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# **BLAINE SLOAN LECTURE†**

## **SOLIDARITY IN THE PRACTICE AND DISCOURSE OF PUBLIC INTERNATIONAL LAW**

**R. St. J. Macdonald††**

The purpose of this paper is to suggest that “solidarity” is both a fundamental and a fundamentally sound principle of international law. I will argue that, as a principle of international law, solidarity has existed within the discourse for a significant period; that it can be found in the work of qualified publicists; that it is evidenced in multilateral and bilateral treaties; and that it is a principle gaining both recognition and importance in the structure of the contemporary international legal order.

Solidarity is first and foremost a principle of cooperation which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely in-

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† This lecture was given at Pace University School of Law on 15 February 1996 for the Tenth Annual Blaine Sloan Lecture in Public International Law. The Blaine Sloan Lecture is presented by the Pace International Law Society and the Pace International Law Review to honor Blaine Sloan, Professor Emeritus of International Law and Organization at Pace University School of Law. The purpose of the lecture is to continue the spirit of scholarly debate for which Professor Sloan is noted for. He has had a distinguished career in the field of international law; serving as Director of the General Legal Division of the United Nations Office of Legal Affairs from 1966-78, and as Deputy to the Under Secretary-General, Legal Affairs, 1978, and as the founder of the Pace International Law Curriculum.

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terfere with the interests of other states. Solidarity, as a principle of international law, creates a context for meaningful cooperation that goes beyond the concept of a global welfare state; on the legal plane it reflects and reinforces the broader idea of a world community of interdependent states.

Several writers have already identified trends in the behavior of states that reflect ideas of solidarity. For example, President Bedjaoui of the International Court of Justice has said that "by asserting the common good . . . the majority of States have set in train a process in which the emphasis is placed on whatever may be expected to contribute to reducing the *de facto* inequalities between States and to promote greater heed for the long-term interests of the globe."<sup>1</sup> It is this process — the formulation of and adherence to measures that enhance the common good — that impels my interest and constitutes the focus of this paper.

## I. HISTORICAL OVERVIEW

Solidarity as a principle of international law was first posited by Emer de Vattel in the mid-eighteenth century.<sup>2</sup> Working from ideas of Christian Wolff, Vattel argued that states have a duty to mutual assistance in order to improve their general situation and relations.<sup>3</sup> "La première loi générale que le but même de la Société des Nations nous découvrons est que chaque Nation doit contribuer au bonheur et à la perfection des autres tout ce qui est en son pouvoir."<sup>4</sup>

Vattel considered solidarity to be the basic condition for the existence of a community of states—a compulsory natural law that could not be altered, abolished or negotiated. His conception of solidarity thus resembles a *jus cogens* norm, that is, a

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<sup>1</sup> Mohammed Bedjaoui, *General Introduction*, INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 1, 14 (Mohammed Bedjaoui ed., 1991).

<sup>2</sup> Emer de Vattel, *LE DROIT DES GENS OU PRINCIPES DE LA SOUVERAINETÉ*, (1758, reprint Geneva, 1958) Préliminaires ss. 1-16; Livre II, Chapitre I, ss. 11-20. On the whole subject see the outstanding study by RAIMUND SCHÜTZ, *SOLIDARIÄT IM WIRTSCHAFTSVOLKERRECHT, EINE BESTANDSAUFNAHME ZENTRALER ENTWICKLUNGSSPEZIFISCHER SOLIDARRECHTE UND SOLIDARPFLICHTEN IM VOLKERRECHT*, 26 (1994).

<sup>3</sup> CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* §§ 12, 156-172 (Joseph H. Drake trans., 1934) (1764).

<sup>4</sup> Vattel, *supra* note 2, Préliminaires ss. 13.

norm "not at the disposal of contracting parties owing to [its] essential role in the preservation of the international community."<sup>5</sup> Although Vattel conceived of solidarity as functioning at the most essential level of international law, he considered the obligations it creates moral rather than legal, and therefore, difficult to enforce.<sup>6</sup>

Vattel's eighteenth-century perplexity over how to resolve the principle of solidarity as something essential, yet voluntary—basic to the law of nations, yet unenforceable—has not appreciably diminished in the past two centuries. Indeed, whatever impetus there was to reconcile the tension between the interests of the individual state and the interests of the global community was dampened significantly during the imperial era of the nineteenth century. It was then that the theory and practice of sovereignty acquired heightened prominence in the international community. Sovereignty superseded solidarity to such an extent that, in the waning decades of the nineteenth century, solidarity was used as a justification for colonial domination. The responsibility of states to one another became the "civilizing mission" of European states in their quest for colonial control over the populations of other states.

The first half of the twentieth century was similarly unfavorable for the principle of global solidarity. During the brief existence of the League of Nations, an isolated example of solidarity made its way into Article 22 of the Covenant, under which a "sacred trust" constituted the basis for the mandate system; but the principle of mutual responsibility was relevant mainly to the extent that it could be identified in treaties concluded between particular states; no general principle of legal responsibility to the community as a whole was articulated at the official level. During the global depression of the 1930s, the League was preoccupied with the struggle to maintain peace and security, and efforts to realize an attitude of solidarity simply failed. By the end of World War II, however, members of the

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<sup>5</sup> Jochen Abr. Frowein, *Jus Cogens*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 327 (R. Bernhardt ed., 1984).

<sup>6</sup> On this topic see Heinhart Steiger, *Solidarität und Souveränität oder Vattel Reconsidered*, in *AUF EINEM DRITTEN WEG, FESTSCHRIFT FÜR HELMUT RIDDER ZUM 70 GEBURTSTAG*, 97 (Stein-Faber ed., 1989).

global community had become more ready to establish a legal foundation for global cooperation and mutual responsibility.<sup>7</sup>

## II. OPINIONS AND PRACTICE ON SOLIDARITY

Since 1945, legal scholars gradually have come to agree that the principle of solidarity exists at the level of international law. They disagree, however, about the nature of the principle. One school argues that the principle of solidarity creates no extra-legal obligations, which it holds arise only from treaties and other legally binding international agreements. A second school argues that the principle of solidarity implies an extra-legal obligation on the part of developed states to assist less developed countries (LDCs)—or, at a minimum, not to interfere with the interests of other states by pursuing entirely self-interested economic policies. A third school believes that solidarity is less an isolated statement within international law than a principle beginning to inform the entire system. It is similar to the concept of equity in domestic law, except that “fairness” is a subset of solidarity, rather than the whole of the principle. Adherents to this school hold that solidarity represents a direction in which international law is traveling.<sup>8</sup>

At the level of practice, a significant number of major legal texts have been created, in part to extend a principle of solidarity to world economic behavior. Similarly, there have been important instruments outlining the principle of environmental solidarity have been created at regional and universal levels. These provisions on states’ obligations to protect the economic and environmental interests of other states are fully consistent with the UN Charter, which requires states to cooperate in sup-

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<sup>7</sup> DOROTHY V. JONES, CODE OF PEACE: ETHICS AND SECURITY IN THE WORLD OF THE WARLORD STATES (1991).

<sup>8</sup> GEORG DAHM, ET AL., I/1 VOLKERRECHT, 222 (2d ed. 1988); Alexandre-Charles Kiss, *Les ressources naturelles et le droit international; Conclusions*, 45-56 ANNUAIRE DE L’A.A.A. 263, 271 (1984-86); MILAN BULAJIC, PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW, 236 (1986); Paul de Waart, *The Right to Development: Utopian or Real?*, in RESTRUCTURING THE INTERNATIONAL ECONOMIC ORDER: THE ROLE OF LAW AND LAWYERS, 99 (Pieter van Dijk et al. eds., 1987); PIETER VERLOREN VAN THEMAAT, THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW, 194 (1981); Ulrich Scheuner, *Solidarität unter den Nationen als Grundsatz in der gegenwärtigen internationalen Gemeinschaft*, in RECHT IM DIENSTE DES FRIEDENS, FESTSCHRIFT FÜR EBERHARD MENZEL (Jost Delbrück et al. eds., 1975); Mbaye, Art. 2, ¶ 1, in Cot/Pellet, *La Charte des Nations Unies*, 87 (1985).

porting the goals it itemized on peace, prosperity and human rights. The existing term for these obligations, *erga omnes*, finds its best-known articulation in the *Barcelona Traction* case<sup>9</sup> decision, which International Court of Justice draws a distinction between the obligations of a state toward the international community as a whole and those vis-à-vis another state—for example, obligations in the field of diplomatic protection. “By their very nature,” said the Court, “the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.”<sup>10</sup> In the remarks that follow, I will briefly review a few of the pertinent obligations in the domain of economic and environmental law in the context of a “larger reading” of obligations *erga omnes*, that is to say, solidarity.

### III. SOLIDARITY IN INTERNATIONAL ECONOMIC LAW

#### 1. *Declaration Concerning the Establishment of a New International Economic Order*

The principles of cooperation expressed in the UN Charter, the Universal Declaration of Human Rights, and the Declaration of Friendly Relations were more specifically defined at the sixth special session of the General Assembly in 1974, which was dedicated entirely to the New International Economic Order (NIEO). The record of its oral debates evidences a will to establish a new cooperative system of economic relations informed by the principle of solidarity.<sup>11</sup>

The preamble to the Declaration of 1 May 1974 Concerning the Establishment of a New International Economic Order (NIEO)<sup>12</sup> identifies the principles of equity, the interdependence of all peoples, and cooperation among states as the bases of the NIEO. For the first time, the General Assembly calls for elimi-

<sup>9</sup> *Barcelona Traction* case (Belg. v. Spain), 1970 I.C.J. 3.

<sup>10</sup> *Id.* See further R. St. J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 THE CANADIAN Y.B. INT'L L. 115 (1987).

<sup>11</sup> Mohammed Bedjaoui, *Droit du Développement et jus cogens* 54-56 ANNUAIRE DE L'A.A.A. 275 (1984-86).

<sup>12</sup> Declaration of 1 May 1974 Concerning the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (1974).

nation of inequality and correction of injustices. The purpose of cooperation is declared to be elimination of disparities among states and preferential treatment of and active assistance to the LDCs.

The NIEO replaced the somewhat vague procedures of the Declaration of Friendly Relations with clearly defined principles, rights, and obligations; it required states to take active steps to eliminate inequalities. Still, the NIEO Declaration was just a declaration; effective implementation indeed depended on treaties and other recognized means of establishing its principles as binding rules of international law.

## 2. *The Charter on Economic Rights and Duties of States*

This Charter (December 12, 1974)<sup>13</sup> also contains strong statements on the duty to cooperate and actively assist the LDCs. Although it does not create strict legal obligations, its content is important.<sup>14</sup> The preamble calls for establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interests and cooperation among states.<sup>15</sup> It refers to "mutual and equitable benefit" as an essential element of the NIEO, and to "promotion of international social justice" and "international cooperation for development."<sup>16</sup>

A principle of solidarity underlies Article 3 of the Charter, which stipulates that, in the exploitation of natural resources shared by two or more countries, each state must cooperate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without damage to the legitimate interests of others.<sup>17</sup> Article 6 underlines the duty of states to contribute to the development of international trade by taking into account the interests of producers and consumers.<sup>18</sup> According to that article, all states share a responsibility to promote the regular flow of and access to all commercial goods traded at stable, remunerative and equitable

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<sup>13</sup> *Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), U.N. Doc. A/3281 (1974), reprinted in 1974 U.N.Y.B. 403 [hereinafter the Charter].

