Session 4B - Refining the Rules: Expert Engagement in the Making of International Law
Préciser les règles: Participation d'experts dans l'élaboration du droit international

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In association with/En association avec:

Rapporteur
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Chair/Président
Bernard Colas, CMKZ, LLP
President/Président, ILA - Canada

Speakers/Conférenciers
Marie-Claire Cordonier Segger, Centre for International Sustainable Development Law
Noemi Gal-Or, Kwantlen Polytechnic University
Mark Jewett, Bennett Jones, LLP
Armand de Mestral, CM, McGill University

Bernard Colas, President of the Canadian Branch of the International Law Association (ILA), began the session by expressing that the topic of this panel is more precisely focused on the contribution of experts within the ILA to the making of international law. He continued by giving a short introduction on the notable foundation of the ILA. It is a non-governmental organisation constituted of lawyers and non-lawyers across all fields. It was founded in Brussels in 1873, following a conference "Pour la réforme et la codification du droit des gens", which first emerged from the idea of New-York lawyers reaching out to European lawyers to bring peace and build a better world. Dr. Colas highlighted that it first undertook the name of the conference, namely the "Association for the Reform and Codification of the Law of Nations", before changing it to ILA. It is the oldest association dealing with international law among the other associations. The objectives of the association are the study and development of international law that can be used by the international community to draft new internationally applicable law. Once, the Canadian Council on International Law was part of the ILA, but Dr. Colas believes that some Members had enough sending money to the Headquarters in London and created their own association. However among the Members, some indispensable members also believed that it was a great opportunity to be part of the ILA committees and develop standards that can be used by other groups. Some remarkable Canadian experts participate in these ILA committees and commented on their work in regard to the development of international law throughout this panel. This session was constituted of experts giving a brief overview of the mandates of their different committees within the ILA over the years.

Dr. Marie-Claire Cordonier Segger
The ILA Committee on Sustainable Development

The first speaker was Dr. Marie-Claire Cordonier Segger from the Centre for International Sustainable Development Law. She spoke on the point of view of the ILA's work in international sustainable development, which is now entering its third decade. She was proud to say that there has been some advancement, even though she humbly declared that they have not quite solved everything. She mostly testified on the mandate of the Committee on the Role of International Law in Sustainable Natural Resource Management for Development (Committee on Sustainable Development). Dr Cordonier Segger mentionned that when the Committee started its work in 1992, it just came out of the Earth Summit in Rio with a set of three new treaties (a fourth treaty relating to forests was developed under Canadian leadership but was not finalized), twenty-seven principles on the environment and sustainable development, and several hundred pages of a set of actions to undertake in relation to the environment and sustainable development (some countries implemented them, while many others simply ignored them), it was really quite a daunting task. Gro Harlem Brundtland just had a committee of legal experts launching the "*Report on Our Common Future (1987), the World Commission on Environment and Development*" which at the time helped to shape the concept of sustainable development and put it to the forefront, but was limited because that committee of experts were barely starting their work and focused mainly on environmental issues, rather than defining what it meant to work toward lasting sustainable development, or what it was to seek sustainable development in international law.

Hence, there was a need to shape and refine the concept of sustainable development and put it at the forefront. The work of the Committee on Sustainable Development in the first decade of its existence contributed to this issue in taking the twenty-seven principles from Rio, tracking their adoption and their use in international law and thoroughly reviewed those which were considered common principles embedded international treaty law. It drafted the "*2002 New Delhi Declaration on Principles on International Law in the Field of Sustainable Development*" (hereinafter the "ILA Declaration"), which was published as a United Nations document. It contained seven principles that the Committee saw appear across a spectrum of international treaties. The kind of work done at that time was very interesting, because, amongst other things, there were various decisions coming out of the International Court of Justice (hereinafter the "ICJ"), and many new treaties being negotiated. The work they did, especially on "*The principle of the precautionary approach to human health, natural resources and ecosystems*" and "*The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives*" for instance, contributed to shape the content of new treaties that were being adopted, by addressing certain key principles. Certainly, "*The principle of public participation and access to information and justice*" had a great influenced in the deliberation on international environmental issues and on development priorities. There was a great receptivity and understanding by the international community that even if this was not already a customary principle in certain decision-making processes, it should be reflected in treaties that had to do with conservation of sustainable use of natural resources and in the decision-making that surrounded those treaties regimes.

