

chlorofluorocarbons, methane gas, deforestation, desertification are likely to raise in mean sea level and this is a matter of common concern. The General Assembly of the United Nations had by its resolution 43/53 entitled 'Protection of Global Climate for Present and Future Generations of Mankind' recognised the climate change to be a common concern of mankind and urged that necessary and timely action should be taken to deal with climate change within a global framework. That resolution marks the acceptance of mounting scientific evidence that emissions of certain substances are depleting the ozone layer thereby exposing the earth's surface to an increased ultra-violet radiation which may pose a threat to human health, agricultural productivity and animal and marine life.

The Permanent Court of International Justice in its advisory opinion in *Nationality Decree in Tunis and Morocco Case*<sup>5</sup> implied that the interests of more than one State had to be effected before another State's activity could be considered an 'international concern'. Environment recognises no international boundaries or frontiers and prevails regardless of East-West, North-South controversies and debates. The degradation of the quality of the natural environment and the resultant climate change and the threat that it poses to the quality of human plant and animal life is more than an 'international concern'. The scenario of extinction of life on earth or even the extinction of many species of the flora and fauna of the planet are indeed a matter of common concern. The International Court of Justice in its judgement in the *Barcelona Traction, Power and Light Co. Case*<sup>6</sup> explicitly recognised the existence of State obligations which are "the concern of all States". It observed that in view of the significance of the rights involved, all States have a legal interest in their protection since such obligations are *erga omnes*. In as much as economic development is necessary for the prevalence and enjoyment of human rights States have both a right and a duty to formulate and implement appropriate national development policies and since States also have a legal interest in the protection and preservation of the environment they have a duty or an obligation to protect and preserve the environment.

The need to protect the environment needs to be viewed in a perspective wherein due emphasis is accorded to promoting economic growth and sustainable development including the eradication of poverty and ignorance, meeting basic needs, and enhancing the quality

of life. Most environmental problems however transcend national boundaries and thus necessitate a coordinated global effort. This is essentially true in areas beyond the national jurisdictions and where there is transboundary pollution on land, in the oceans, atmosphere and outer space. The legal principles to be developed and enforced as well as measures to be taken, including international cooperation, at international level for the preservation and protection of the environment will require to take into account current imbalances in global patterns of production as well as consumption. The right to development, an attribute of the sovereignty of a State, and the aspiration of all peoples both in the developing and developed countries should be balanced against the onerous obligation of the protection and preservation of the environment. A sustainable development which is also environmentally benign would per force be the key principle.

Against this background the Precom of the UNCED has been entrusted with the onerous task of performing the groundwork for a World Charter of Environment. The chief objective of the proposed "Social Contract" for Environment and Development would be to ensure that economic, social, scientific and technological development should not be at the cost of a steady and progressive degradation of the environment and the inalienable human right of development should not be exercised at the expense of an equally fundamental human right to a clean and salubrious environment.

The complex task of drawing up proposals relating to legal, institutional and other matters related to development and environment has been entrusted to Working Group III of the Precom of the UNCED. That Group has been mandated not only to codify the existing international customary law on environmental but also to codify such principles bearing in mind the needs of both the present and future generations in both the industrialised North and the developing South. This Working Group should look into the rights and obligations of the primary subjects of international law—States—in the domain of environment. A focussed enquiry into the rights and duties of States—or an environmental code of conduct—implies an examination of the concept of sovereignty and its attributes. Hitherto the concept of sovereignty has, in certain instances, proved to be as much of a bane as it has been a boon. In the context of the environment and development States would require, in the interest of inter-generation equity, to subordinate their sovereignty in favour of the common good of all mankind. As the World Commission on Environment and Development observed :

5. See PCIJ Reports (1923) Series B, No. 4, p. 2.

6. See *Barcelona Traction Light and Power Co. Case (Belgium vs. Spain)* ICJ Reports 1970, p. 3.



"The traditional forms of national sovereignty are increasingly challenged by the realities of ecological and economic interdependence. Nowhere is this more true than in shared ecosystems and in 'the global commons'—those parts of the planet that fall outside national jurisdictions. Here, sustainable development can be secured only through international cooperation and agreed regimes for surveillance, development and management in the common interest. But at stake is not just the sustainable development of shared eco-systems and the commons, but of all nations whose development depends to a greater or lesser extent in their rational management"<sup>7</sup>.