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

prices, and thus to contribute to the equitable development of the world economy, and it takes into account in particular developing countries' interests.<sup>19</sup>

Articles 7, 8 and 9 refer to the obligations of states to promote social, economic and cultural rights, to initiate structural changes in the international economic system, and to cooperate in the social progress of the world.<sup>20</sup> The strongest reference to the principle of solidarity is found in the last sentence of Article 18: "In the conduct of international economic relations the developed countries should endeavor to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favor."<sup>21</sup> This appeal to take into consideration the external effects of national activities is repeated and formulated as a legal obligation in Article 24.<sup>22</sup>

What emerges from the Declaration on the NIEO<sup>23</sup> and the Charter<sup>24</sup> is a clear sense that the obligations they describe devolve to the developed countries and are understood to be for the general benefit of the LDCs. Although this preference for the need to strengthen the position of the "have-not" states appears to make general economic sense, it does not appear to be working well politically or in terms of actual practice. This does not mean that the LDCs should not be given preferential treatment in order to encourage their economic growth; it does suggest that the principle of solidarity has been wrongly perceived and applied in these two documents. By definition, solidarity cannot impose a *one-sided obligation*, which is what they appear to do.

### 3. *The Seoul Declaration*

The Seoul Declaration of the International Law Association (ILA)<sup>25</sup> which, based on impressive study, attempted to estab-

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Supra* note 13.

<sup>22</sup> *Id.*

<sup>23</sup> *Supra* note 12.

<sup>24</sup> *Supra* note 13.

<sup>25</sup> ILA, REPORT OF THE SIXTY-SECOND CONFERENCE HELD AT SEOUL, AUGUST 24th to AUGUST 30th, 1986, 5.



lish the legal aspects of the NIEO, describes solidarity in a manner that appears to retain the "one-way principle" of the declarations preceding it:

The principle of solidarity reflects the growing interdependence of economic development, the growing recognition that States have to be made responsible for the external effects of their economic policies and the growing awareness that underdevelopment or wrong development of national economies is also harmful to other nations and endangers the maintenance of peace. Without prejudice to more specific duties of cooperation, all States whose economic, monetary and financial policies have a substantial impact on other States should conduct their economic policies in a manner which takes into account the interests of other countries by appropriate procedures of consultation. In the legitimate exercise of their economic sovereignty, they should seek to avoid any measure which causes substantial injury to other states, in particular to the interests of developing States and their peoples.<sup>26</sup>

The preamble of the Seoul Declaration states that the principles outlined are "generally recognized legal principles as well as others that need acceptance by treaty or as customary international law in order to obtain binding force." This suggests that each principle in the document must be examined in order to determine its legally binding character. Solidarity, then, appears to have been understood by the ILA as a principle in need of more widespread recognition. As set out in the Seoul Declaration, solidarity was still a functional rather than a material principle containing rights and duties; it was simply an appeal to developed countries on behalf of the LDCs.

#### 4. *The Declaration of International Economic Cooperation*

Attempts to define solidarity in the previously discussed documents were understood by all concerned as much-needed efforts to establish the responsibility of developed countries for the economic well-being of the LDCs. From the time of the NIEO onwards, however, developed countries resisted any recognition, let alone imposition, of legal obligations; and by the time of the special session of the General Assembly in 1990, a shift had occurred in the focus of the debate about the meaning

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<sup>26</sup> *Id.*

of solidarity.<sup>27</sup> The Declaration of International Economic Cooperation (1990),<sup>28</sup> does not mention any of the crucial terms used earlier, and the term "new international economic order" is nowhere to be found. This resolution adopts a different approach to North-South relations, focusing on human rights and protection of the environment as opposed to "unilateral" claims of developing countries.

The Declaration has three chapters. The first deals with the 1980s and judges that decade a loss for the developing countries: disparities between North and South increased rather than diminished.<sup>29</sup> The second chapter deals with the challenges and opportunities of the 1990s, focusing particularly on the environment.<sup>30</sup> Paragraph 29 says that environmental threats concern all states and must be avoided and remedied by all, according to their means. In light of the developed nations' wealth and technological capacities, it is apparent that most of these responsibilities are seen as devolving on them. The third chapter, dealing with obligations to cooperate in international development, says that development requires the concerted action of all states.<sup>31</sup> Developed countries should continue to promote growth that is not detrimental to other countries, and coordination of macroeconomic policies should take into consideration the interests of all states, especially the LDCs.

Statements by some representatives at the General Assembly special session echoed Judge Bedjaoui's argument for solidarity in economic relations on the basis of the interdependence of the global economy. "The world has grown more interdependent,' Brazil observed, 'and, paradoxically, less co-operative.'"<sup>32</sup> According to Singapore:

There are probably numerous reasons why more progress has been achieved in international political relations than in international economic relations. A possible reason could be that in the

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<sup>27</sup> See Russel Lawrence Barsh, *Current Developments: A Special Session of the UN General Assembly Rethinks the Economic Rights and Duties of States*, 85 AM. J. INT'L L. 192 (1991).

<sup>28</sup> The Declaration of International Economic Cooperation, U.N. GAOR 18th Spec. Sess., Supp. 2 U.N. Doc. A/S.18/15 (1990).

<sup>29</sup> *Id.*

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

<sup>31</sup> *Id.*

<sup>32</sup> *Supra* note 27, at 193.

global political sphere, many countries understand that they share a commonality of interests in mutual survival, whilst international economic relations is viewed as a zero-sum game. Markets, technology, exports, foreign exchange are seen as proprietary and exclusive, whilst political cooperation is perceived as a necessity.<sup>33</sup>

The President of Cyprus stressed that politics and economics are interdependent. It is a "paradox," he said, that members of the global community can appreciate the necessity of political cooperation without also appreciating the necessity of economic cooperation; in his opinion, the two cannot properly be kept distinct.<sup>34</sup>

On the whole, the declaration . . . represents a balanced compromise between North and South. It assigns proportionately greater responsibility for the economic problems of the 1980s, and meeting the 'challenges' of the 1990s, to the North. This responsibility will entail increased financial and environmental self-discipline, as well as transfer of resources and technology to the South. At the same time, the South will assume the burden of macroeconomic policy reform at the national level, including more attention to human rights and the environment.<sup>35</sup>

While it is difficult to weigh the influence of its conclusions on state practice, the 1990 Special Session marked an acknowledgement by states that they must share responsibility for the general welfare of the globe. This is an important affirmation of the concept of obligations *erga omnes*: the unilateral claims of the LDCs were tempered by their recognition that they, too, have commitments to the international community as well as to their own economic development.

##### 5. *The General Agreement on Tariffs and Trade (1947)*

The GATT<sup>36</sup> would appear to offer a fertile source of tangible signs of the principle of solidarity. Instead, it represents the conflict between concepts of solidarity based on equality and those based on preference. As is well known, three principles

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<sup>33</sup> *Id.*

<sup>34</sup> *Supra* note 27, at 193.

<sup>35</sup> *Supra* note 27, at 200.

<sup>36</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

inform the General Agreement: freedom, legal equality and reciprocity.<sup>37</sup> The NIEO, on the other hand, champions new principles such as protection of the economic interests of the LDCs, preferential treatment and nonreciprocity.<sup>38</sup> I will refer briefly to the unsuccessful attempt of the GATT to accommodate the principles of the NIEO.

The GATT accepts certain fundamental principles of liberal trade economics. The concept of legal equality finds expression in Article I.<sup>39</sup> Article XI (1) prescribes the elimination of quantitative restrictions on international trade.<sup>40</sup> Article XXVIII calls for the gradual reduction and eventual elimination of tariffs.<sup>41</sup> The GATT essentially assumes the existence of an international society of economically, financially and technically equal developed nations. Article XXVIII bis ¶ 1 expresses the principle of reciprocity in decisions dealing with the accession of new contracting parties.<sup>42</sup> However, in a society marked by differential development it was bound to reinforce the inequality of states and result in the polarization of economic power in the hands of a relatively small number of countries.<sup>43</sup> In order to overcome the inequities of the situation, several amendments were made to the GATT's original articles, so that the result that the document is now a hybrid of the classic principles of international trade and the newer principles of the NIEO.

In 1955, Article XVIII was amended specifically in order to make the treaty more attractive to developing countries.<sup>44</sup> The revision conferred extended preferential rights and privileges on those parties whose economies could support only low standards of living and were in the early stages of development. Paragraph 4.1 allowed less developed countries "to deviate temporarily" from the provisions of other articles of the Agreement,

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<sup>37</sup> *Id.*

<sup>38</sup> *Supra* note 12.

<sup>39</sup> *Supra* note 36.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> W. D. Verwey, *The Principles of a New International Order and the Law of the General Agreement on Tariffs and Trade (GATT)* 3 AM. J. INT'L L. 117, 122 (1990).

<sup>44</sup> See Protocol Amending the Preamble and Parts (ii) and (iii) of the General Agreements on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, 278 U.N.T.S. 168 (effective Oct. 7, 1957).

and the potential of this amendment to protect infant industries was reinforced by the adoption of the "Agreement on Interpretation and Application of Article VI, XVI and XXIII"<sup>45</sup> (1979).

On the question of the elimination of nontariff barriers to trade, the 1979 Agreement acknowledged that export subsidies were an integral part of economic development programs in developing countries. It also said that such countries should not be prevented from adopting policies necessary to support their industrialization, including assistance to their exporting industries. Article XXVIII bis ¶ 3(b) stipulates that tariff negotiations should provide "adequate opportunity to take into account the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of those countries to maintain tariffs for revenue purposes."<sup>46</sup> The farthest-reaching implementation of the fundamental principle of nonreciprocity is Part IV of the GATT, entitled "Trade and Development",<sup>47</sup> which entered into force in 1966.

From the 1960s through the 1980s, the economic gap between developing and developed countries widened, changes to the GATT notwithstanding. The number of persons the World Bank calls the "absolute poor" climbed to more than 1.3 billion, a 50 percent increase over the number in the late 1970s.<sup>48</sup> In other words, attempts to modify the GATT system to make it more attractive to the LDCs brought about changes that were perhaps largely cosmetic. Introducing principles of preferential treatment and nonreciprocity into the GATT attracted more signatories among the LDCs but did not appreciably diminish the effects of liberal trade on nonpowerful members. The failure of the modified GATT to enact the principles of solidarity, despite its seeming to ascribe to them, suggests that the concept of solidarity as "preference" needed to be rethought.

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<sup>45</sup> Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 1186 U.N.T.S. 204, *reprinted in* 18 ILM 579 (entered into force Jan. 1, 1980) [hereinafter the 1979 Agreement].

<sup>46</sup> *Id.*

<sup>47</sup> Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, Feb. 8, 1965, 17 U.S.T. 1977, 572 U.N.T.S. 320.