Later that year, the ILA Declaration served as groundwork for discussions among governments, academic institutions and non-governmental associations at the World Summit on Sustainable Development in Johannesburg. The heads of State adopted what the ILA calls "The Johannesburg

Plan of Implementation" (hereinafter the "JPI"), which closely reflects the seven principles of the ILA Declaration. From her personal experience in the preparatory process for the Summit, Dr. Cordonier-Segger noted that there was a group of leading countries, about forty to fifty countries, which negotiated how those principles would appear in the text of the JPI. This was controversial to a certain extent because some large countries wanted all decision-making to be based only on sound science and well-established literature, while others thought that precaution might be useful in decision-making (i.e when burden of proof is shifted to the proponent of the project, due to scientific uncertainty about the extent of the damages that the project might cause and its results). She specifically highlighted that not only were the ideas underlying the seven principles the subject of lively discussions in their field, those ideas were also included in the declarations of the heads of States and into the declarations of the partnerships that were being formed. From her point of view, although many treaties were adopted between 1992 and 2002, she believed that the most interesting thing that happened in the 2002 World Summit was the mobilization of over 20 billion dollars worth of resources for over 400 partnerships at that time between governments, international organizations, academic institutions joining up to take action on priority issues such as water, energy, health, agricultural production and biodiversity. Interestingly, with ILA being composed of judges, respected jurists and experts, the ILA Declaration was also annexed to the JPI by the government of the Netherlands and is still included in the gathering of documents that surrounds the Summit.

The most exciting thing for her however, reported Dr. Cordonier-Segger, probably started when the Committee met subsequent to the World Summit and agreed that what had been done was insufficient in order to clarify first what it meant to work towards sustainable development in international law, what it meant to seek sustainable development in fields such as resource extraction, joint management, and also in economic development under trade and investment treaties. The Committee's concerns originated from the belief that international courts and tribunals had a big role to play in these matters, because by 2002 there were more and more disputes brought to the ICJ, the Permanent Court of Arbitration, the World Trade Organization dispute settlement mechanism, the human rights regional courts, and even to the various inter-governmental courts dealing with environmental issues. Therefore, the subsequent contribution of the ILA Committee on Sustainable Development to the development of international law on sustainable development addressed the question of how the judge or the international lawyer advising a State on a dispute brought to an international tribunal would use the principles of the ILA Declaration. Responses to this question are elaborated in the "*2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development*" (hereinafter the "Sofia Guidelines"). Dr. Cordonier-Segger moderated the impact of the Sofia Guidelines, specifying that of course not all decisions on this matter took the Sofia guidelines into account. However what she has seen since 2012, is Members of the Committee becoming judges and drawing upon the work of the Committee, while others have used the principles in making decisions, and with new members of the ICJ being directly involved in the work of the Committee she believes that we may see that trend continuing. The Committee on Sustainable Development is now working on its next mandate and is concentrating its work on natural resources and governance, more precisely on how the principles can be used in the development of soft law, guidelines, operating principles, standards, etc., and how they are used and reflected in domestic legislation.

Professor Noemi Gal-Or

The ILA Committee on Feminism and International Law

The second speaker is Professor Noemi Gal-Or from the Kwantlen Polytechnic University. She is a Member of a number of ILA committees but spoke on behalf of the Committee on Feminism and International Law. The committee worked on critical issues since its creation in the 1990s, but its results are pretty modest due to a relatively small membership, comprised of 22 Members. The Committee's work aims to further the ideal of a just and representative international legal order. Its early mandate concerned women's equality and nationality in international law, to later focus on women and migration and emphasizing the trafficking of women. The Final Report was tabled in 2010 at The Hague, when Professor Gal-or joined the Committee. Since then, the mandate of the Committee has been to examine the economic empowerment of women and the contribution of international law to the economic empowerment of women.