Contemporary international law while recognising the sovereign right of States to explore and exploit their natural resources pursuant to their social, economic and development policies requires/obligates them to ensure that the activities within their jurisdictions or control do not degrade the environment of other States or of areas beyond the limits of national jurisdictions—the global commons. In several fields, such as the Law of the Sea, international law recognises the obligation of States to contain, reduce and where possible to eliminate environmental damage in accordance with their respective capabilities and responsibilities. States are required to dispose of hazardous and toxic wastes as close to the source of their generation. The Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal seeks to control the transboundary movement of hazardous wastes. The States which generate pollutants, whether hazardous or toxic, and from whose territories the emission of such pollutants emanate have the main legal and moral responsibility to combat such pollution of the environment. These and other measures as provided in the Basel Convention fall short of the realization and exercise of the inalienable right of people to a clean and healthy environment and States may require to be obligated to ensure that activities within their jurisdiction and control do not degrade the environment of other States not only to the global commons but also to the environment *within* their own jurisdiction or control. While this may entail the dilution of domestic jurisdiction of States—it would be an index of the precautionary, preventive action required for the protection of the environment.

The attainment of sustainable development would require the environmental policies of States to be based on the preventive or

7. See *Our Common Future*, Report of the World Commission on Environment and Development (Oxford University Press 1987), p. 261.

precautionary principles. States would have the duty to protect and preserve the environment and be obligated to ensure that their development policies in the fields of industry, agriculture, shipping, tourism, urban development, etc. do not cause likely damage to the environment in the future. In this the burden will, most certainly, be heavier on the developing countries who may want or be required to preserve and safeguard the pristine environment of certain areas within their jurisdiction and control. It is for consideration whether developing countries which may be required to protect and preserve the pristine environment of certain areas and parcels of land must not be assured of adequate assistance—both material and technical—and cooperation from their fellow members of the international community. It may be stated that it is important to view this not in the context of existing developmental aid but in the context of discharging mutual common responsibility.

Preventive or precautionary international action as a strategy for the protection of the environment would need to be supplemented by responsive action to deal with existing or expected danger. The threat posed by the depletion of the ozone layer and the objective of conserving the bio diversity of the planet for example, would require responsive or restorative measures to be adopted. The preservation, for all the peoples of spaceship earth, and for the future generations of a world no less habitable would require the international community to make available to the developing countries clean production methods and technology suited to environmentally sound management of wastes at affordable costs and allied technical knowhow. The responsibilities of large industrial houses, in particular the multinational corporations who are main repositories of technical skills required for the preservation and restoration of the environment would require to be considered.

The question of transferring and making available the requisite technology to the developing countries would involve just more than transferring or licencing of intellectual property rights. Here too is a conflict of interests, for while the developing countries and environmentally sound management of wastes should be transferred cost free to private enterprises in whom the rights to such intellectual property vest are reluctant to do so. This is yet another issue which the Working Group as well as the Precom of the UNCED must honestly and realistically address itself to.

Among the questions which Working Group III would need to address itself is one relating to institutions. In the promotion of the



further development and codification of international environmental law this august body would require to consider whether the existing international organizations and/or the Specialized Agencies thereof have the necessary infrastructure, competence, knowhow and the wherewithals to supervise, coordinate and implement the many policies, programmes and principles which the UN Conference on Environment & Development may adopt and recommend for implementation. Simply stated the question is whether an international institution specifically mandated to oversee, coordinate and implement the principles and programmes of the proposed Charter of Nature would need to be created/established or whether existing ones are adequate? The Secretariat of the AALCC is of the view that the common interest in the preservation of the environment would need for its fulfilment the creation of new bodies both multilaterally on a global scale, and regionally not only for the supervision and coordination of the implementation of the policies and principles of conduct endorsed by the UN Conference on Environment and Development but also for the future formulation of rules of conduct relating to the protection and preservation of the environment and the enforcement thereof. Such new institutions need not create any huge new bureaucracies as they should neither supplant nor encroach upon the mandate of existing institutions.