<sup>48</sup> SISSELA BOK, *COMMON VALUES* 2-4 (1995).

6. *The World Trade Organization (WTO) and the Connected Agreements (GATT 1994, GATS, and so forth)*

At the Summit Conference for the Middle East and North Africa in Casablanca, Morocco (October 31, 1994), six and one half months after the Final Act of the Uruguay Round was signed in Marrakesh,<sup>49</sup> Peter Sutherland, Director-General of the GATT, said: "In addition to consolidating and extending the frontier of trade liberalization, the WTO will also provide a platform for developing a new global trade agenda; for improving international economic cooperation and for promoting sustainable development in developing countries."<sup>50</sup> Whether future efforts to benefit the developing countries within the WTO framework will be fruitful remains to be seen. While changes in the GATT rules, the new rules on the liberalization of services, and the structure of the WTO organization do not improve the situation of the developing countries dramatically, their interests have not been totally neglected. I will now review a few of these agreements to indicate how far they take into account the principle of solidarity.

(a) The World Trade Organization

The Agreement establishing the WTO<sup>51</sup> provides for a political organ, the Ministerial Conference, which meets at least once every two years, and the General Council, which meets "as appropriate", which means more often than the Ministerial Conference. The Ministerial Conference will deal with politically difficult decisions, and the General Council will tackle technical questions.

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<sup>49</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (Dec. 15, 1993) *reprinted in* 33 I.L.M. 1140; Peter-Tobias Stoll, *Die WTO: Neue Welthandelsorganisation, neue Welthandelsordnung, Ergebnisse der Uruguay-Runde des GATT*, 54 ZAO RV 241 (1994). For an economic analysis of the negotiation, see Ernst-Ulrich Petersmann, *Why do governments need the Uruguay Round Agreements, NAFTA and the EEA?*, 49 AUSSENWIRTSCHAFT 31 (1994).

<sup>50</sup> GATT WTO News, 31 October 1994, issued by the Information and Media Relations Division of GATT.

<sup>51</sup> Agreement Establishing the World Trade Organization, pt. II of Final Act embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (Dec. 15, 1993), *reprinted in* 33 I.L.M. 144 (1994), pt. II.

A Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions, and a Committee on Budget, Finance and Administration will function as Ministerial Conference subcommittees. The Committee on Trade and Development will provide developing countries with a forum in which they can monitor the effects of the Agreements of the Uruguay Round on their development and seek implementation measures and system changes to ensure that their needs are not neglected. The Committee on Trade and Development will periodically review the special provisions in the Multilateral Trade Agreements in favor of the least-developed member states and report to the General Council for appropriate action.

An important feature of the WTO Agreement is the "reuniversalization" of the GATT rules.<sup>52</sup> Professor John Jackson of the University of Michigan rightly used the term "Balkanization" to describe the old structure of the GATT system, under which a group of states was allowed to develop rules binding *inter se* without obtaining the consent of all GATT members to amend the GATT agreement itself.<sup>53</sup> While, previously, a series of separate agreements (for example, the codes on standards subsidies and anti-dumping) had been concluded by interested member states outside the GATT ambit, membership in the WTO now requires acceptance of the whole set of rules. According to Article II of the Agreement Establishing the World Trade Organization, the agreements included in Annexes 1, 2 and 3 of the Final Act of the Uruguay Round (basically the separate agreements or codes on standards, subsidies and anti-dumping adopted by some GATT members at the Tokyo Round), are now an integral part of GATT 1994 and therefore binding on all members.<sup>54</sup> The members of the WTO must also accept the new agreements negotiated in the Uruguay Round, especially the agreements on trade in services, on trade-related aspects of

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<sup>52</sup> Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GAAA*, 88 AM. J. INT'L L. 477, 478 (1994). See also Knut Ipsen & Ulrich R. Halter, *Rule of Law in den Internationalen Wirtschaftsbeziehungen: Die Welthandelsorganisation*, 40 RECHT DER INTERNATIONALEN WIRTSCHAFT 717, 719 (1994).

<sup>53</sup> John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 36, 52 (1980). See also Lowenfeld, *supra* note 52, and discussions by panelists, including John H. Jackson, in AM. J. INT'L L., *Proceedings of the 89th Annual Meeting*, April 5-8, 1995, pp 316-337.

<sup>54</sup> *Supra* note 51.

intellectual property rights, on trade-related aspects of investment measures, and on trade in textiles and clothing.<sup>55</sup>

Missing from the Uruguay Round agenda was a fundamental reform of the GATT in order to enable developing countries to acquire a more balanced share of the world market. The driving force behind the negotiations was the developed countries, particularly the United States, which sought *inter alia*, to gain better market access in the service sector and to secure better protection of intellectual property rights.<sup>56</sup> Nevertheless, the developing countries did achieve some benefits.

#### (b) General Agreement on Trade in Services (GATS)

During the negotiations on the liberalization of services, developing countries were preoccupied with questions of sovereignty. Service industries in these countries are often owned by governments, which use them as instruments of economic and social policy. Governments of these states thus have been reluctant to deregulate their service sectors and grant access to foreign competitors, even though the latter often can provide more efficient services and indeed stimulate growth in other sectors of a national economy.

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<sup>55</sup> *Id.* A few former agreements concluded by some Member States under the ambit of the old GATT system are now called Plurilateral Trade Agreements. They are binding only on those members who have agreed to them. The agreements include the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Arrangement and the International Bovine Meat Agreement (See Annex 4 of the Final Act).

<sup>56</sup> See Terrence G. Berg, *Trade in Services: Toward a 'Development Round' of GATT Negotiations Benefiting Both Developing and Industrialized States*, 28 HARV. INT'L L.J. 1 (1987) (for a detailed analysis of the policy goals of the United States and their negotiating position in the Uruguay Round in relation to services). See generally THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986-1992) (Terence P. Stewart ed., 1994). A brief history of the negotiations is provided by Stoll, *supra* note 49, at 241-339. According to Thomas Oppermann and Marc Beise, the Uruguay Round had a negative impact on trade diplomacy. Thomas Oppermann & Marc Beise, *Die neue Welthandelsorganisation - ein stabiles Regelwerk für weltweiten Freihandel?* 49 EUROPA ARCHIV 195, 199 (1994). The most important compromises were reached in negotiations between the main opponents, the United States and the European Union. *Id.* Japan and Canada were also important players but the smaller states found themselves in a "take it or leave it" situation. *Id.* They foresaw major difficulties in upcoming debates over the issue of trade and environment. *Id.*



The "general obligations" in Part II of the GATS,<sup>57</sup> binding on all member states, contain provisions on most-favored-nation (MFN) treatment and on publication and notification of national measures or international agreements ("transparency," Article III).<sup>58</sup> Article VII deals with the recognition of professional qualifications and requires nondiscriminatory treatment.<sup>59</sup> The obligations in Part III go farther but are not automatically binding. Article XVII requires national treatment of suppliers of services.<sup>60</sup> Article IX prohibits the hindering of payment for services.<sup>61</sup> These and the other Part III obligations arise only for member states that agree to them.

Article IV of the GATS pays special attention to the needs of developing countries.<sup>62</sup> It says that the increasing participation of developing-country member states in world trade is to be facilitated through negotiated specific commitments by members pursuant to Parts III and IV of the Agreement.<sup>63</sup> Part IV schedules successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving progressively higher levels of liberalization.<sup>64</sup> The commitments that must be negotiated in the future relate to access to markets, technology, distribution channels and information networks.<sup>65</sup> The agreement on services makes it clear that the industrialized countries are not willing to negotiate obligatory technology transfers as stipulated in Part XI of the Law of the Sea Convention before it was changed.<sup>66</sup> Article IV of the GATS

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<sup>57</sup> General Agreement on Trade in Services, in Uruguay Final Round Act, December 15, 1993, Annex 1B, GATT Doc. No. MTN/FA, 33 ILM 1130 (1994).

<sup>58</sup> *Id.*

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

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

<sup>61</sup> See Annex 1B, *supra* note 57.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

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

<sup>65</sup> See Annex 1B, *supra* note 57.

<sup>66</sup> MAHMOUDI, *THE LAW OF DEEP SEA-BED MINING* (1987); see also Norbert J. Prill, *Technologietransfer und Meeresnutzung*, 38 ZAORV 801 (1978); Renate Platzöder, *Substantive Changes in a Multilateral Treaty Before Its Entry into Force: The Case of the 1982 United Nations Convention on the Law of the Sea*, 4 EUR. J. INT'L L. 390 (1993); Marius B. Berenbrok and Peter Nussbaum, *Zum Inkrafttreten des Seerechtsübereinkommens der Vereinten Nationen*, 40 RECHT DER INTERNATIONALEN WIRTSCHAFT 910 (1994).

provides for technology access on a commercial basis aimed at strengthening the capacity, efficiency and competitiveness of service sectors in developing countries.<sup>67</sup>

Access to information about service markets in developed countries is to be facilitated in order to improve market access for service suppliers in developing countries. According to Article IV(2) of the GATS, industrialized countries must establish contact points within two years from the date of entry into force of the WTO Agreement and make available information about commercial and technical aspects of the supply of services, about registration, recognition, professional qualifications, and the availability of services technology.<sup>68</sup>

(c) GATT 1994 and Dispute Settlement

The dispute-settlement procedure of Article XXIII of GATT 1947 made it possible for the losing party to block the adoption of a panel report. Panel reports required the approval of the GATT Council to become effective; every member state had one vote in the Council, and the decision required unanimity. At the same time, when their interests were in jeopardy, the economic powers, by exerting economic pressure on states they regarded as recalcitrants, were able to enforce GATT rules outside the ambit of the established dispute-settlement mechanism. In this context, one thinks immediately of the famous (or infamous) procedure under section 301 of the U. S. Trade Act.<sup>69</sup>

The Understanding on Rules and Procedures Governing the Settlement of Disputes establishes a stricter, more effective system.<sup>70</sup> A major reform is that, unless disapproved by consensus, panel decisions go into effect automatically within sixty days. Article 23 of the Understanding, "Strengthening of the Multilateral System," provides that, when member states seek redress of a violation of the GATT or a related agreement, "they shall have recourse to, and abide by the rules and procedures of this understanding"; and they shall not make a determination

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<sup>67</sup> See Annex 1B, *supra* note 57.

<sup>68</sup> *Id.*

<sup>69</sup> See AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh Patrick eds., 1990).

<sup>70</sup> For an evaluation of the new dispute-settlement procedure, see Lowenfeld, *supra* note 52, at 479; Stoll, *supra* note 49, at 266; and Bernard May, *Der erfolgreiche GATT-Abschluss - ein Pyrrhussieg?*, 49 EUROPA-ARCHIV 33, 37 (1994).

that a violation has occurred or that benefits have been nullified, "except through recourse to dispute settlement in accordance with the . . . Understanding."

(d) Agreement on Textiles and Clothing

The gradual integration of the clothing and textile sector into the GATT system has been a matter of importance for developing countries.<sup>71</sup> Their market access was severely restricted by the Multifiber Arrangement, which protected the interests of the industrialized countries' textile industries.<sup>72</sup> Although those countries were able to negotiate a long transition period of ten years, the new Agreement will gradually phase out Multifiber Arrangement restrictions.