The first results of this new mandate were essentially revealed in 2012 at the Sofia Conference, with the presentation of a report, which consisted of mapping research. It identified "*Positive Obligations of State Parties in relation to Substantive Equality"* arising from the ratification of treaties contributing to the economic empowerment of women. In this report they examined "soft law" and "hard law". In relation to "hard law" the report addressed treaties falling under the auspice of the United Nations, the International Labour Organization (hereinafter the "ILO") and Regional Arrangements. Under "soft law", the report addressed in particular the Millennium Development Goals. The Committee adopted a broad and dynamic understanding of the positive obligations required to achieve substantive equality in the field of women's economic empowerment. The methodology agreed on in order to facilitate the work of the Committee in analysing each instruments was guided by to the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter the "CEDAW"), the Committee's General Recommendation 28 (hereinafter the "GR 28"), which provided considerable guidance as to the nature of States parties' obligations and referred to the General Recommendation 25 (hereinafter the "GR 25"). The methology was also guided by other well-established international human rights principles.

Professor Gal-Or then turned to an overview of how the Report identified key international law instruments that address the relationship between substantive equality and positive obligations. First, according to GR 25 "States parties to the Convention are under a legal obligation to respect, protect, promote and fulfil this right to non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with me"'. The obligation to "respect" requires that the States parties refrain from adopting laws and policies that interfere directly or indirectly with a woman's equal enjoyment of her rights. States parties must therefore ensure that their policies do not have adverse consequences for women ('negative obligation'). The obligation to "protect" (or to ensure respect) comprises the positive obligations of States parties to protect women from discrimination by non-State actors, and to 'take steps directly aimed at eliminating customary and all other practices that prejudices and perpetuate the notion of inferiority or superiority of either of sexes'. The obligation to "fulfil" (or to promote) requires States parties to adopt public policies and institutional frameworks to fight discrimination against women. Second, the Report looked at treaties under the ILO, labour being the primary source of income, and thus economic empowerment for women. The standards, programs and policies established by the ILO are directly concerned with ensuring social justice in the arena of economic empowerment. The

Committee also looked at the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Treaty on the Functioning of the European Union, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. These are only some of the instruments examined, but are the most basic ones.

In their research, they identified cross-cutting themes running through those conventions, such as intersectionality (discrimination) and the elimination of violence against women. The Committee also identified particular substantive areas, where inequalities women encounter in one field may affect their rights and opportunities in others. The Report highlighted in particular how treaties address education, vulnerable employment and the informal economy, social protection and formal sector employment. Overall, Members of the Feminism and International Law Committee did not reach very positive conclusions. They mainly concluded that the obligations under international instruments addressing the economic empowerment of women are not coherent, coordinated, properly integrated nor implemented and lack an effective follow-up mechanism.

The more recent Report of the Committee presented in Washington in 2014 also addressed the sub-theme of the economic empowerment of women, the "*Positive Obligations of States Parties in Relation to Substantive Equality",* arising from the CEDAW and other international instruments, and more specifically economic empowerment relating to two substantive areas: Equal Remuneration and Equal Access to Economic Activities. It discussed in particular insights into the problems related to actual implementation of international positive obligations in domestic legal orders. The Committee also suggested a set of actions that should be taken by States in order to dislodge systemic patterns of discrimination. Professor Gal-Or added that there is still a lot of work to be done for this coming summer in South Africa in order to address issues surrounding the general theme of the mandate, and more specifically issues preventing the economic empowerment of women, such as of gender responsive budgeting and women in decision making under the cross-cutting themes of education, legislation, case law and example of best practices.

Morover, Professor Gal-Or shared the observations of the United Nations 59th session Commission on the Status of Women, there is an enormous amount of politicization that undermines the work to empower women, there is a lack of involvement of NGOs, little index work and discussion on the part of the Commission and data collection is still an outstanding issue.

She concluded her presentation by expressing her joy that one of the Members of the Committee, Ms Yoko Hayashi, was nominated President of the CEDAW Committee until 2018. She joined Dr. Cordonier-Segger by implying that this nomination may influence the creation of international law addressing the economic empowerment of women and more generally, feminist issues.

