International Law and Sustainable Development

Principles and Practice

Edited by

Nico Schrijver and Friedl Weiss

MARTINUS NIJHOFF PUBLISHERS

INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT
PRINCIPLES AND PRACTICE

Developments in International Law

VOLUME 51

International Law and Sustainable Development

Principles and Practice

by

NICO SCHRIJVER & FRIEDL WEISS

Editors

with a Foreword by
BRUNO SIMMA

and

with a Preface by
KAMAL HOSSAIN

MARTINUS NIJHOFF PUBLISHERS
LEIDEN / BOSTON

A C.I.P. Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper.

Layout and camera-ready copy:
Anne-Marie Krens – Oegstgeest – The Netherlands

ISBN 90-04-14173-1

Brill Academic Publishers incorporates the imprint Martinus Nijhoff Publishers.
http://www.brill.nl

Printed and bound in The Netherlands

FOREWORD

Bruno Simma
Judge of the International Court of Justice

Major concerns as well as interests beget ideas, then concepts, principles, eventually practice, practice of law, at least sometimes. These are the familiar ways of all law including international law, everywhere and at all times. The present book on *International Law and Sustainable Development. Principles and Practice* is a vivid testimony in favour of that process.

International legal doctrine, while forever seeking to establish or at least paint certainty and predictability of legal order, has recently had to grapple with relatively unfamiliar, possibly somewhat unsettling phenomena of international life, to wit the proliferation of states, international organisations and of non-state actors, the "opening up" of supposedly "self-contained régimes" (such as that of the World Trade Organisation) and of the classical system of sources of international law, to name but a few.

Two of the most important legal questions arising from these changes of international socio-political reality, so to speak, constitute the central theoretical theme underlying all chapters of this copious collaborative work. The first is the emergence of evocative ideas relating to at least two pressing global problems, environmental degradation and poverty. The second concerns the still somewhat controversial contention, made at least implicitly throughout the book, that the principle of "sustainable development" is amply supported and reenforced by numerous instances of "practice", justifying its elevation into the pantheon of international law.

Principles and practice of international law, its raw material, have one thing in common: both may develop from a state of amorphous flux until, after meanderings, and metamorphoses – "Prinzipienwanderung", "Verdichtung von Praxis" – they may crystallize as the (legal) crux of a subject matter, perhaps enjoying unquestioned even unchallengeable authority in law. Naturally, while

some good ideas have succeeded in this manner, for instance "self-determination", others, such as that of the "common heritage of mankind", have had a more mixed reception.

However, there has been much debate, if not confusion lately about the range of sources of international law and, more particularly, about the tests for their validity, confusion that was, if anything, compounded by the International Court of Justice in its Nicaragua judgment of 1986. Fortunately, neither the editors nor the contributing authors have embarked on a review of that already somewhat dated theoretical debate. Nor have they sought to contribute to it. Instead, they have, refreshingly, assembled a variety of case studies all illustrating instances of practice, some of it state practice, deduced from the principle and objective of sustainable development. In so doing they have embraced contemporary complexity of international life, not merely state practice, thereby avoiding siding with either the dwindling number of traditionalists who tenaciously cling to the *biblia pauperum* of Article 38 of the Statute of the International Court of Justice, or with radical obfuscationists steeped in the art of campaign-hardened advocacy of their preferred standards of international law, regardless of the degree of their acceptance by the community of states or even by different so-called civil societies.

Still, the first part of the book presents an overview of the evolution of principles, some kind of quasi-theoretical prolegomena to the case studies assembled in parts two and three of the book. These studies examine practice in the fields of International Trade, Foreign Investment, Human Rights and Natural Resources and Waste Management as well as selected Regional and National Experience in Europe, Africa, Asia and Latin America.

The editors, as well as most authors who contributed chapters to this volume, readily acknowledge some degree of relative conceptual uncertainty inherent in sustainable development. But perhaps it is inevitable that content and contours of an integrative concept such as that of sustainable development which was endorsed as such by the world community as a whole, lacks the kind of clarity of articulation of concepts one might be accustomed to in a more limited, homogeneous group of states. However, that need not necessarily be considered a disadvantage. Indeed, it may well have been the very lack of conceptual rigor which permitted the entire world community to embrace it.