(e) Agreement on Agriculture

As is well-known, agriculture proved to be the most difficult aspect of the Uruguay Round. In this trade arena, the dividing line runs not between North and South but between Europe and North America.<sup>73</sup> Import quotas will now be transformed into duties, the duties will be reduced, and exports of subsidized agricultural products will also be reduced. While these arrangements will considerably benefit developing countries that are food exporters, they will cause difficulties for the poorest countries that are food importers. Low-income, food deficit countries will not be able to go to the market and buy sufficient food, if prices rise, as is likely. This problem — a real one — was addressed by the "Decision on measures concerning the possible negative effects of the reform programme on least-developed and net food-importing developing countries." These countries are to be granted differential treatment in agreements relating to agricultural export credits and international financial institutions are to take measures to alleviate short-term financial difficulties of developing countries.

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<sup>71</sup> For Agreement on Textiles and Clothing, *supra* note 57, Annex 1A.

<sup>72</sup> Damian Chalmers, *The Multifibre Arrangement—Ripping The Shirt Off The Poor Man's Back*, in *INTERNATIONAL ECONOMIC LAW AND DEVELOPING STATES*, 193 (Hazel Fox ed., 1992).

<sup>73</sup> For Agreement on Agriculture, *supra* note 57, Annex 1A. *See also* Stoll, *supra* note 49, at 283.

The Decision also deals with humanitarian relief. It was agreed that the implementation of the results of the Uruguay Round on trade in agriculture would not adversely affect the availability of food aid at a level sufficient to assist in meeting the food needs of developing countries, especially least-developed and net food-importing developing countries. To this end, member states agreed to review the level of food aid established periodically by the Committee on Food Aid under the Food Aid Convention (1986) and to initiate negotiations to establish a level of food aid commitments sufficient to meet the needs of developing countries during the reform program; to adopt guidelines to ensure that an increasing proportion of basic food-stuffs is provided to least-developed and net food-importing developing countries; and to give full consideration to requests for the provision of technical and financial assistance to those countries to improve their agricultural productivity and infrastructure.

These obligations are not formulated in language sufficiently precise to confer concrete rights for aid payments on developing countries, but at least the problems facing them in this sector were addressed in very clear terms. In short, the decision on attenuating the possible negative effects of the reform program on net food-importing countries is useful for developing countries seeking to strengthen their position when they negotiate for specific assistance from international institutions and from developed states. The text is also important because it recognizes the obligation of the community of states (members of the GATT/WTO) to remedy the negative effects of their activities on the least wealthy members of the community.

(f) Agreement on Trade-Related Investment Measures  
(TRIMS)

Following on from the discussion of the concept of the New International Economic Order in the 1970s, developing countries, relying on their sovereign rights to regulate foreign direct investment, imposed strict controls and restrictions on foreign investment—especially on the activities of multinational corporations.<sup>74</sup> Conditions short of expropriation on, for example, lo-

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<sup>74</sup> See Agreement on Trade-Related Investment Measures, opened for signature Dec. 15, 1993, GATT Sales No. 1994 - 4 (1994) [hereinafter TRIMS].

cation, employment, procurement of materials and components, exports, and local participation in ownership were at first accepted, albeit reluctantly, by most of the developed countries.<sup>75</sup> In the 1980s, however, European countries and the United States concluded investment treaties under which they sought to secure access to Third-World markets and at the same time limit restrictions on their investments.

The United States was keen to transform the standards of the older investment treaties into multilateral standards that abolished or restricted regulations of the host country on, for example, local content requirements, export performance requirements, trade balancing requirements, and foreign exchange restrictions. Predictably, developing countries opposed the inclusion of these matters in the GATT negotiations. In the end, the Agreement on TRIMS, which applies to trade in goods,<sup>76</sup> provided that TRIMS in violation of the principle of national treatment<sup>77</sup> or the prohibition of quantitative restrictions<sup>78</sup> should not be applied. The Annex to the TRIMS Agreement contains an "illustrative list" of such measures.<sup>79</sup>

Developing countries are granted a transition period of five to seven years, which may be extended.<sup>80</sup> Article IV allows developing countries to deviate temporarily from the obligations on national treatment and the abolition of quantitative restrictions. They have thus been able to defend (at least temporarily) their sovereign rights to restrict investments. Unfortunately, however, they have not attempted to obtain a code of restrictive business practices, which could strengthen their capacity to protect against the abusive practices of multinational corporations.

(g) Trade-Related Aspects of Intellectual Property Rights (TRIP)

Intellectual property is another field in which the Uruguay Round altered the earlier claims and practices of the developing

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

<sup>76</sup> See GATT, *supra* note 36, art. 1.

<sup>77</sup> See GATT, *supra* note 49, art. III.

<sup>78</sup> See GATT, *supra* note 49, art. XI.

<sup>79</sup> TRIMS, *supra* note 74.

<sup>80</sup> See GATT, *supra* note 36, art. 5.3.

countries. The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>81</sup> binds WTO Members to the material (not the procedural and institutional) provisions of existing conventions in the field of intellectual property.<sup>82</sup> Article III imposes an obligation for national treatment, Article IV for MFN treatment.<sup>83</sup> Article VII ("Objectives") refers to the protection and enforcement of intellectual property rights as a way of promoting technological innovation and refers specifically to the transfer and dissemination of technology.<sup>84</sup> Article VIII permits restrictions, if they are necessary to protect public health and nutrition or to promote the public interest in sectors of vital importance to socioeconomic or technological development.<sup>85</sup> Measures needed to prevent the abuse of intellectual property rights or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology are also accepted.<sup>86</sup> Article XL concerns the control of anti-competitive practices in contractual licenses and requests the host country of enterprises applying such practices to enter into consultations with member states affected by such practices.<sup>87</sup>

## 7. *Conclusions*

In this brief overview, we see that the (limited) success of the compromise of the Declaration of International Economic Cooperation and the failure of the GATT and the new WTO markedly to incorporate the principle of solidarity illustrate how the dynamic of the principle should and should not be understood. Although, in the instruments discussed, the principle of solidarity was first conceived as an obligation on the part of developed countries to the LDCs, the past four decades have revealed the essential error of that conception.

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<sup>81</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994 [hereinafter TRIP], *reprinted in* The Results of the Uruguay Round of Multilateral Trade Negotiations — The Legal Texts 6-19, 365-403 (GATT Secretariat ed., 1994) [hereinafter Results of the Uruguay Round].

<sup>82</sup> TRIP, *supra* note 81, art. 1(1).

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

<sup>84</sup> *Id.*

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

<sup>86</sup> TRIP, *supra* note 81.

<sup>87</sup> *Id.*

The "one-sided" obligation of solidarity made it practically impossible for any developed state willingly to recognize a general legal obligation arising from it. Although the political and economic context of the period following decolonization seemed to create a sense among the Group of 77 that the North did indeed "owe" the South, there has been no indication that any such debt can or ever will be paid, so long as the relevant obligation is perceived as belonging solely to the developed countries.<sup>88</sup> The continuing deterioration in terms of trade for the LDCs indicates that "preferential treatment" alone is not the solution.

In his remarkable study on the principle of solidarity in international economic law, Raimund Schütz analyzes state practice in the United States, the United Kingdom, France and Germany, as well as the practice of international organizations, such as the International Monetary Fund, the European Community and the International Commodity Organization.<sup>89</sup> He first identifies a number of claims related to the idea of solidarity, such as financial assistance, transfer of technology, preferential and nonreciprocal treatment and stable export income. At the end, he is able to provide a few instances in which such rights are vested in the developing countries—for example, the right to financial assistance in the bilateral relations between France and its former colonies in black Africa, and the right of the African-Caribbean-Pacific states in the Lomé Convention to unhindered EC market access. One of the central conclusions of this important work is that state practice and the practices of international organizations have recognized "solidarity rights" only in situations where there are obligations on *both* sides, including, for example, the duty of developing countries to supply natural resources, to use financial assistance efficiently and to realize specific development projects. The kind of reciprocity in-

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<sup>88</sup> The Group of 77 is an intergovernmental caucus of the United Nations General Assembly created in 1963 to promote the economic interests of the developing countries.

<sup>89</sup> SCHÜTZ, *supra* note 2. Schütz also looks at the practice of the following institutions: International Bank for Reconstruction and Development, International Development Association, International Fund of Agricultural Development, regional development banks, United Nations Development Programme, Food and Agriculture Organization, United Nations Industrial Development Organization, GATT, Common Fund for Commodities.

volved here does not always imply "equal" obligations; rather, the relationship is understood in a broader sense of displaying *a balance of long-term interests* between developed countries, who give assistance, and developing countries, who receive it.

At this point, we can recall Vattel's statement that solidarity involves the idea of states offering "mutual assistance in order to improve their general situation and relations."<sup>90</sup> The key word is "mutual." While it is apparent that wealthier states will be in a better position to offer assistance to poorer states, this should not lead to the conclusion that poorer states have no corresponding obligations to the international community or to their own nationals. The interdependence of states precludes this conclusion. It follows that the principle of solidarity cannot create a global welfare state, for "welfare" also denotes a lopsided obligation in the preferential treatment of the "have-nots" by the "haves." The cooperative compromise of the Declaration of International Economic Cooperation indicates that solidarity should create a context in which states acknowledge that they have obligations to the peace, prosperity, and cultural and environmental health of the global community, and that they must act in accordance with these obligations.

In theory, then, solidarity extends beyond the welfare obligations of strong to weak states. It should be conceived of as the impetus behind genuine cooperative effort on the part of all states. Differences in resources and capacities mean that there will be differences as to how states meet their obligations, but the fact remains that all states share these obligations. Solidarity, in short, goes beyond "leveling the playing field"; it applies itself to the rules of the game. Recalling the words of Singapore at the 1990 General Assembly special session, solidarity changes the rules from the zero-sum game—"In order to win, someone else must lose"—to "No one wins unless everyone wins."

This conception of solidarity may not fit comfortably into the current context of global economic activity. The WTO framework, however, with its connected treaties, contains not only escape clauses and exceptions for developing countries but also a few embryonic elements of a maturing understanding of

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<sup>90</sup> Vattel, *supra* note 2.



solidarity. The developing countries have for the first time accepted obligations to reduce tariffs. Furthermore, two key advantages for them stem not from further exceptional treatment but from the genuine application of the principles of the GATT. First, the restrictive regulation of trade in textiles will be phased out. Secondly, the dispute-settlement procedure has been improved. Since developing countries are usually not in a position to use economic pressure to coerce violators of the GATT rules to fulfil their obligations, the stricter dispute-settlement procedure should be to the advantage of the former.

Nonetheless, there are shortcomings in the Final Act of the Uruguay Round. Two examples should be sufficient for purposes of illustration. Agriculture and textiles, sectors in which developing countries should be able to rely on their low labor costs to competitive advantage, still suffer from the protectionism of the developed countries. The Uruguay Round does phase out the trade restrictions of the Multifiber Agreement, in that way opening textile markets, but the ten-year transition period is too long. In the agricultural sector, the negotiations were driven mainly by the conflicting interests of the United States and the European Community; the interests of the developing countries were not really an issue.

