appropriate legal mechanisms and processes to make innovative financing possible.</p>	<p>Introducing an innovative system of financing will be a challenge for IEL and will cross the operational divide between development thinking and practice.</p>
<p><b>IMPROVING GLOBAL ECONOMIC GOVERNANCE</b></p>	<p>Strengthening the leadership of the U.N. for development;</p> <p>Enhancing coherence, governance, and consistency of the international system;</p> <p>Improving international financial architecture;</p> <p>Enhancing participation of developing countries in international dialogues, norm setting, and decision-making processes.</p>	<p>Giving effect to measures aimed at improving global governance, for which IEL is indeed indispensable.</p>	<p>Here again, it is the mutually reinforcing process between development aspirations and legal framework and spirit that makes a powerful combination for effective improvement. IEL would not only provide the necessary instruments, but it would also furnish models of good governance in various spheres of life for adoption and emulation.</p>