PREFACE

Kamal Hossain

This volume on *International Law and Sustainable Development. Principles and Practice* is a tribute to the creativity of the contributors and to the seminal character of the concept of *sustainable development*. This concept**,** injected into the discourse on environment and development by the Brundtland Commission Report (1987), became the keystone of the Rio Declaration (1992) which was adopted by consensus by the international community at the 1992 UN Conference on Environment and Development in Rio de Janeiro (UNCED). It has since then inspired principles upon which a new global economic order can be based – one which would be responsive to the legitimate, even if competing, expectations of all states. The quest for such an order has been continuing over several decades. Since the mid-sixties, UNCTAD has provided a forum for developing countries to present proposals for reform of the global trading system. A more radical initiative launched within the UN was the call for a New International Economic Order (NIEO) put forward in the special session of the UN General Assembly in 1974, followed by the formulation of a Charter of Economic Rights and Duties of States. However, the process has been arduous. Negotiations within UNCTAD were described as 'a dialogue of the deaf'. In other international fora North-South encounters became increasingly confrontational and unproductive despite the fact that there were genuine concerns on the part of both developed and developing countries about the operations of the global economic system. One dimension which reflected mutual concerns related to the threat of environmental degradation resulting from economic activities.

International lawyers were drawn into this process since reforms called for new legal frameworks to regulate trade, investment, financial flows and technology transfer. In 1978 the International Law Association (ILA), after some debate, decided to take steps which led to the formation of its Committee on Legal Aspects of a New International Economic Order. It provided a discussion forum for international lawyers across the north-south divide. At its meeting in Seoul

in 1988 and after several years of constructive debate, it succeeded to adopt by consensus a declaration on the emerging and evolving legal norms of a new international economic order ("Seoul Declaration"). Given the stalemate in international fora on the establishment of a NIEO, an opportunity was presented to the international community at UNCED in 1992 to seek and achieve consensus on basic principles on the environment and development. The Rio Declaration spelt out a set of principles aimed at promoting sustainable development. These principles provided signposts to be followed in formulating and elaborating legal norms. Thus, principle 1 stated: "Human beings are at the centre of concern for sustainable development, and "are entitled to a healthy and active life in harmony with nature". Principle 3 declared that: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Principle 4 asserted that: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

Agenda 21 adopted in Rio established a programme for action for sustainable development which included the formulation and elaboration of appropriate legal principles and rules. Rising to that challenge, the ILA established a committee to work on the legal aspects of sustainable development. This committee was able to move beyond the Seoul Declaration and to address issues which involved striking a balance between competing concerns and interests of different segments of the international community, while keeping in view overriding common concerns. At its meeting in New Delhi in 2002 its efforts culminated in the adoption by consensus of a Declaration of Principles of International Law relating to Sustainable Development ("New Delhi Declaration"). This Declaration was circulated as a UN document at the World Summit on Sustainable Development as well as at the following session of the United Nations General Assembly (A/57/329). Having completed its work, the committee was disbanded and replaced by a a new committee on sustainable development established in 2003. It is gratifying to see that the new committee has moved ahead with its work and succeeded in attracting a great many interested scholars eager to make their contribution to this volume.

As this volume is being prepared for publication, a reassuring statement was published in the International Herald Tribune of 23 June 2004, recognizing the importance of international law in shaping a new global order, a statement made in a joint article by the Foreign Minister of Sweden Laila Freivalds and the British Foreign Secretary Jack Straw on "A Global Order based on Justice": "There can be no peace without justice, no freedom without human rights and no sustainable development without the rule of law."

Kamal Hossain

Vice-Chairman of the International Law Association (ILA); Chair, ILA Committee on Legal Aspects of Sustainable Development (1994-2002); former Minister of Foreign Affairs of Bangladesh.

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INTRODUCING THE BOOK

The editors
Nico Schrijver and Friedl Weiss

"Sustainable development" has captured peoples' imagination, appears to be *en vogue*, sometimes almost resembling a new mantra. However, as this book will show, sustainable development far from being a purely ephemeral phenomenon, has become rooted in manifold practice, that of states as well as of international organisations.