It is thus apparent that there is a long way to go before we can say that the international economic system has incorporated the principle of solidarity in any comprehensive sense. In the sphere of international environmental law, however, the principle has been more widely accepted, and we now turn our attention to that area.

#### IV. SOLIDARITY IN INTERNATIONAL ENVIRONMENTAL LAW

##### 1. *The Stockholm Declaration*

The 1972 Stockholm Declaration on the Human Environment<sup>91</sup> said that there is a need "for a common outlook and for common principles to inspire and guide the peoples of the world."<sup>92</sup> Indeed, the success of the Stockholm Conference was ascribed, in the language of the late Wolfgang Friedmann, to

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<sup>91</sup> UN Doc. A/Conf. 48/14 (1972) reprinted in 11 I.L.M. 1416.

<sup>92</sup> *Id.* See further, Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423 (1973).

the growing realization that the "public international law of co-existence" was rapidly being replaced by the "public international law of cooperation." Principles 21 and 22 of the Stockholm Declaration echoed the Trail Smelter decision: states must ensure that activities within their jurisdiction "do not cause damage to the environment of other states."<sup>93</sup> Principle 22 said that states must cooperate in developing laws on the liability of polluting countries.<sup>94</sup> The Organisation For Economic Co-operation and Development (OECD) Principles Concerning Transfrontier Pollution, which came into existence as a direct result of the Stockholm conference, states in its preamble that "the common interests of countries concerned by trans-frontier pollution should induce them to cooperate more closely in a spirit of international solidarity and to initiate concerted action for preventing and controlling transfrontier pollution."<sup>95</sup> Several scholars have suggested that the principles in the Stockholm and OECD documents are indicative of custom in international law.

The Stockholm Declaration recognized the interrelationship of economic and environmental development and spelled out ways in which assistance should be given to developing countries. For instance, Principle 9 states that "Environmental deficiencies generated by the conditions of under-development and natural disasters [pose] grave problems and [can] best be remedied by substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as might be required."<sup>96</sup> The United Nations Environmental Programme (UNEP), established by the General Assembly in 1972, was an-

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<sup>93</sup> United States v. Canada, 3 R.I.A.A. 1905 (1931-1941). On these questions see Sir Robert Jennings, *The Role of I.C.J. in the Development of International Environmental Law*, address delivered at the Earth Summit in Rio, 1992; see also HARALD HOHMANN, PRÄVENTIVE RECHTSPFLICHTEN UND - PRINZIPIEN DES MODERNEN UMWELTVÖLKERRECHTS (1992); Ulrich Beyerlin, *Grenzüberschreitender Umweltschutz und allgemeines Völkerrecht*, in 98 FESTSCHRIFT FÜR KARL DOEHRING 37 (Beiträge Zum Ausländischen öffentlichen Recht und Völkerrecht, 1989); Bruno-Otto Bryde, *Umweltschutz durch allgemeines Völkerrecht?*, 31 ARCHIV FÜR VÖLKERRECHT 1 (1993); for an overview see Wolff Heintschel von Heinegg, *Internationales öffentliches Umweltrecht*, in VÖLKERRECHT 805 (Knut Ipsen ed., 3d ed. 1990).

<sup>94</sup> *Supra* note 91.

<sup>95</sup> 14 ILM 242 (1975).

<sup>96</sup> *Supra* note 91.

other positive result of the Stockholm Conference. As an organ of the General Assembly, UNEP coordinates international environmental activities and prepares draft conventions. Its Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States extends the Stockholm declaration but has not yet been formally adopted by the General Assembly.<sup>97</sup>

## 2. *The Montreal Protocol on Substances that Deplete the Ozone Layer*

In the twenty years since the adoption of the Stockholm Declaration, we have seen the coming into force of a number of conventions; they show that cooperation in dealing with environmental problems goes beyond concern for neighboring states and has become a legal duty. I will focus for a moment on the Vienna Convention for the Protection of the Ozone Layer (1985),<sup>98</sup> because the 1990 amendment of its Montreal Protocol marks a crucial turning point in the development of international environmental law. As Patrick Széll said:

When the history of international environmental law comes to be written, 19 June 1990 will stand out as a critical date. On that day a large number of the world's States agreed, for the first time, on a financial regime to tackle, in a really meaningful way, the interrelationship between environment and development. Earlier international environmental instruments contained numerous references to 'taking into account in particular the needs of the developing countries' . . . to manage their environments, but did little, if anything, to meet those needs or expand those capabilities.<sup>99</sup>

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<sup>97</sup> See text of the UNEP Draft in 17 ILM 1091 (1978); see also comments by Dietrich Rauschning *Allgemeine Völkerrechtsregeln zum Schutz gegen grenzüberschreitende Umweltbeeinträchtigungen*, in STAATSRECHT-VÖLKERRECHT-EUROFARECHT, Festschrift für Schlochauer, 557, 569 (Ingo von Münch ed., 1981).

<sup>98</sup> Vienna Convention for the Protection of the Ozone Layer, opened for signature Mar. 22, 1985, U.N. Doc. UNEP/IG.53/Rev. 1, T.I.A.S. No. 11,097, 26 ILM 1529 (1987) [hereinafter Vienna Convention].

<sup>99</sup> Patrick Széll, *Ozone Layer and Climate Change*, in ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 167 (Winfried Lang et al. eds., 1991); on the relationship between environmental protection and development see also

The Vienna Convention sets forth a number of general obligations and some specific provisions on monitoring, interstate cooperation, exchange of information, and so on.<sup>100</sup> Because it obliges the parties to cooperate in various ways, it has produced practical results in terms of environmental protection of the ozone layer, as scientific evidence regarding the damaging effects of ozone-depleting substances and public concern have increased, and as technological progress has enabled industry to find satisfactory substitutional substances.<sup>101</sup>

The Montreal Protocol<sup>102</sup> to this convention provides for a staged reduction of both the consumption and production of the five most depleting chlorofluorocarbons (CFCs) and a freeze on the production and consumption levels of three other compounds.<sup>103</sup> It also limits trade in depleting substances with nonparties and takes account of the special situation of developing countries.<sup>104</sup> Apart from granting generous time tables for the reduction of relevant substances to the developing countries, the protocol calls on the parties to make available environmentally safe substitutes and related technology and to support their use through the granting of subsidies, aids, credits, guarantees and insurance programs.<sup>105</sup>

Important for our present purposes, the protocol established a multilateral fund to enable developing countries to comply with their environmental obligations.<sup>106</sup> Proposals to

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ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT (R. D. Munro & J. G. Lammers eds., 1987).

<sup>100</sup> *Supra* note 98.

<sup>101</sup> *Supra* note 98.

<sup>102</sup> The Montreal Protocol on Substances That Deplete the Ozone Layer, opened for signature Sept. 16, 1987, 26 ILM 1550 (1987) [hereinafter Montreal Protocol].

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

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* The Montreal Protocol contains an interesting procedure for expanding the obligations of this regime. While "amendments" to the Vienna Convention and its protocols must be ratified (Articles 9, 10, 13 Vienna Convention), the "adjustments" (Articles 2.9, 2.10) can be adopted by a two-thirds majority of the parties present. See Peter M. Lawrence, *International Legal Regulation for Protection of the Ozone Layer: Some Problems of Implementation*, 2 J. ENVTL L. 17, 34 (1990).

<sup>106</sup> The fund's capital (\$160 million over three years from 1991-93) was increased by \$40 million to \$200 million for the same period after China joined the Montreal Protocol. The fund is administered by an Executive Committee that consists of seven representatives of developing countries and seven from other countries. Montreal is the venue of the secretariat of the fund. See Peter Lawrence,

establish the fund were initially opposed by the United States, which was anxious to avoid a precedent; but agreement was eventually reached on a fund that would also serve as an incentive to developing countries to become parties to the protocol. This fund is financed by contributions levied on developed countries in accordance with the UN scale of assessment. The overall policy of the fund is determined at annual meetings of the parties acting in cooperation with the World Bank, the UNEP and the UNDP.

The fund is designed to cover the "incremental" costs of developing countries in meeting their obligations under the Montreal Protocol—for example, the cost of converting existing production facilities in order to produce substitutes for ozone-depleting substances. The protocol also provides for the sharing of information.

### 3. *The Mediterranean Action Plan*

Most attempts to regulate the international environmental order with hard-law instruments, such as those I have referred to, have met resistance similar to that experienced by attempts to regulate the international economic order. Part, but certainly not all, of the difficulty is that environmentally hazardous behavior is often linked with economic interests. Deeply entrenched in the discourse is the idea that environmental protection will impair economic growth—an effect that both developed and developing countries see as a cause for concern.

As a result of inequalities in resources, different economic needs, and the difficulties of attributing legal responsibility, international environmental regulation has not based itself on strict legal rights and duties. "Soft law" regimes, usually at the regional level, that set out objects, purposes and interests, have frequently replaced firm legal obligations. It is generally understood that "soft law" creates and delineates goals to be achieved in the future rather than strict directives for instant action. Fortunately, the practice of states indicates that these guide-

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*Technology Transfer Funds and the Law—Recent Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 4 J. ENVTL. L. 15, 18 (1992); Peter H. Sand, *International Environmental Law After Rio*, 4 EUR. J. INT'L L. 377, 388 (1993) (for remarks on the bipolar structure of this committee and other organizations).

lines are taken seriously, even in the absence of enforcement mechanisms.<sup>107</sup>

An example of the success of soft-law regimes is the Mediterranean Action Plan (Med Plan) which, driven by information supplied by an "epistemic community" of scientists, began in the early 1970s under the auspices of the UNEP. The Med Plan began as a loose and informal effort to coordinate the policies of states bordering on the Mediterranean and grew, over the next decade, into a more traditional legal arrangement with standards and enforcement mechanisms at regional and local levels. The Plan demonstrates that, at least with regards to environmental problems, soft-law can help to define standards of good behavior without the need for those standards to be consecrated as norms of customary law. Soft-law creates the "pull" of legitimacy even without sanctions. The coherence it confers on states' behavior enables, and possibly expedites, the lawmaking process. It is significant that soft-law creates this pull of legitimacy *through the articulation of common goals*. Soft-law is itself a reflection of solidarity.

#### 4. *The UN Conference on Environment and Development*

Twenty years after the Stockholm Conference of 1972, the UNCED—the largest UN conference ever organized, with more than 30,000 participants from 176 countries—took place in Rio de Janeiro.<sup>108</sup> Although the link between development and environmental protection was recognized by the Stockholm Declaration, the fact is that developmental concerns received rather peripheral attention in that important document. The Rio Conference, in contrast, placed development at the very center of its concerns. Principle 4 of its Declaration states, "In order to achieve sustainable development, environmental protection

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<sup>107</sup> See Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377 (1989); Aldo Chircop, *Cooperative Regimes in Ocean Management: A Study in Mediterranean Regionalism* (1988) (unpublished doctoral thesis, Dalhousie Law School (Canada)); and Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420 (1990).