Having said that it may be necessary to say a few words about the composition of the proposed body of persons. It is a matter of consideration whether the international multilateral institution to be established should be of the nature of a 'World Assembly on Nature and Environment' or be a representative group of legal and technical experts drawn and elected from the various regions of the globe so as to ensure equitable geographical distribution.

A Code of Conduct aimed at ensuring that future development is environmentally benign would be incomplete if it did not address itself to the question of international funding mechanisms in order to reconcile the developing world's need for continuing development with the global need to protect and preserve the earth's environment. This body may consider establishing a World Environment Fund. It may be stated in this regard that without substantial funding and effective technology transfer from developed countries to developing countries reconciliation of conflicting interests and forging international cooperation will be difficult to accomplish. Developing nations are not inclined to defer development in the face of predictions of environmental threats, since they know that it is the developed

countries that have been and continue to be the prime authors of the environmental degradation including the climate change. Their own populations are now entitled to the benefits of development and that the wealthy developed world, the major contributors to the greenhouse effect, should pay the due share to ensure that their own development is environmentally benign. The establishment and operation of a World Environment Fund in the initial substantive contributions to which may be required to be made by the prime authors of environmental degradation needs to be considered.

Realistic and practical solutions are urgently required in the creation of such an Environmental Fund. Mention has been made on tax to be levied on polluting industries and activities. Consideration needs to be given to converting some or all of the exorbitant debts owed by the developing countries to Environmental Bonds, to be utilized in the countries concerned solely on environmental projects.

The future may well witness a need for the working out of mechanisms for assessing State liability for damage to the environment, whether domestic or in the global commons, with questions arising of the enforcement of payment, the character of the recipients of compensation and the mode of application of compensation received. Each of these issues would be complex and require multidisciplinary skills for their resolution. An allied issue would be that of settlement of disputes. The Working Group would need to inquire into these and other related matters.

**(b) Report of the First Substantive Session of the Preparatory Committee for the United Nations Conference on Environment and Development : 6—31 August 1990**

In accordance with the United Nations decision contained in Resolution 44/228 to convene a Conference in Brazil in 1992 on Environment and Development, the first substantive session of the Preparatory Committee was held in Nairobi from 6th to 31st August 1990. The Conference was attended by about 96 member States of the United Nations out of which the following 29 member States of the AALCC were represented. These were Bangladesh, Botswana, China, Cyprus, Egypt, Gambia, Ghana, India, Indonesia, I.R. of Iran, Japan, Jordan, Kenya, Kuwait, Malaysia, Nigeria, Palestine, Pakistan, Philippines, Republic of Korea, Saudi Arabia, Senegal, Singapore, Somalia, Sri Lanka, Sudan, Thailand, Turkey and Tanzania. Represented also were various units of the United Nations Secretariat



and United Nations bodies including specialised agencies of the United Nations. International Atomic Energy Agency and GATT were also represented. Several inter-governmental organisations including the AALCC and the Organisation of African Unity were also represented.

There were numerous non-governmental organizations enjoying consultative status with the Economic and Social Council which were also represented. There were also numerous other non-governmental organisations not enjoying consultative status with the ECOSOC and there was considerable debate about how they should be accommodated in the Conference. Many representatives from the developing countries were not in favour of giving them full participation rights. These NGOs, majority of which came from industrialised countries would be expected to promote their specific interests which may not always be consistent with the interest of developing countries. After lengthy consultations on this, the Chairman of the Conference came up with a formula through which such NGOs will only be given opportunity to address the Conference on specific items within their field of specialisation at the discretion of the Chairman.

At its organizational session in March 1990, the Preparatory Committee had elected as the Chairman His Excellency Ambassador Tomy Koh from Singapore who is assisted by 39 Vice Chairmen (11 from African States, 9 from Asian States, 4 from Eastern European States, 8 from Latin America and Caribbean States and 7 from Western European and other States). The Rapporteur was from Algeria.