The invention of new legal concepts is normally a rare occurrence and always challenging. Where some such concepts, for instance those of the "most-favoured nation treatment" and of "self-determination" have evolved, maturing from idea to legal standards or norms, others such as that of the "common heritage of humankind" or of a "New International Economic Order" (NIEO), or the "basic needs strategy" have faded away, having lost their initial evocative appeal.

However, sustainable development, at least as a concept, is not going to disappear from sight, as these mentioned concepts have. On the contrary, it can be confidently predicted that sustainable development will remain with us because, clearly, it has already successfully established its credentials, both as an idea and as a legal concept in law. We believe, consequently, that one can show that sustainable development has already evolved beyond the realm of ideas, concepts, even that of policy objectives, or reference standards. In fact, this book contains considerable evidence tending to show that sustainable development has acquired the status of a normative standard in a variety of ways and areas. In short, we believe the book will demonstrate that there is "practice" of sustainable development and that more of it remains to be discovered and analysed.

Indeed, sustainable development, together with the twin principle of good governance, is widely recognised as the response of society to such main global problems as affect humankind as a whole as well as its habitat, "mother earth". Climate change, loss of biodiversity, ozone layer depletion and extreme poverty spring to mind. Even if scientific predictions or assumptions as to the degree

of environmental degradation and of poverty are not always correct, problems stemming from unsustainable practices abound, at global, regional, national and local levels.

What then does sustainable development mean? Many definitions have been proffered whether in political, economic or legal discourse. However, the definition suggested by the Brundtland Report of 1987 is still the best and the most widely accepted definition: "…development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs."[1] Key components of sustainable development have been further developed through a number of techniques and processes, including treaty-making, case law, doctrine and instruments adopted by relevant Non-governmental Organisations, such as the World Conservation Union (IUCN) and the International Law Association (ILA). For instance, at a conference in New Delhi in 2002, the latter adopted a Declaration of Principles of International Law Relating to Sustainable Development.[2] That Declaration purports to capture its key contents in the following seven principles:

1. The duty of States to ensure sustainable use of natural resources;
2. The principle of equity and the eradication of poverty;
3. The principle of common but differentiated responsibilities;
4. The principle of the precautionary approach to human health, natural resources and ecosystems;
5. The principle of public participation and access to information and justice;
6. The principle of good governance;
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

The last of these principles, that of integration and interrelationship, best characterises the nature of the concept of sustainable development as being

1 World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987, p.43. The chairperson was Gro Harlem Brundtland, the former Prime Minister of Norway.

2 This ILA Declaration was brought, by the governments of Bangladesh and the Netherlands, to the attention of the Johannesburg summit as UN Doc.A/CONF 199/8 and later the United Nations General Assembly in New York as UN Doc. A/57/329. The Declaration appeared, with an introduction, also in 49 *NILR* (2002), p.299. The final report of the ILA Commission and the New Delhi Declaration were published in ILA, *Report of the 70th Conference New Delhi*, London, 2002, p. 22 and p. 380 and can also be found on www.ila-hq.org

essentially an integrative concept. As such, it is building on the foundations of three special areas of international law, namely international economic law relating to development, international environmental law and international human rights law. Evidently, these areas, separately and in combination, equally concern both industrialised and developing countries.

But International law related to sustainable development is more than the sum of these three parts. This gives rise to the question, addressed throughout this book, as to whether we are witnessing the emergence of international law "for" or "relating" to sustainable development or whether the evolution of sustainable development has already matured into a distinct branch of international law "of" sustainable development.

Viewed from another angle, one might ask what the proper role of international law is in the evolution, promotion and realisation of sustainable development? In this regard**,** international law exhibits at least three distinct, yet interrelated functions. The function of standard-setting, leading to the creation of general norms, the function of providing specific regulations, and the function of providing for instruments to monitor, supervise and enforce the general norms.

With respect to the evolution of *principles*, as will be shown in Part I, we see sustainable development recognised in a considerable variety of legal instruments, including treaty law, covering a broad range of general fields, particularly the environment, development, trade, decision-making, as well as more specific regimes, such as climate change and fisheries.