<sup>108</sup> See Sand, *supra* note 106.

shall constitute an integral part of the development process and cannot be considered in isolation from it."<sup>109</sup>

The Convention on Climate Change, opened for signature at Rio, covers carbon dioxide and all other greenhouse gases and establishes a process by which emissions of those gases can be monitored and controlled.<sup>110</sup> It does not lay down a specific timetable for a freeze on or reduction of emissions, but it provides a framework within which to proceed and sets conferences on a regular basis to "examine the obligations of the parties and the institutional arrangements under the convention."<sup>111</sup> The first conference, in Berlin in 1995, did not succeed in setting a fixed date and a fixed reduction target for carbon dioxide emissions; it agreed instead to negotiate a protocol in 1997.

Article 11 of the Convention on Climate Change establishes a mechanism to provide financial resources on a grant or concessional basis, for assistance with, *inter alia*, the transfer of technology.<sup>112</sup> Article 4 lists the kinds of assistance, including financial transfers, that are expected from the developed countries.<sup>113</sup> They are to assist developing countries that are especially vulnerable to the adverse effects of climate change—for example, small island-states and states with low-lying coastal areas—in meeting the costs of adapting to those adverse effects.<sup>114</sup> They are to facilitate and finance the transfer of or access to environmentally sound technologies and know-how to developing countries to enable them to implement the provisions of the convention. The treaty does not contain provisions on the administration of the fund or the contributions of the developed countries, but the interim arrangement in Article 21 provides that financial assistance under the convention is to be channeled through the Global Environmental Facility (GEF)<sup>115</sup> of

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<sup>109</sup> Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, U.N. Doc. A/CONF. 151/5/Rev. 1 (1992), reprinted in 31 ILM 874.

<sup>110</sup> Framework Convention on Climate Change, United Nations Conference on Environment and Development, U.N. Doc. A/AC. 237/18, May 9, 1992, reprinted in 31 ILM 849 (1992).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Supra* note 110.

<sup>115</sup> The GEF was launched in November 1990 as an experimental three-year program. The fund, in excess of \$1.000 million, is managed by the World Bank and

the World Bank, the UNDP, and the UNEP.<sup>116</sup> The Convention on Biological Diversity<sup>117</sup> also contains provisions on technology transfer (Article 16) and financial funding (Article 29).

It is not surprising that the industrialized countries are somewhat reluctant to contribute to the climate change and biodiversity funds. While the funds established by the Montreal Protocol are ear-marked for specific problems, especially those in the context of the substitution of the CFCs, the funds established by the Rio Conference are directed at problems of a much larger scale. Nevertheless, the point of these and other examples is that at the Rio Conference the international community recognized that environmental protection of the globe and the development of all states is a common aim now formulated in the principle of sustainable development.

It is apparent, then, that technology transfer and contributions to the funds are not to be thought of as donations; the industrialized states by such measures fulfill their obligations under the principle of solidarity. Developing states have a corresponding obligation under the same principle to cooperate and participate in the common efforts to protect the environment. It can be expected that developed countries will be more willing to provide funds when developing countries comply with the terms of the conventions and when the funds are seen to have been used effectively.

## 5. Conclusions

Thus far, I have noted similarities between environmental and economic regulation. These similarities arise from the fact that economic and environmental issues are interconnected; both present challenges to enforcement of rights and duties at the international level, and both reveal the essential interdependence of states.

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is designed to help developing countries relieve pressure on global ecosystems. See Peter Slinn, *Development Issues: The International Law of Development and Global Climate Change*, in *INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE* 75, 92 (Robert Churchill & David Freestone eds., 1991).

<sup>116</sup> See Sand, *supra* note 106, at 387; Urich Bayerlin, *Rio-Konferenz 1992: Beginn einer neuen globalen Umweltrechtsordnung?*, 54 *ZaöRV* 124, 136 (1994).

<sup>117</sup> The Convention on Biological Diversity, U.N. Misc. Doc. [ST/DPI/1307-Oct. 1992, June 5, 1992, 31 *ILM* 1818 (1992).



It is consistent with the interconnectedness of these two matters that the growing consensus about environmental issues should be mapped onto economic issues. More developed, perhaps, in the economic than in the environmental sphere is the sense that the obligations of solidarity devolve on all states. In the domain of environmental law, however, the concept of mutually beneficial common goals is more clearly articulated. If the two developments—still apparently distinct—are combined, a picture resembling the previously described theoretical conception of solidarity begins to emerge.

Solidarity is neither charity nor welfare; it is an understanding among formal equals that they will refrain from actions that would significantly interfere with the realization and maintenance of common goals or interests. Solidarity requires an understanding and acceptance by every member of the community that it consciously conceives of its own interests as being inextricable from the interests of the whole. No state may choose to exercise its power in a way that gravely threatens the integrity of the community. This principle would have an obvious impact on economic law; larger, more powerful capital-exporting states could not, by placing their own interests first, significantly interfere with the interests of smaller, weaker countries. Similarly, in the environmental domain, no state, whether developed or developing, could significantly interfere with the general interest of the community by asserting that its narrower national interests came first.

#### V. SOLIDARITY IN THE CONSTITUTIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY AND IN THE LEGAL ORDER OF THE EUROPEAN COMMUNITIES

Several solidarity-related concepts are already well established in various parts national and international judicial systems; even a brief reference to these examples will help us acquire a sense of the future development of the principle of solidarity at the broader international level.

### 1. *Bundestreue in German Constitutional Law*

The principle of "Bundestreue" has a long history in German constitutional law.<sup>118</sup> This principle translates into English as "fidelity to the federation."<sup>119</sup> This duty of loyalty to the federation and to the idea of cooperation between the federal government and the Länder influences the strict interpretation and application of the letter of the Basic Law.

The German Constitutional Court first elaborated the principle of Bundestreue in the 1950s and used it most aggressively in the 1960s.<sup>120</sup> It was first mentioned in 1952 in a case where the Constitutional Court held that a legislative provision requiring the Länder to agree to the allocation of federal funds demanded unanimous consent of all Länder.<sup>121</sup> The Court emphasized, however, that a duty of fidelity obligated the Länder to cooperate and work together in good faith to reach a common understanding with the federal government. Other cases involved salaries of Länder employees,<sup>122</sup> restriction of confessional education by the Länder and obligations of international

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<sup>118</sup> See generally H. BAUER, *DIE BUNDESTREUE: ZUGLEICH EIN BEITRAG ZUR DOGMATIK DES BUNDESSTAATSRECHTS UND ZUR RECHTSVERHÄLTNISLEHRE*, (1992) (description and analysis of historical and philosophical underpinnings of the concept of Bundestreue). Although this section explores the principle of Bundestreue only in the context of German law, it exists as well under Swiss law. See *Ungültige Wiedervereinigungsinitiative des Juras*, *Neue Zürcher Zeitung*, No. 139 (June 18, 1992).

<sup>119</sup> Philip Blair, *Federalism, Legalism and Political Reality: The Record of the Federal Constitutional Court*, in *GERMAN FEDERALISM TODAY* 63 (Charlie Jeffery & Peter Savigear eds., 1991) [hereinafter Blair, *Federalism, Legalism and Political Reality*]; P. BLAIR, *FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY* 162 (1981) [hereinafter BLAIR, *FEDERALISM AND JUDICIAL REVIEW*]. Bundestreue is defined as "die wechselseitige Verpflichtung zwischen dem Gesamtstaat und den Gliedstaaten (in der Bundesrepublik also zwischen Bund und Ländern) zu vertrauensvoller Zusammenarbeit und zur Einhaltung der verfassungsmässigen Kompetenzverteilung." See CREIFELDS' *LAW DICTIONARY* 238 (9th ed. 1988).

<sup>120</sup> For an overview of German case law, see Blair, *Federalism, Legalism and Political Reality* and BLAIR, *FEDERALISM AND JUDICIAL REVIEW*.

<sup>121</sup> 2 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 299, 315 (1952).

<sup>122</sup> 4 BVerfGE 115, 140 (1954). In this case the court invalidated the federal framework regulations regarding civil servants' salaries, leaving the Länder free to develop their own salary structures. Here the court also used the principle of Bundestreue to limit the Länder's autonomy in determining fiscal policy by requiring the governments to take into consideration the interests of the federal government and the overall financial structure of the federation.

treaties,<sup>123</sup> and the establishment of a second television channel by the federal government.<sup>124</sup> The court also applied the doctrine of *Bundestreue* to protect the power of the federal government—for example, in the case of a referendum on nuclear armament organized by a local authority.<sup>125</sup>

In addition to *Bundestreue*, which, though now less prominent than it was in the 1960s, remains a relevant principle in the context of German federalism, it is important to bear in mind that German constitutional law incorporates the obligations of mutual cooperation, loyalty and assistance also (and in more precise terms) in the financial chapter of the Basic Law (X. *Das Finanzwesen* Articles 104(a) to 115 GG). The structure of the financial system of federalism in the Basic Law “seeks to reconcile the budgetary and fiscal autonomy of the *Länder* and local authorities with sound finance and an equal level of re-

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<sup>123</sup> 6 BVerfGE 309, 361 (1957). In this case the court upheld *Länder* actions severely restricting confessional education, which was guaranteed under the 1933 Concordat Treaty with the Vatican, on the ground that education is under the exclusive control of the *Länder*. Addressing the federal government’s resulting lack of power to enforce international treaties involving matters under the control of the *Länder*, the court emphasized the principle of *Bundestreue* and the obligation of the federal government and the *Länder* to work toward a mutually acceptable agreement. Later that year, the Lindau Agreement was reached, requiring the federal government to obtain the approval of the *Länder* before accepting international obligations in areas of *Länder* power.

<sup>124</sup> 12 BVerfGE 205, 254 (1961). In the controversial Television Case, the court used the principle of *Bundestreue* to support what many argued were highly political dicta regarding the behavior of the federal government. In that case, the court prohibited the federal government from establishing a second television channel and rebuked the government for its tactics in attempting to establish the channel. The court objected to the government’s tactic of seeking the approval only of amenable *Länder* and delaying a response to counterproposals of other *Länder* and to the appointment of temporary trustee for the reluctant *Länder*. These heavy-handed techniques violated the duty of *Bundestreue*.