Mr. Mark Jewett
The ILA Committee on International Monetary Law

The third speaker of the session was Mr Mark Jewett from Bennett Jones, LLP, who spoke from his experience in the work of the International Monetary Law Committee of the ILA. Although monetary issues were previously discussed in the ILA on several occasions in the 1920s and

1930s, the Committee was only formally established in 1951 and is today composed of around 40 Members specializing both in public and private monetary law.

He principally addressed the concerns of the Committee in the years surrounding 2012 about the fragility of the Separate Entity Doctrine (hereinafter the "SED"), a principle that has governed international monetary law for a long time, and the Committee's influence at that time on the law-making process by the adoption of the 2012 Resolution on the "Principles of Jurisdiction Over Foreign Bank Branches in the Matter of Extraterritorial Attachment and Turnover". The SED derives from a widely recognized principle around the globe that a bank has "in some measure localized its obligation to its customer so as to confine it, primarily at least, to a particular branch" (1912 House of Lords case). The SED mainly holds that each office, branch or agency of a bank should be treated as a separate entity, lacking the possession or control over accounts maintained by depositors in other branches of the bank or at the home office.

Mr Jewett added that along with the SED, is the private international law doctrine of territoriality or localization of debt, more specifically, the rule that an asset should be treated as situated at the place of the bank branch where the account is located, and thus that demands on the asset should be made at that branch. Related principles also encompass the basic principles of legal certainty and good administration of justice, which hold that disputes over assets should, generally, be governed by the law of the place where the asset is located. There were serious concerns among the Committee's Members in the years leading to 2012, regarding courts extending their reach of jurisdiction when they were confronted with scenarios in which a judgment creditor was requesting an order to require a bank (typically not a party to the underlying action) to attach or turn over a judgment debtor's property, even though the debtor's assets were held by a branch or office of the bank located abroad. Alternatively, traditionally, an attachment order or writ of execution was effective only on the assets located at the branch served, and would not reach outside of the jurisdiction where the branch was located.

Thus, the non-respect of the SED and related doctrines and principles would permit the granting of extraterritorial turnovers orders or attachment of assets held in accounts located abroad, raise serious policy implications for the financial services industry and legitimately affect legal certainty in international transactions. Mr. Jewett elaborated more specifically on four consequences of these decisions by the courts:

(i) If such orders are granted, judgment creditors, as well as secured creditors, would be able to file conflicting claims for a single asset in multiple jurisdictions, thus opening up the possibility for two or more courts to issue contradictory rulings on an asset's rightful ownership;
(ii) Extraterritorial turnover orders expose banks to the possibility of double liability, by requiring banks to transfer property without the consent of other entities with an interest in that property, where the property is located, and exposing the bank to liability where the property is located if it complies with the extraterritorial turnover order;
(iii) Extraterritorial turnover orders can require banks to violate the laws of the countries where the assets at issue are held, including bank secrecy laws and other local laws; and
(iv) Extraterritorial turnover orders ultimately cause the misallocation of limited judicial resources, by inviting creditors to seek to enforce claims against judgement debtors, even where neither the creditor nor the debtor have any relationship to the jurisdiction.

In a view to influence courts of various jurisdictions, especially in the United States, to rule accordingly with the SED, the Committee adopted the ILA Resolution, which was meant to articulate principles that have long governed international monetary law, and implicitly incorporates the SED and related doctrine and principles mentioned previously. Among the features that led to the drafting of an effective resolution, according to Mr. Jewett two were most remarkable in the preparatory work of the Committee. First, the high level of input from Committee Members and the intensity of the debate over every detail and aspect ensured a text that was technically sound, thoroughly considered and made it largely impervious to attack on doctrinal or factual grounds. Second, the fact that the Committee very rarely uses the resolution process emphasizes that it only enters the arena when the courts were in danger of going seriously awry and disrupting the international banking system.