As for the evolution of *practice*, most books on the subject pay considerable attention to international environmental law. This book seeks to avoid unnecessary duplication of such efforts. Instead, it aims, in Part II, at complementing them by means of analysing the developments in other interrelated areas, such as international trade, foreign investment, human rights and natural resources and waste management.

Furthermore, the contributions to this book deal with issues in their multidimensional settings, considering developments and activities not merely at the global level, but also at lower levels where much instructive evidence can be discovered that sustainable development is taking root at regional, national and even local levels. Such experience is recorded in Part III of this book.

Ultimately, we trust the discerning reader will share our view that the concept of sustainable development has rapidly "graduated", first from being an invocative, perhaps inspirational, but merely political concept to being a principle

possessing a widely recognised legal core. Subsequently, that principle "graduated" again as a main policy objective of states, non-state actors including multinational enterprises, and of international organisations, such as the United Nations and the World Trade Organisation, to becoming central to a bewildering variety of practice rooted in law. It is because this practice is substantial and widespread that we feel confident asserting that sustainable development will become an increasingly accepted benchmark in the future.

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ACKNOWLEDGEMENTS

The editors would like to thank a number of institutions and persons for the invaluable help they have given them when working on this book. We particularly would like to thank the Amsterdam Institute for International Development (AIID), a joint institution of the two universities in Amsterdam (*Vrije Universiteit* and University of Amsterdam) for their encouragement and generous financial support. We also gratefully acknowledge receiving some financial assistance from the International Social Sciences Council (ISSC) facilitating the participation of young scholars from developing countries in this book project.

Six chapters contained in this book have previously been published; five in a special issue on 'The International Law of Sustainable Development' of the Journal *International Environmental Agreements: Politics, Law and Economics* (vol. 2 (2002), no. 2, guest editors Nico Schrijver and Friedl Weiss; chapters by Fuentes, French, Matsui, Sueli and Stoett); and one in the *Chinese Journal of International Law*, vol. 1 (2002), no. 1 (chapter by Mushkat). For permission to republish these chapters in this volume we are grateful to Kluwer Academic Publishers and World Academic Press, respectively.

Furthermore, we have been privileged to have benefited from the skilful services of Esther Kentin, doctoral fellow at the *Vrije Universiteit* Amsterdam, as well as from the work of several student assistants, including Jessica Hardeman, Femke Weidekop, Léontine Loeber, Mischa van den Brandhof and Daniëlla de Jong. We are also grateful to Cécile Moonen who cheerfully provided us with some logistical support.

Last but not least, we also owe a great debt of gratitude to Anne-Marie Krens for patiently and skilfully preparing the manuscript for production and to Annebeth Rosenboom of Brill Academic Publishers for overseeing the production process and for ensuring the timely launch of the book at the 71st Conference of the International Law Association, held in August 2004 in Berlin.

The editors, Nico Schrijver and Friedl Weiss, Amsterdam, May 2004.

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1939 · Trail Smelter Arbitration (United States v Canada) 3 RIAA (1941) 1905

1949 · *Corfu Channel* (United Kingdom v Albania) ICJ Rep. (1949) 4

1969 · North Sea Continental Shelf (Germany v Denmark; Germany v The Netherlands) ICJ Rep. (1969) 3

1970 · *Barcelona Traction, Light and Power Company Limited* (Belgium v Spain) ICJ Rep. (1970) 3

1971 · *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion)*, ICJ Rep. (1971) 16

1974 · *Nuclear Test Cases* (Australia v France; New Zealand v France) Merits, ICJ Rep. (1974) 253

1983 · *Guinea – Guinea Bissau Arbitration* (1983) 77 ILR 636

1986 · *Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v United States) Merits, ICJ Rep. (1986) 14

1989 · *Elettronica Sicula SpA Case* (United States of America v Italy) ICJ Rep. (1989) 15

1991 · *United States – Restrictions on Imports of Tuna*, GATT Panel Report, 30 ILM 1594 (1991) (Tuna/Dolphin I)