<sup>125</sup> 8 BVerfGE 122, 138 (1958). In this case a local government arranged to hold an advisory referendum on the issue of supplying the German army with atomic weapons in violation of an earlier federal judicial opinion prohibiting such referenda. The court held that a *Länd* violated the principle of *Bundestreue* in failing to ensure the local government’s respect for Basic Law. *Id.* at 138. *Bundestreue* arguments were rejected in a variety of contexts. (See, e.g., 14 BVerfGE 197, 215 (1962) (federal inspection of *Länder* Banks); 21 BVerfGE 312, 326 (1967) (federal taxation of licenses pursuant to *Länd* law); 31 BVerfGE 314, 354 (1971) (federal taxation of broadcasting organizations); 32 BVerfGE 199, 218 (1971) (*Länd* regulation of salary grouping of judges); 34 BVerfGE 9, 44 (1972) (*Länd* regulation of general salary framework); 43 BVerfGE 291, 348 (1977) (quotas of students per *Länd* admitted to selective university programs).

sources and social provision throughout Germany.”<sup>126</sup> While the complex problems of the division of taxes and tax revenues between the Federation and the Länder cannot be explored in this discussion, a few words on the subject may throw light on our search for solidarity.<sup>127</sup>

To understand the redistributive elements in the federal structure of Germany, it is sufficient to note that the principal taxes in revenue terms, income tax, corporation tax and value-added tax are shared between the Länder and the Federation. Once the revenue is divided between the Federation and the Länder according to fixed quotas and among the different Länder according to the origin of the tax, a transfer system redistributes up to 25 percent of the Länders' VAT share (Finanzausgleich Article 107,114,GG). The wealthier Länder must transfer part of their VAT share to the poorer Länder (horizontal transfers).<sup>128</sup>

For some Länder, the transfers paid or received are very substantial.<sup>129</sup> Between 1988 and 1992 Baden-Württemberg and Hessen were carrying the main burden of transfers. In 1988 Baden-Württemberg contributed DM 1 billion and Hessen contributed some DM 1.4 billion to the transfer mechanism. In 1992 it was Hessen that had to transfer the largest amount (almost DM 2 billion); for Baden-Württemberg it was almost DM 2.6 billion. Between 1989 and 1991, Bavaria, Hamburg and North Rhine-Westphalia also paid in, but on a much smaller scale, ranging from DM 5 million to DM 98 million. In the period between 1988 and 1992, Rhineland-Palatinate, Niedersachsen, Schleswig-Holstein, Saarland and Bremen were at the receiving end. The payments ranged from DM 28 million to

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<sup>126</sup> WILLIAM E. PATERSON & DAVID SOUTHERN, *GOVERNING GERMANY* 154 (1991).

<sup>127</sup> See *id.* (for a brief outline); see also Jörn Ipsen 2 *Staatsrecht, Staatsorganisationsrecht*, ch. 13 (1994); Ingo von Münch, 1 *Staatsrecht* 221 (1993).

<sup>128</sup> The calculations involved are rather complicated. Details are fixed in “Finanzausgleichsgesetz” [Equalization Law], which has been changed recently (by the law on the federal consolidation program 1993 BGB1 I S.944) and has become even more complex. Simplifying the process, one could say that the average tax revenue per capita from income tax, corporation tax and VAT is calculated for the Länder. The Länder below average receive transfers from the Länder above average in order to bring their tax revenue up to 95 percent.

<sup>129</sup> For all the figures, see the table in Jörn Ipsen, 1 *Staatsrecht, Staatsorganisationsrecht*.

nearly DM 2 billion. Niedersachsen received the largest sums, between DM 1.5 and 2 billion; Rhineland-Palatinate, Schleswig-Holstein, Saarland and Bremen were paid between DM 300 million and DM 600 million.

The new Länder were not included in the system of equalization payments in the first years after German unification; instead, they received payments from separate funds established by the Federation and the Länder—for example, the German Unity Fund (Fond Deutsche Einheit). The amounts needed to finance the transfers were estimated at DM 500 billion for the Federation alone. In the context of the present discussion, these payments can be seen as an act of solidarity in a very special historical situation. As from 1995, the new Länder were included in the transfer system, which substantially increased the amounts paid through this channel.

Apart from the equalization of funds on the level of the Länder (horizontal transfers), there are also vertical transfers. The Federation makes grants to the financially weaker Länder in order to bring their resources up to a level of at least 99.5 percent of the average.<sup>130</sup> The sum of the federal payments reached almost the level of the payments of the Länder; between 1988 and 1992 the transfers of the Federation ranged from DM 2.5 billion to almost DM 4 billion per year. After the new Länder were integrated into the financial mechanism, the transfers expected for 1995 were much higher.<sup>131</sup>

The financial provisions of the German constitution have been described as the core of the German federal system.<sup>132</sup> Indeed, the Federal Constitutional Court describes the financial provisions as the cornerstone of the system.<sup>133</sup> For present purposes, it is relevant to emphasize that in several judgments the court has interpreted the provisions and explained their purpose and limits with reference to the principle of

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<sup>130</sup> Bundesergänzungszuweisungen, Article 107 II 3 Basic Law.

<sup>131</sup> See ULRICH HÄDE, *DIE BUNDESSTAATLICHE FINANZVERFASSUNG DES GRUNDGESETZES* 1-13, 33-43 at 39 (1994); see also W. Patzing, *Zwischen Solidität und Solidarität - die bundesdeutsche Finanzverfassung in der Übergangszeit* 578 (1992).

<sup>132</sup> Rudolf Wendt, *Finanzhoheit und Finanzausgleich*, in 4 *HANDBUCH DES STAATSRECHTS, FINANZVERFASSUNG - BUNDESSTAATLICHE ORDNUNG*, 1021, 1022 (Isensee-Kirchhof ed., 1990).

<sup>133</sup> E.g., 55 BVerfGE 274, 300; 72 BVerfGE 330, 338.

Bundestreue.<sup>134</sup> In summary, then, the principle of Bundestreue has been elaborated in the judgments of the court and enshrined in the financial provisions of the Basic Law that provide for massive financial transfers from the richer Länder and the Federation to the poorer Länder. The legal value of these provisions has reached such a degree as to allow the troubled Länder, Bremen and Saarland, which suffer from enormous budgetary deficits, to claim additional financial assistance from the Federation.<sup>135</sup>

## 2. *The Duty of Mutual Cooperation in the Jurisprudence of the European Court of Justice*

The concept of solidarity is also echoed, this time in an international context, in the jurisprudence of the European Court of Justice. Article 5 of the European Economic Community Treaty says that "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."<sup>136</sup>

Article 5 thus imposes two general duties on states party to the treaty: to honor commitments growing out of the treaty or institutional actions and to promote the realization of the aims of the Community. The jurisprudence of the European Court of

<sup>134</sup> E.g., 72 BVerfGE 330, 386; 86 BVerfGE 248 at 214 (where the court uses the expression: "das bündische Prinzip des Einstehens füreinander").

<sup>135</sup> In 84 BVerfGE 148, the court found Bremen and Saarland to be existentially threatened by their budgetary deficits. The court described the purpose of the financial provisions: to provide for an adequate distribution of funds that would enable the Länder and the Federation fulfil their tasks in their own responsibility, i.e., autonomously. The court decided in favor of the Länder's claim. It held that the Federation and the Länder are under an obligation to assist the two troubled Länder. However, it did not prescribe the exact measures to be taken. The solutions that the court offered ranged from transfer payments to the reorganization of the territory in order to create viable Länder. The Federation implemented the judgment with the adoption of section 11 VI Finanzausgleichsgesetz [Equalization Law], which will make extra funds available for Saarland and Bremen (DM 3.4 billion). See Häde, *supra* note 131, at 37.

<sup>136</sup> TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC Treaty], art. 5.

Justice (ECJ), especially in recent years, has developed these general duties.<sup>137</sup>

The President of the ECJ has distinguished three applications of Article 5.<sup>138</sup> Originally the court used Article 5 to reinforce the application of other more specific provisions in the treaty. For example, in *Oberkreisdirektor des Kreises Borken and Another v. Moormann*,<sup>139</sup> which upheld a challenge to German reinspection of imported poultry as equivalent to quantitative restrictions, the Court said that "the right of an individual Community citizen to rely on an unconditional and sufficiently precise provision of a directive against a Member State which has failed to implement it or has not correctly implemented it is based on the combined provisions of the third paragraph of Article 189 and Article 5 of the EEC Treaty."<sup>140</sup> In this first application, Article 5 is used to reinforce Article 189's provision that directives are binding.

The second application uses Article 5 as an independent basis of obligations of states party to the treaty.<sup>141</sup> For example, in *Factortame and Others*,<sup>142</sup> a case involving new British requirements for the registration of fishing vessels, the ECJ held that "it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law."<sup>143</sup> While in the *Factortame* case the ECJ required the national court to "invent"

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<sup>137</sup> John Temple Lang observed that as of 1990, over half of the more than 120 judgments citing Article 5 were handed down after 1984. See John Temple Lang, *Community Constitutional Law: Article EEC Treaty*, 27 COMMON MKT. L. REV. 645 (1990) [hereinafter Lang Article 5 EEC Treaty].

<sup>138</sup> Ole Due, *Article 5 du Traité CEE: Une Disposition de Caractère Fédéral?*, CONFERENCE ROBERT SCHUMAN SUR LE DROIT COMMUNAUTAIRE (June 17, 1991). In the jurisprudence of the European Court of Justice, the concept of general principles of community law is broader than the fundamental objectives of the freedoms granted by the Treaty and include, *inter alia*, the principles of proportionality and equity. For the different functions of Article 5, see also Vlad Constantinesco, *L'article 5 CEE, de la bonne foi à la loyauté communautaire*, in DU DROIT INTERNATIONAL AU DROIT DE L'INTÉGRATION: LIBER AMICORUM PIERRE PESCATORE, 97, 114, (Francesco Capotorti et al. eds., 1987).

<sup>139</sup> Case 190/87 1988 E.C.R. 4689, 4722 ¶ 24.

<sup>140</sup> *Id.*

<sup>141</sup> For a description of the case law on this application, see Due, *supra* note 138, at 8.

<sup>142</sup> Case C-213/89 1990 E.C.R. 2433, 2473 ¶ 19.

<sup>143</sup> *Id.*

injunctions against Acts of the Crown (measures that were unknown to British law up to that moment) the *Francovich* case went even further.<sup>144</sup> Based on Article 5, the court laid down the principle that member states that violate their treaty obligations must compensate individuals who suffer damage as a consequence thereof. This application of Article 5 thus seeks to ensure the full implementation of Community law by creating positive obligations for member states.

This third application of Article 5 most closely resembles the concept of solidarity in international law in that it establishes a duty of mutual cooperation or loyalty in interstate federalism.<sup>145</sup> Under this case law, a state may have failed to comply with its Article 5 duties if it "adversely affected the interests of another Member State" without good reason.<sup>146</sup> Since the prosperity of all member states is an aim of the treaty, one state may not harm another without reason or justification. Member states may also be obliged to take positive action to harmonize their legislation and policies to conform with those of other member states.<sup>147</sup>

This duty of mutual cooperation also obtains between Community institutions and member states in a manner analogous

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<sup>144</sup> Joined cases C-6/90 and C-9/90, *Francovich, Bonifaci v. Italy*, 1991 E.C.R. 5351. For an account of the possible consequences of the decision see Denis F. Waelbroeck, *Treaty violations and liability of Member States and the European Community: Convergence or Divergence?*, in II INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION, ESSAYS IN HONOR OF HENRY G. SCHERMERS 467 (Deirdre Curton & Ton Heukels eds., 1994). Cf. Sabine Schlemmer-Schulte and Jörg Ukrow, *Haftung des Staates gegenüber dem Marktbürger für gemeinschaftsrechtswidriges Verhalten*, 27 *Europarecht* 82 (1992) (providing a thorough analysis of the case and questioning whether the court has overstepped its power to interpret and develop the law).