The wishes of the Committee were granted in 2014, when the United States' courts endorsed the principles embedded in the ILA Resolution, put a halt to the extraterritorial turnovers, and experienced the rather sour implications of the non-application of the SED. Mr. Jewett concluded in citing the case *Motorola Credit Corporation v Standard Chartered Bank*, 24 N.Y.3d 149 (October 23, 2014), where the New York Court of Appeals applied the SED and confirmed that considering its existence for nearly 100 years, it remains a valid rule of law. While the extent to which the ILA Resolution influenced the decision is unknown, the Resolution was allegedly of great interest to the Court and according to Mr. Jewett, is a clear example of experts' engagement in international law making.

Professor Armand de Mestral
ILA Committee on International Trade Law

Professor Armand de Mestral presented the last topic of the session, which dealt with the involvement of the ILA Committee on International Trade Law. Reiterating the values and origins of the ILA, Professor de Mestral highlighted the strong professional and international grounding of the association and its functions as it compares to the more academic focused 'Institut de droit international'. The ILA had to define itself over the years, just like any other international law association. Thus, looking back in the 60s, the only association that was really concerned with public international law issues in Canada was the ILA. In the 70s, the Canadian Council on International Law (CCIL) was established to engage experts on a Canadian perspective to international law. The Canadian branch of the ILA at the time did not like it so much, it was concerned about the future, even though it had done pretty well since then, for example in supporting the first launch of Canadian Yearbook of International Law. Professor de Mestral added that today the CCIL has become more focus and its impact is very positive. Therefore, following the creation of the CCIL, the Canadian branch of the ILA had to find its own path with Canadian experts involved in the CCIL, but also involved in the ILA in different ways, all following their own interest under the various ILA committees.

Shifting to the work of the ILA Committee on International Trade Law, Professor de Mestral saluted the Committee's completion of a fifteen year mandate in 2014, and the soon-to-be beginning of another Committee on International Trade Law replacing the original Committee. It has been a very active Committee over the years, one of the most significant things it did each year was to maintain a very close dialogue with the leaders responsible for the WTO and the World Intellectual Property Organization (WIPO) in order to subsequently report on the actions

of the organizations. The Annual Reports of the Committee would be circulated to the WTO and WIPO officials, whom would later, generally, comment on the Reports. Each of the Members had their own areas of interest in the field, but Professor de Mestral noted that many books and articles were written together by Members of Committee, and in particular he recognized the contribution of Professor Petersmann to the issues of human rights in trade and investment law.

Professor de Mestral highlighted three central themes on which the Committee worked over the years. First, he noted that the Committee was concerned with the impact of trade rules on private citizens, on human rights, and that Members' efforts have been directed to ensure that the WTO in its decision-making, under the various decision-making bodies, takes these matters into account. Second, a central issue for Committee was the concern that patent rights would be overemphasized to the detriment of the need to ensure that drugs, whether under patent or generic drugs, could be made available at a reasonable cost in developing countries where they are desperately needed. A series of the Committee Resolutions and discussions focused on these issues. Finally, Professor de Mestral acknowledged a central issue that was addressed early on by the Committee, namely the exponential proliferation of regional trade agreements (RTAs). The concerns of the Members were directed at ensuring coherence between the multiple agreements and the benchmark of the WTO, focusing in particular on the question of the relationship between dispute settlement under the RTAs and under the WTO mechanism, which in many ways both claimed a monopoly. A number of the Committee's reports, as well as research of the Committee's Members address this theme.

Professor de Mestral concluded by sustaining the relevance of these central themes in international law and the Committee's Reports that ensued, which was always communicated to leaders among the WTO and the WIPO, thus suggesting just how much they value the work of the Committee on International Trade Law.

Question Period: Focusing on how to get involved in the ILA?

Professor Gal-Or, Professor Cordonier Segger, and Dr. Colas all responded to this question, which seems to be indeed hard to answer. What is important to remember is that there is a very high level of expertise in each committee, not many new openings for new applicants because Members stay on Committees for a very long time (although the Canadian branch is undertaking steps in order to remedy to the situation where long-time Members have not been contributing to the work of the ILA for a while), and there are always a lot of qualified applicants. However, there may be other opportunities at the ILA Biennial Conferences, as Rapporteurs, or in study-groups and workshops.