The preparatory Committee had lengthy agenda which had already been substantially adopted at the first session and which included the following items :

1. Adoption of the Agenda and other organizational matters;
2. Preparations for the United Nations Conference on Environment and Development on the basis of General Assembly resolution 44/228 and taking into account other relevant General Assembly resolutions;
  - (a) Activities of the Conference Secretariat, report of the Secretary General of the Conference,
  - (b) Overview of the activities of the United Nations system,

- (c) Recommendations made by the Governing Council of the United Nations Environment Programme at its second special session,
  - (d) Recent actions of intergovernmental and other bodies of relevance to the preparatory process,
  - (e) Preparations at the national level, guidelines for national reports,
  - (f) Preparations at the regional level,
  - (g) Arrangements for the effective contributions of relevant non-governmental organizations in the preparatory process,
  - (h) Operations of the voluntary fund,
  - (i) Reports of the working groups.
3. Arrangements for future sessions of the Preparatory Committee.
  4. Provisional agenda for the second session of the preparatory Committee.
  5. Adoption of the report of the Preparatory Committee.

The Preparatory Committee had also established two working Groups—Working Group I and Working Group II. The Agenda of the Working Groups I and II has already been given above in the introductory part.

The Preparatory Committee was inaugurated by the President of Kenya, Mr. Daniel Arap Moi, who made an inspiring speech on the importance of the proposed Conference on Environment and Development, the efforts and concerns of his country on all these issues. The vital importance of the proposed Conference was also underscored by the Chairman of the Conference in his opening remarks. The Secretary General of the Conference Mr. Maurice Strong gave an exhaustive account of the preparatory work so far done by the Secretariat in preparation for the Conference and made numerous recommendations on how to proceed in the brief period remaining before the convening of the Conference in June 1992.

In his opening speech the Secretary General underlined the extensive co-operation and major inputs that UNEP had extended to the UNECD in the preparatory work. He underscored the decline in assistance to developing countries and pointed out that it was necessary for these countries to receive additional assistance if they were to be able to carry out the necessary adjustments in their development policies to meet the environmental concerns. He singled



out the recent London agreement on depletion of ozone layer and its final provisions whereby such assistance to developing countries has been instituted which could be emulated in the provisions of the 1992 Conference. It was important that development dimension should be kept in mind in the formulation of any legal institution arrangements while carrying out the objectives of Agenda 21. Such agenda for the 21st century would only be feasible if the means of implementation are well established. This would include as a minimum the following aspects :

1. Development and economic policies and attitudes must be changed to meet environmental concerns;
2. Positive incentives to arrive at sustainable development policies should be provided for;
3. The incorporation of environmental policies however will on the whole require additional financial resources which must be provided for;
4. Youth, women groups, religious leaders as well as industries must be involved in Agenda 21;
5. Preparation at national level was very crucial and it is in this field that NGOs can make their maximum inputs.

The Executive Director of UNEP Dr. Tolba briefed the Preparatory Committee on the recommendations made on the proposed Conference by the just concluded Session of UNEP Governing Council. The Secretariat introduced several reports that the Secretary General had prepared for the Conference and which would form the basis for discussion for the latter part of the meeting. These included :

- (a) Report of the Secretary General of the Conference (A/CONF. 151/PC/5 and Add. 1 and 2).
- (b) Note by the Secretariat on an overview of the activities of the United Nations system relevant to General Assembly Resolution No. 44/228 (A/CONF. 151/PC/6).
- (c) Report of the Secretary General of the Conference on a summary of activities of intergovernmental and international organizations relevant to General Assembly Resolution 44/228 (A/CONF. 151/PC/7).
- (d) Note by the Secretariat on decisions of immediate relevance to the Preparatory Committee for the United Nations Conference on Environment and Development adopted by the Governing

Council of the United Nations Environment Programme at its second special session (A/CONF. 151/PC/L.7).

- (e) The Report of the Secretary General on the protection and preservation of the marine environment (A/44/461 and Corr.1) was also made available to the Preparatory Committee.