<sup>145</sup> Due, *supra* note 138, at 14. Constantinesco, *supra* note 138, at 114. See generally Lang, *supra* note 137, at 677-78 (reciprocal duty of cooperation between member states and between member states and the Community institutions); John T. Lang, *Article 5 EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice*, 10 *FORD. INT'L L. J.* 503, 529-30, 536 (duty of cooperation of Commission and Member States).

<sup>146</sup> Case 32/79 *Commission v. U.K.* 1980 E.C.R. 2403, ¶ 58, *Common Mkt. Rep.* (CCH) ¶ 8692; Case 42/82 *Commission v. France*, 1983 E.C.R. 1013 ¶ 36, *Common Mkt. Rep.* (CCH) ¶ 8931.

<sup>147</sup> Case 235/87, *Matteucci*, 1988 E.C.R. 5589; Case 272/80, *Biologische Produkten*, 1981 E.C.R. 3277; Case 141/78, *France v. Royaume-Uni*, 1979 E.C.R. 2923.



to the principle of *Bundestreue* on the domestic level.<sup>148</sup> In fact, Judge Ole Due, President of the ECJ, recently observed that “[L]’article 5 a pris, dans la jurisprudence de la Cour, une importance qui dépasse de loin celle du principe ‘Pacta sunt servanda’ dans le droit international et qui se rapproche de celle du principe de droit fédéral qui, dans le droit constitutionnel allemand, s’appelle la ‘Bundestreue’”.<sup>149</sup>

But the principle of solidarity is to be found not only in the jurisprudence of the European Court of Justice in relation to Article 5 of the EC Treaty. As early as 1953, the preamble of the ECSC Treaty, which was concluded before the EEC Treaty and the Euratom Treaty, referred to solidarity by recognizing that Europe could be built “only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development.”<sup>150</sup>

After the adoption of the Maastricht Treaty,<sup>151</sup> a reference to the principle of solidarity was included in the EC Treaty (the former EEC Treaty): “The Community shall have as its task . . . the promotion . . . of . . . the economic and social cohesion and solidarity among member States.”<sup>152</sup> As a result of the abolition

<sup>148</sup> Case C-2/88 *Imm., Zwartveld*, 1990 E.C.R. 3365 ¶¶ 16-19 and 21-22; Case 94/87, *Commission v. Germany*, 1989 E.C.R. 175; Cases 358/85 and 51/86, *France v. Parliament*, 1988 E.C.R. 4821; Case 52/84 *Commission v. Belgium*, 1986 E.C.R. 389; Case 44/84, *Hurd v. Jones*, 1986 E.C.R. 29, ¶¶ 38-39, 44-45, 48-49; Case 230/81, *Luxembourg v. Parliament*, 1983 E.C.R. 255, ¶ 37. Due, *supra* note 138, at 14.

<sup>149</sup> Due, *supra* note 138, at 19.

<sup>150</sup> The French text refers to “solidarité de fait”, while the German text does not use the word solidarity but the less colorful term “tatsächliche Verbundenheit.” For details, see Christian Tomuschat, *Solidarität in Europa*, in *DU DROIT INTERNATIONAL AU DROIT DE L’INTÉGRATION: LIBER AMERICORUM* PIERRE PESCATORE 729, 730 (Francesco Capotorti et al. eds., 1987). However, the term solidarity was used to describe the relation of the EEC to the overseas countries: “Intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations.” Again the German text used the term “Verbundenheit.” The notion of solidarity appeared in a number of political texts of the Community prior to the Single European Act. See Epaminondas A. Marias, *Solidarity as an Objective of the European Union and the European Community*, in *LEGAL ISSUES OF EUROPEAN INTEGRATION*, 87 (1994). Apart from EEC Treaty art. 5, art. 44, ¶ 2, art. 108, ¶ 1b, art. 130a and art. 234 can be understood as reflecting the principle of solidarity.

<sup>151</sup> Treaty on European Union and Final Act, Feb. 7, 1992 Europe/Doc. No. 1795/60, reprinted in 31 ILM 247 (1992) (entered into force Nov. 1, 1993) [hereinafter *Maastricht Treaty*].

<sup>152</sup> EC Treaty art. 2.

of unanimity in many fields of community action, observers now believe that it will not be long before member states initiate legal proceedings against Community measures that fail to observe solidarity as a binding objective. Similar predictions uttered in reference to the principle of subsidiarity have met with skepticism.<sup>153</sup>

Whether or not the principle of solidarity will turn out to be a legal basis on which smaller or poorer member states can invalidate Community measures that are unfavorable from their points of view, the obvious fact remains that the principle of solidarity already underlies the financial mechanisms of the Community.

Of the measures designed to promote economic and social cohesion and solidarity among member states, the most significant are probably the *financial* contributions of the Community to specific projects in less favored regions of the Community.<sup>154</sup> These so-called structural funds are intended to redress the principal regional imbalances in the Community through the development and structural adjustment of regions whose development is lagging and the conversion of declining industrial regions.<sup>155</sup>

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<sup>153</sup> On the conflict between the principle of subsidiarity and the principle of solidarity, see CHRISTIAN CALLIES, DAS SUBSIDIARITÄTSPRINZIP NACH ART. 3b DES VERTRAGES ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT, DISS. SAARBRÜCKEN, 153 (1994).

<sup>154</sup> See European Regional Development Fund, Articles 130b, 1130c EEC Treaty.

<sup>155</sup> Another fund that belongs to the structural funds is the European Agricultural Guidance and Guarantee Fund, Guidance Section. For details see Thomas Oppermann, *EUROPARECHT*, 324-328, 611-616 (1991); HENNIG KLODT, *DIE STRUKTURPOLITIK DER EG - ZIELE, AUSWIRKUNGEN, BEZIEHUNGEN ZUR NATIONALEN STRUKTURPOLITIK* (1992); *ECONOMIC AND SOCIAL COHESION IN EUROPE, A NEW OBJECTIVE FOR INTEGRATION*, (Achille Hannequart ed., 1992); *THE REGIONS AND THE EUROPEAN COMMUNITY, THE REGIONAL RESPONSE TO THE SINGLE MARKET IN THE UNDERDEVELOPED AREAS* (Robert Leonardi ed., 1993) (outlining the structure of the regions in Spain, Portugal, Italy and Greece and evaluating the Integrated Mediterranean Programs). See also Harvey Armstrong, *Community Regional Policy*, in *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE* 167 (Juliet Lodge ed., 1989) (outlining the development of the regional fund); MICHAEL SCHAKLETON, *FINANCING THE EUROPEAN COMMUNITY*, 31-36, 433-48 (1990) (discussing some problems of the funds); Joanne Scott and Wade Mansell, *European Regional Development of Policy: Confusing Quantity and Quality* 18 *EUR. L. REV.* 87, 87-108 (1993) (applying the debate on development in international law to the level of European regional policy and criticizing EC regional policy as one-dimensional in that it is fixed on economic growth only).

The Community's Social Fund is designed to improve employment opportunities for workers in the common market; it is to increase geographical occupational mobility within the Community and facilitate the adaptation of workers to industrial changes and to innovations in systems of production. The Cohesion Fund, included in the EC Treaty by the Maastricht Treaty, is designed to foster the economic and social cohesion of member states by assisting the less wealthy states. In the Protocol on Economic and Social Cohesion annexed to the Maastricht Treaty, member states agree that the Cohesion Fund will provide financial contributions of up to 85 percent of public expenditure to projects in the field of environment and trans-European networks in member states with a per capita GNP of less than 90 percent of the EC average.

The provision of these funds could be seen as side-payments to the poorer member states in return for their acceptance of measures promoting further integration on the level of the EC. In the absence of a solid basis on which the have-nots could claim financial assistance, it would have been more difficult to justify new integrationist policies to them.<sup>156</sup> However that may be, the assistance to the less favored regions fosters the "common good" of the Community; in the words of the member states in the Protocol to the Maastricht Treaty, "The Commission and the Member States . . . reaffirm that promotion of cohesion is vital for success of the Community."<sup>157</sup>

We see, then, not only that the European legal order includes an evolutive interpretation of the duty of mutual cooperation,<sup>158</sup> but also that as the result of the amendments of the Maastricht Treaty, the EC Treaty explicitly endorses the solidarity principle in its Article 2. Equally important for our search for examples of solidarity are the provisions on the Com-

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<sup>156</sup> For a correct evaluation in terms of the negotiation process, see Jo Shaw, *Twin-Track Social Europe—the Inside Track*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY*, 295, 306 (David O'Keeffe and Patrick M. Twomey eds., 1994). For details see JIM CLOOS, GASTON REINESCH, DANIEL VIGNES, JOSEPH WEYLAND *LE TRAITÉ DE MAASTRICHT, GENESE, ANALYSE, COMMENTAIRES*, 151, 154 (1993). For critical comments on the concept of cohesion see Ingo Hochbaum, *KOHASION UND SUBSIDIARITÄT*, 285, 287 (1992) (who views the concept of cohesion as another medium of the Community to extend its competences (especially in the field of education) at the expense of the member states).

<sup>157</sup> *Supra* note 151.

<sup>158</sup> EC TREATY art. 5.

munity structural funds. One may say that the elements of a transfer system already incorporated in the structure of the European Community reflect the obligations of the principle of solidarity. Moreover, as we have seen, the Article 5 jurisprudence is a fundamental part of EEC law; it will still apply should the Maastricht Treaty come into effect. Thus, within the context of the EEC Treaty and the Maastricht Treaty, the principle of solidarity has a fundamental legal impact on the duties of member states and Community institutions.

## VI. CONCLUDING REMARKS

If state sovereignty is regarded as the cornerstone of international law, the proper architectural metaphor for solidarity, as an evolving principle, may be "the keystone of international relations." Solidarity could continue to develop to the point where it would inform the major choices states make about their right to achieve their fullest potential while not gravely interfering with first-order principles of the community of nations. To take this thought one step further: If solidarity is understood as the common ascription to a common good, it follows that forestalling self-interested behavior that gravely threatens the collective good can be characterized as a kind of super-self-interest. As a member of a community that benefits from the protection of the community, a state acting in a manner that preserves the good of the community also preserves its own individual good.

In some federal states, and in some regions of the world, the theory and practice of solidarity have already reached impressive levels. I am not suggesting that solidarity has achieved this stage of development as a principle of universal international law. Relatively speaking, solidarity will not for some time reach the level represented by the transfer payments and constitutional norms in the Federal Republic of Germany, the EC, and several other federal states. If current practice is any indication, however, one must conclude that the principle of solidarity can and does operate within the framework of international law and that its importance is growing. It represents a further legal impulse to strengthen those shared obligations that promote the essential interests of the broader community. The possibilities inherent in the idea of solidarity should stimu-

late our thought about the constitutional and structural means by which a more democratic global society can be realized.<sup>159</sup>

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<sup>159</sup> For discussions of solidarity at the domestic level, see PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY*, 357 (1992); NICHOLAS RESCHER, *PLURALISM: AGAINST THE DEMAND FOR CONSENSUS* (1993); NORMAN GERAS, *SOLIDARITY IN THE CONVERSATION OF HUMANKIND: THE UNGROUNDABLE LIBERALISM OF RICHARD RORTY* (1995). And, on the whole question, see the stimulating discussion in SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* (1996).