

## ***The Project on International Courts and Tribunals***

*Report of the First Meeting of the Steering Committee  
of the Project on International Courts and Tribunals and Follow-Up Plan  
(The Hague, March 20-21, 1998)*

### **INTRODUCTION**

On March 20-21<sup>st</sup>, 1998, the Steering Committee of the Project on International Courts and Tribunals (Steering Committee) with the help of the International Bureau of the Permanent Court of Arbitration held its first meeting at the Peace Palace, The Hague.

The following members of the Steering Committee attended the meeting:

G. Abi Saab  
L. Boisson de Chazournes  
P.M. Dupuy  
D. Kennedy  
R. Hauser  
K. Highet  
K. Hossain  
A. Rosas  
B. Simma  
T. Treves

The meeting was chaired by G. Abi Saab in place of the co-chairs R. Jennings and M. Shahabuddeen who were unable to attend. FIELD was represented by Philippe Sands and Ruth MacKenzie and the Center on International Cooperation by Shepard Forman and Cesare Romano. Mr. Yuval Shani acted as rapporteur of the meeting.

The present report does not intend to be a verbatim record of the very rich discussions held during the one and half days of the meeting. Rather, it provides a sense of the meeting and a summary of what the Projects co-directors (Philippe Sands and Shepard Forman) understood to be its main outcomes.

The discussion was organized around two preparatory documents -the "Project Research Agenda" and the "Project Outline"- and can be conveniently summed up in three parts: The first dealing with the rationale, merits and focus of the Project; the second with its tangible outcomes; and the third with the Steering Committee's role and future activities in the Project.

## **I) RATIONALE, MERITS AND FOCUS OF THE PROJECT**

Among the members of the Steering Committee there was general agreement on the timeliness and viability of the Project and on its general structure. Most members expressed the opinion that the main thrust of the Project should be to study the phenomenon of the burgeoning of international courts and tribunals with a view to promote further understanding of their structure, financing and use.

However, there was some difference of opinion on what should be the center of gravity of the Project. Some members expressed the view that the Project should mainly address the concerns of the potential users -being either States or non-State actors-, stressing issues of access and capacity building. Others stressed the problems related to the viability of international courts and tribunals themselves, and in particular the issue of their funding. Finally, others argued that the focus should be on the legal and organizational issues arising from the multiplication of international judicial fora.

This issue was not resolved in favor of one or another approach. Rather, it was implicitly agreed that a remarkable feature of the Project is its comprehensiveness and that the research should be carried out on multiple tracks, along the lines of the three-pronged research proposal submitted to the Steering Committee in the Project's "Research Agenda": financing, access, and legal and procedural issues.

There was also considerable discussion on whether the Project should encompass only adjudication before institutionalized procedures (i.e. courts and tribunals) or should also include ad hoc arbitral tribunals. While the members recognized the important role that arbitration has played in the past in the peaceful settlement of international disputes, because of their transient and usually bilateral nature, it was agreed to exclude the ad hoc arbitral tribunals from the scope of the Project.

Another debated issue was whether the Project should embrace alternative, quasi-judicial dispute settlement procedures, such as the non-compliance procedure under the Montreal Protocol or the World Bank Inspection Panel. On this issue, a compromise formula seemed to emerge which suggested that the scope would be elastic, that it will be narrower with regard to the research agenda and more open for the Project capacity-building components. Thus, for instance, it was proposed that the Handbook should be all-inclusive, whereas the Project monographs will probably be more focused (except where comparison to other procedures may be warranted).

A third issue which was thoroughly discussed was what the Project should mean by "access". Some participants pointed out that the term is inherently ambiguous. As a matter of fact, whether a given international court or tribunal is accessible depends ultimately on the consent of the States that created it. Nonetheless, the members of the Steering Committee recognized that even when consent has been given there might be several factors -costs and awareness of the procedures foremost- that deter potential users from resorting to these international bodies.

It was agreed that for the Project's purpose the term "access" should be employed in the latter sense. Yet, again, there was discussions as to whether to concentrate on access by states, non-state actors, or both. It was proposed that the Project's research effort should take into account and study the degree to which the interests of all actors (including International Organizations, NGOs, individuals and the interests of the international community as a whole) are adequately represented in the existing international legal order.

Finally, while some supported the idea of exploring the feasibility of international legal aid or pro bono activities, others doubted whether these measures are actually justified in the context of inter-state adjudication.

## **II) PROJECT'S OUTPUT**

As a general principle, and drawing from the "Project Outline" and the "Research Agenda", the members of the Steering Committee agreed that the Project should focus on those practical activities, research and dialogue that might promote further understanding of the structure, financing and use of international courts and tribunals.

The discussions indicated that the following activities should encompass as many International Courts and Tribunals as possible and involve all relevant actors in international society (States, NGO's, corporate sector, international organizations, individuals, etc.).

### *II.1) Research*

The members of the Steering Committee agreed that it is necessary to carry out a broad mapping of the actual state of development of the international judicial system. Starting from the two background papers presented by Philippe Sands and Cesare Romano at the London meeting, in 1997, it was agreed that the Center on International Cooperation will carry out this charting exercise.

This study is intended to provide the general framework for the production of more focused monographs on particular issues (See para. II.2) and attempt to formulate recommendations for reform, to be published in a set of policy papers directed toward a more general audience (See para. II.3).

The Steering Committee also debated what might be the best format for this study. The Project's "Research Agenda" proposed to break down the research into clusters of courts (either by issue-matter or by geographical scope) and subsequently to farm out parts of it to various partners. Some members have expressed the opinion that such an approach might diminish from the uniquely comprehensive scope of the project. However, the issue was not settled and it was agreed that the Center will seek the further advise of Steering Committee members on how to carry out the work most efficiently.