The first week of the Conference was largely devoted to general debate at the plenary in which most delegations gave their view on the seriousness of environmental degradation that is taking place and the related issue of development and its contribution to environmental changes. It would be correct to say that all the States and international organisations including the non-governmental organisations share the common concern that serious efforts need to be taken both nationally and internationally to arrest the serious degradation of the environment to assure its survival in all spheres. To that extent the Conference was marked by a spirit of understanding and non-confrontation towards achieving the common goal. Nevertheless, there is major disagreement with respect to what needs to be done and how this is to be accomplished. If particular concern was the insistence of the developing countries that all efforts to protect the environment should not hamper in any way the process of economic development and uplifting of the welfare of the people.

It is not in question that the present sorry state of affairs with respect to the environment has gradually been created by decades of reckless development policies by the developed countries which for long did not take into consideration the environmental concerns. Even at the moment they continue to consume more than their fair share of the world resources wastefully. The developing countries on the other hand are faced with serious problems of poverty, underdevelopment indebtedness and unfair trade practices, which contribute in no small measures to the pursuit of economic policies leading to such consequences as deforestation, soil degradation, desertification and drought etc., all contributing to the various environmental hazards that are being experienced today. If developing countries are going to be able to transform their economic and production policies to reverse environmental degradation they insist that they would require massive additional resources including technical assistance to help them transform their developmental processes to accommodate environmental concerns without prejudicing their primary responsibility towards their people for development.



While this concern was accepted by the industrialised countries particularly the Nordic countries, there was reluctance on the part of a number of important industrialised countries to the concept of additional resources. Led by the United States, United Kingdom and some of their allies, they continued to insist that in view of the present economic difficulties in their own countries, any assistance for environmental purposes in the developing countries will have to be accommodated in the existing levels of assistance. This disagreement continued to be manifest throughout the conference and its Working Groups and it will have to be one of the major areas where agreement would have to be somehow evolved if the 1992 Conference is going to be a success.

The fears of the developing countries in this respect were firmly reflected in a proposal presented by Bolivia on behalf of the State members of the Group of 77 calling for a progress report for the next session of the Preparatory Committee underlining the close relationship between development and environment and taking into account the provisions of the Declaration on International Economic Co-operation in particular the revitalisation of economic growth and development of developing countries which was adopted by the General Assembly in Resolution S-18/3 of 1st May 1990. Particularly, this would consider the relationship between poverty and environment, economic growth and degradation of environment in developing countries, inappropriate patterns of growth and development and the degradation of environment, the debt crisis in developing countries and relationship between negative international economic environment and the degradation of the environment. These concerns were eventually reflected in a decision of the Conference in Doc. A/CONF. 151/PC/L. 22.

During the general debate an important initiative was made by the delegation of Malaysia on the question of Antarctica. The delegation of Malaysia pointed out that Antarctica is being subjected to the creation of more and more research bases and the introduction of all types of pollutants. He pointed out that there has already been three major oil spills in the area around Antarctica. In view of the importance of the Antarctica to the global climate and the environment, his delegation was of the view that Antarctica should be declared a marine park in which all exploitation of natural resources would be prohibited indefinitely.

The Chairman however ruled that since there was no working document on that issue the question of Antarctica should be put on

the agenda of the Preparatory Committee and be discussed at a subsequent session on the basis of adequate documentation by the Secretariat. His ruling was supported by the delegate of United States who said that the Antarctica Regime should be asked to contribute documentation about Antarctica. It is therefore important that for the future sessions the delegations of our member States should come prepared to support this important initiative by the Government of Malaysia.

### **Preparation at National Level**

The Preparatory Committee also concentrated on other important issues on its agenda. One of this related to the preparation for the Conference at national level. This national report will highlight the impact on the environment of economic development of member States and thus provide a national profile of what is actually happening in each country and what needs to be done to ensure sustainable development consistent with environment considerations. The Secretariat had prepared suggested guidelines for the preparation of the national reports which is a fairly detailed outline and which will require considerable amount of expertise in elaboration of the report particularly so far as developing countries are concerned. The Secretary General of the Conference emphasised that many developing countries will need technical or financial assistance for preparation of these national reports. To that extent the Secretariat of the Conference was making arrangements with UNDP and other multilateral or bilateral donors who have indicated their willingness to help developing countries in the preparation of such reports. In many cases the Secretariat itself will be able to assist the developing countries both financially and technically and a number of other countries have also indicated their willingness to assist. This includes Scandinavian countries and other industrialised countries most of whom indicated willingness to assist developing countries on bilateral basis.