1993 · *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen* (Denmark v Norway) ICJ Rep. (1993) 83

1994 · *López Ostra v Spain*, European Court of Human Rights, ECHR Series (1994), Vol. 303-C
· *Minors Oposa v Secretary of the Department of Environment and Natural Resources*, Supreme Court of the Philippines G.R. no. 10183, 33 ILM 173 (1994)
· *United States – Restrictions on Imports of Tuna*, GATT Panel Report, 33 ILM 839 (1994) (Tuna/Dolphin II)

1995 · *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 30 December 1974 in the Nuclear Tests Case* (New Zealand v France) ICJ Rep. (1995) 288

1996 · *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Rep. (1996) 226 at 254

1997 · *The Gabćikovo-Nagymaros Project* (Hungary v Slovakia), ICJ Rep. (1997) 7 (Danube Dam Case)
· *The Regime for the Importation, Sale and Distribution of Bananas* (United States et al v European Communities) WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R
· *Diego Cali & Figli Srl v Servizi Ecologici Porto Di Genova SpA,* European Court of Justice, 18 March 1997, Case C-343/95, 5 C.M.L.R. 484 (1997)

1998 · *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R and WT/DS48/AB/R (Beef Hormones Case)
· *Ethyl Corporation v the Government of Canada*, NAFTA**,** Award on Jurisdiction, 38 *ILM* 700 (1999)
· *Greenpeace International & Ors v Commission of the European Communities*, Case T 585/93, E.C.R. I-1651
· *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report, WT/DS58/AB/R, 38 ILM 118 (1999) (Shrimp/Turtle Case)

1999 · *Robert Azinian and others v United Mexican States*, ICSID Case No. ARB(AF)/97/2, 39 ILM 537 (2000)
· *Southern Bluefin Tuna Cases* (New Zealand v Japan; Australia v Japan), Provisional Measures, Order, ITLOS Nos. 3 & 4

2000 · *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South Eastern Pacific Ocean* (Chile v European Community), ITLOS, Constitution of Chamber, Order 2000/3

- *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, 40 *ILM* 426 (2001)
- *Compañía del Desarrollo de Santa Elena S.A. v The Republic of Costa Rica*, ICSID Case No. ARB/96/1, 15 ICSID Review (2000), 39 *ILM* 1317
- *Emilio Augustín Maffezini v Kingdom of Spain*, Award, ICSID Case No.ARB/97/7, 40 *ILM* 1148 (2001)
- *Metalclad Corporation v United Mexican States*, Award, ICSID Case No. ARB(AF)/97/1, 16 ICSID Review (2001)
- *S.D. Myers Inc. v Government of Canada*, Partial Award, NAFTA, 40 ILM 1408 (2001)
- *Southern Bluefin Tuna Arbitration* (Australia and New Zealand v Japan), ITLOS, 39 ILM 1359 (2000)

2001
- *Alex Genin, Eastern Credit Limited Inc. and A.S. Baltoil v The Republic of Estonia,* ICSID Case No. ARB/99/2
- *Hatton and Others v The United Kingdom*, European Court of Human Rights, 2 October 2001, 8 July 2003, Appl.Nr.36022/97

2002
- *Methanex Corp. v United States of America*, First Partial Award, 7 August 2002
- *Volga Case* (Russian Federation v Australia) Application for Prompt Release, Judgment, ITLOS/PV.02/05
- *Waste Management Inc. v United Mexican States*, 26 June 2002, ICSID Case No. ARB(AF)/00/3

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TABLE OF TREATIES

1883 · Convention for the Protection of Industrial Property (Paris)

1929 · Nile Waters Agreement between Egypt and Sudan

1945 · Charter of the United Nations (San Francisco), in force 24 October 1945, 1 *UNTS* XVI

1947 · General Agreement on Tariffs and Trade (Geneva), 55 *UNTS* 194 (in force provisionally since 1 January 1948 under the 1947 Protocol of Provisional Application, 55 *UNTS* 308)

1949 · Convention on the Establishment of an Inter-American Tropical Tuna Commission (Washington), in force 3 March 1950, 80 *UNTS* 3

· Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva), in force 21 October 1950, 75 *UNTS* 31

· Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva), in force 21 October 1950, 75 *UNTS* 85

· Convention (III) relative to the Treatment of Prisoners of War (Geneva), in force 21 October 1950, 75 *UNTS* 135

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1950 · European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome), in force 3 September 1953, 213 *UNTS* 221

1957 · Treaty of Rome Establishing the European Economic Community (Rome), in force 1 January 1958

1958 · Convention on the Continental Shelf (Geneva), in force 10 June 1964, 499 *UNTS* 311

1959 · Agreement for the Full Utilization of the Nile Waters between Egypt and Sudan (Cairo), in force 12 December 1959, 6519 *UNTS* 63 (1963)

1961 · International Convention for the Protection of New Varieties of Plants (Brussels), in force 10 August 1968, 815 *UNTS* 11609 (1972)

1965 · Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in force 14 October 1966, 575 *UNTS* 159

1966 · International Convention for the Conservation of Atlantic Tunas (Rio de Janeiro), in force 21 March 1969, 673 *UNTS* 63 (and Paris Protocol)
· International Covenant on Economic, Social and Cultural Rights (New York), in force 3 January 1976; Annex 1 to UNGA Res. 2200 (XXI) 16 December 1966, 6 *ILM* 360 (1967)
· International Covenant on Civil and Political Rights, in force 23 March 1976; Annex 2 to UNGA Res. 2200 (XXI) 16 December 1966, 6 *ILM* 368 (1967)

1968 · African Convention on the Conservation of Nature and Natural Resources (Algiers), in force 16 June 1969, 1001 *UNTS* 3
· Treaty on the Non-Proliferation of Nuclear Weapons (Washington, London, Moscow) in force 5 March 1970, 729 *UNTS* 161, 7 *ILM* 809

1969 · Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances (Bonn), in force 9 August 1969, 704 *UNTS* 3, 9 *ILM* 359
· American Convention on Human Rights (San José), in force 18 July 1978, 9 *ILM* 673 (1970)
· Convention on the Law of Treaties (Vienna), in force 27 January 1980, 8 *ILM* 679 (1969)

1971 · Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar), in force 21 December 1975, 996 *UNTS* 245, 11 *ILM* 963 (1972)

1972 · UNESCO Convention for the Protection of the World Cultural and Natural Heritage (Paris), in force 17 December 1975, 11 *ILM* 1358 (1972)

1973 · Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington), in force in July 1975, 993 *UNTS* 243

1977 · Agreement establishing the Kagera Basin Organisation, 1977
· Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva), in force 7 December 1978, 1125 *UNTS* 3, 16 *ILM* (1977) (Protocol I)

1978 · Convention on the Succession of States in Respect of Treaties (Vienna), in force 6 November 1996, 1946 *UNTS* 3; 17 *ILM* 1488

1979 · Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (New York), in force 11 July 1984, 13 *UNTS* 21, 18 *ILM* 1434
· Convention on the Conservation of European Wildlife and Natural Habitats (Berne), in force 1 June 1982, ETS 104 (1982)
· Convention on Long Range Trans-Boundary Air Pollution (Geneva), in force 1983, 1302 *UNTS* 217, 18 *ILM* 1442 (1979)
· Convention on the Conservation of Migratory Species of Wild Animals (Bonn), in force 1 November 1983, 19 *ILM* 15 (1980)
· Convention on the Elimination of All Forms of Discrimination against Women (New York) in force 3 September 1981, 34 UN GAOR Supp. (No.46) at 193, UN Doc. A/34/46

1980 · Inter-Arab Investment Protection Treaty, Amman, in force 19 May 1987

1981 · African Charter on Human and Peoples' Rights (Banjul), in force 21 October 1986, 21 *ILM* 59 (1981)

1982 · Convention for the Conservation of Salmon in the North Atlantic Ocean (Reykjavik), in force 10 October 1983, EEC OJ No. L378, 25 (1982)
· United Nations Convention on the Law of the Sea (Montego Bay), in force 16 November 1994; 21 *ILM* 1261 (1982)