## II.2) *Monographs*

The members of the Steering Committee agreed that specific, selected issues related to the questions of financing, functioning and use of the courts and tribunals might be of sufficient interest and importance to be highlighted apart from the core research effort. These issues would best be addressed in a set of monographic studies designed to heighten their visibility and spark debate among legal scholars and practitioners. The aim would be to produce up to fifteen such studies within the next three years (five of them possibly by the Autumn of 1999).

Some members of the Committee pointed out that, starting from the widely shared assumption that an international judicial system (i.e. a functionally related, interacting and organized set of judicial fora) does not exist, ideally the first studies should deal with the question of whether building such a system would be desirable or not. Two papers might address this question. One advocating for and one against. The first draft of these two initial papers should be prepared by the end of 1998.

Other subjects in which the Steering Committee showed keen interest include:

### Financing

- The Impact of Procedural Law on Costs
- UN Secretary General's Trust Fund: Assessment of its Functioning
- Non-State Funding of International Courts and Tribunals

### Functioning

- International Litigation: A Domain open to Cultural Diversity?
- Nature and Character of the International Judiciary
- International Bar
- Cross-fertilization of Rules of Procedure and Practice and Possible Development of Common Rules
- Precedent in International Law. Cross-fertilization and Reciprocal Influences of Judgments rendered by Different Courts and Tribunals
- Judgments: How they are Reached
- International Judges: Issues arising from their Appointment and Re-Appointment

## Use

- *Locus standi* and the Representation of Non-State's Interests in International Litigation
- Pro Bono Activities
- The Cost of Litigating a Case
- Dormant Courts and Tribunals: Reasons for Their Neglect
- Forum Shopping
- *Lis pendens*
- Provisional Measures
- Are international Courts and Tribunals used in Ways not Foreseen at the Time of their Creation?

Some members expressed their interest in participating actively in writing some of these monographs. The Project co-Directors will welcome specific suggestions from them. Other contributions will be solicited in an open competition by the Center and FIELD from individuals and research institutions around the world. Adequate funding for these studies will be sought by the Center and FIELD, and a decision-making mechanism will be created within the Steering Committee to ensure the quality and fit of proposed monographic studies.

It was suggested that the series of monographs produced under the Research component of the Project might eventually be published in a single volume.

### II.3) *Policy Papers*

As an addition to the menu of activities originally contained in the "Research Agenda", some of the members of the Steering Committee proposed that the Project should produce two sets of policy-papers, to be drafted by the Center and FIELD, respectively, on the issue of financing and access to international courts and tribunals. These policy-papers should stem from the conclusions reached by the Center's mapping exercise and provide, in a synthetic but detailed way, a set of recommendations aimed at international policy-makers on improving the way international courts and tribunals work. In order to add weight and persuasiveness to the conclusions reached, the papers will need to be developed under the guidance of the members of the Steering Committee themselves.

### II.4) *Handbook*

The members of the Steering Committee welcomed the idea of producing a two-volume international courts and tribunals user's guide, including basic information on the different tribunals and the relevant instruments. There was some disagreement on what bodies should be covered, but it would seem that most participants supported a broad approach. Therefore, the list of institutions to be included in the Handbook will be revised as to include other bodies (e.g. the United Nations Commission on Human Rights, and those fora to which only individuals and NGO's might have access, like the World Bank and other Inspection Panels).

The first draft of the Handbook should be completed by September 1998. A large part of the data-gathering work has already been carried out by FIELD. Further data needs to be integrated. An Advisory Committee (including members of the Steering Committee) will be established to supervise its drafting.

Finally, it was suggested that a French-language version of the Handbook be prepared.

#### II.5) *Courses*

All participants endorsed the idea of having seminars directed to legal advisors from developing States and economies in transition. It was suggested to expand the scope of seminars to include legal officers representing non-state actors.

It was also agreed that the faculty should include practitioners, academics and registrars. It was suggested that attempts be made to include in the faculty persons from developing countries, and to hold some of the courses in developing states.

Many ideas were presented on the structure and substance of the course. Some members stressed the importance of disseminating knowledge on the operation and possible benefits of the different tribunals; others stressed teaching case-management (including how to compose a legal team, and basic advocacy skills, how to prepare memorials, establish evidence) and general related legal concepts (e.g. what to do with a judgment). Yet, no uniform modality was agreed upon (for instance, whether separate courses shall be given on each cluster of tribunals).

It was suggested that participants at the meeting of the member States' legal advisors, held annually in New York at the United Nations, could be invited to a half day event to introduce them the Project and get their opinions on the structure and contents of the proposed training courses.

### **III) ROLE OF THE STEERING COMMITTEE AND FUTURE MEETINGS**

A proposal was made that the Steering Committee would work in two subgroups: one concentrating on overseeing the mapping effort and the development of the policy papers, and the other supervising the selection of topics and scholars for the monographs.

It was agreed that the Steering Committee as a whole will receive periodical reports on the progress of the research effort, and be invited to comment on the substance and methodology.

It was also agreed that a sub-set of the Steering Committee will select the topics for the monographs and help select the research partners, ensuring the academic excellence of the work and its consistency with the overall objectives of the Project.

In addition, the members of the Steering Committee were invited to get directly involved both in the core research effort as well as in the monographic studies.

Finally, it was suggested that since some of the members of the Steering Committee will be in New York towards the end of September, beginning of October, they might informally meet there for one day. Other members of the Steering Committee who want to join their colleagues will be welcome, and lodging and transportation will be arranged accordingly.

The members of the Steering Committee are encouraged to remain in contact with each other and with FIELD and the Center between the meetings. To this end a mailing list of the members is attached to this document.