It was generally agreed that these reports should be prepared in such a way that they were computable for incorporation in the final report to be prepared for the Conference by the Secretariat. To that extent it was suggested that the national report should have maximum of a hundred pages and unlimited number of annexes, but overall quality was emphasised as more important than quantity. It is therefore necessary to follow as closely as possible the suggested guidelines.



It is even more important to seek financial and technical assistance as soon as possible from the Secretariat on bilateral basis as these national reports to be incorporated in the final report must reach the Secretariat not later than August 1991. It is hoped that most of these reports will be received by middle of 1991 and the Secretariat of the Conference has been requested to prepare as soon as possible a model report based on already prepared national reports, which could be useful for the preparation of national reports by those countries which have never done so before.

### Preparation at Regional Level

In its Resolution 41/228 the General Assembly had stressed the importance of holding regional Conference on Environment and Development in preparation for the 1992 United Nations Conference with full cooperation of the respective regional commissions which were mandated to organise such conferences. To that end, it was reported that Secretaries of the various Regional Commissions had held a meeting in May 1990 and had agreed to give priority to convening of such regional conferences which would bring together all the States in the region and other interested governmental and non-governmental organisations to chalk out a regional programme for presentation at the Conference. Specifically the major role of such regional meetings was spelt out by the UNCED Secretariat in their proposal to the Conference. They include the following four points :

- (a) to analyse regional activities in integrating environment and economic development policies;
- (b) to give a regional perspective to substantive inputs on the major issues indentified in General Assembly Resolution 44/228 and point up issues of particular regional concern to help make the results of the 1992 Conference relevant to the regions;
- (c) To help stimulate national participation in the preparatory process and in the Conference;
- (d) To recommend actions for the Preparatory Committee and the Conference to consider.

Already the Economic Commission for Europe has held its meeting in Bergen, Norway from 8th to 16 May, 1990. The meeting came up with a programme which is now known as the "Bergen Ministerial Declaration on Sustainable Development in the ECE region and a

Joint Agenda for Action". The Economic Commission for Asia and the Pacific (ESCAP) is organising a similar conference in Bangkok in October 1990 and the Economic Commission for Africa is proposing a similar meeting for the African region in early part of 1991. It is hoped that the Secretariat of the AALCC will be represented at both these regional conferences so as to be able to give as much assistance as possible to the member States in the final stages of the Conference.

### Operating of Voluntary Fund

The need for effective participation by all developing countries has been emphasised over and over again. To that extent the General Assembly in its Resolution 44/228 had decided to open a voluntary fund for the purposes of supporting developing countries and in particular the least developed countries to participate in the preparatory process for the Conference commencing with the first substantive session of the Preparatory Committee.

It was reported by the Secretary General of UNCED on the last day of the Conference that the Secretariat had received four contributions amounting to US \$ 453,500 and pledges amounting to US \$ 350,000, i.e. a total of US \$ 803,500. During the Nairobi Session a sum of US \$ 230,000 was utilised from the voluntary fund in support of the participation of representatives from developing countries. This support had taken the form of provision for the 42 least developed countries and two liberation movements with tickets as well as daily subsistence allowance as an exceptional measure for the delegations from these countries who have requested for some funds for subsistence to enable them to continue with the participation.

A decision was taken by the Preparatory Committee that in view of the amount of contributions which would be utilised for the future sessions to provide for tickets and daily subsistence allowance only to the least developed countries. This will require a sum of US \$ 361,000 per session or US \$ 1,330,000 for the remaining sessions of the Preparatory Committee and the 1992 Conference itself.

It should be noted that so far contributions that have actually been received have been made by the following countries :

Finland	US \$ 203,000
Myanmar	500
Singapore	50,000
Sweden	200,000