1985 · Association of South East Asian Nations Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur) not in force; 15 EPL 64 (1985)
· Charter of the South Asian Association for Regional Cooperation, 8 December 1985
· Convention on the Protection of the Ozone Layer (Vienna), in force 22 September 1988, 26 *ILM* 1529 (1985) (*see* 1987 Montreal Protocol)
· Convention establishing the Multilateral Investment Guarantee Agency, Seoul, in force 12 April 1988, 24 *ILM* 1598 (1985)

1986 · Agreement of the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Wastes, C.T.S. 1986 No. 39

1987 · ASEAN Agreement for the Promotion and Protection of Investments (Manila), in force 23 February 1989
· Protocol on Substances that Deplete de Ozone Layer (Montreal), in force 1 January 1989, 26 *ILM* 154 (1987)

1988 · Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in force 16 November 1999; OAS Treaty Series No. 69, 28 *ILM* 161 (1989)
· Protocol Concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes (Sofia), in force 14 February 1991, 28 *ILM* 214 (1988)

1989 · Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel) 22 March 1989, in force 1992, 28 *ILM* 657 (1989)
· Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), in force 5 September 1991, 75 ILO Official Bulletin 59 (1989), 28 *ILM* 1382 (1989)
· Convention on the Rights of the Child, in force 2 September 1990, *U.N. Doc.* A/44/49 (1989)

1990 · Convention on the International Commission for the Protection of the Elbe (Magdeburg), in force 13 August 1993, reprinted in 75 *International Environmental Law* 293 (1991)

1991 · Convention on Environmental Impact Assessment in a Transboundary Context (Espoo), in force 10 September 1997, 30 *ILM* 802 (1991)
· Convention on the Ban of the Import into Africa and Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako), in force April 1998; 30 *ILM* 775 (1991)

1992 · Convention on Biological Diversity (Rio de Janeiro), in force 29 December 1993, 31 *ILM* 822 (1992)
· Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki), in force 6 October 1996, 31 *ILM* 1312 (1992)
· North American Free Trade Agreement (Washington, Ottowa, Mexico City), in force in January 1994, 32 *ILM* 289 (1993) and 32 *ILM* 605 (1993)
· Treaty of the Southern African Development Community (Windhoek)
· Treaty on European Union (Maastricht), in force 1 November 1993, 31 *ILM* 247 (1992)
· UNECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki), in force 19 April 2000; 31 *ILM* 1330 (1992)
· United Nations Framework Convention on Climate Change (New York), in force 24 March 1994, 31 *ILM*, 849 (1992)

1993 · North American Agreement on Environmental Cooperation (Washington D.C.), in force 1 January 1994, 32 *ILM* 1482 (1993)
· Treaty Establishing the Common Market for the Eastern and Southern Africa (Lusaka), in force 8 December 1994, 33 *ILM* 1067 (1994)

1994 · Agreement Establishing the World Trade Organization, Marrakesh, in force 1 January 1995, 33 *ILM* 1125 (1994)
· General Agreement on Tariffs and Trade, Annex 1A to the WTO Agreement 1994, 33 *ILM* 29 (1994)
· Agreement on Agriculture, Annex 1A to the WTO Agreement
· Agreement on Safeguards, Annex 1A to the WTO Agreement
· Agreement on Sanitary and Phytosanitary Measures, Annex 1A to the WTO Agreement
· Agreement on Subsidies and Countervailing Measures, Annex 1A to the WTO Agreement
· Agreement on Technical Barriers to Trade, Annex 1A to the WTO Agreement
· Agreement on Textiles and Clothing, Annex 1A to the WTO Agreement
· Agreement on Trade-Related Investment Measures, Annex 1A to the WTO Agreement
· General Agreement on Trade in Services, Annex 1B to the WTO Agreement 1994, 33 *ILM* 1167 (1994)
· Agreement on Trade-Related Intellectual Property Rights, Annex 1 C to the WTO
· Agreement on Co-operative Enforcement Operations (Lusaka), in force 10 December 1996
· Agreements on the Protection of the Meuse and Scheldt, 34 *ILM* 851 (1995)
· Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea (New York), in force 28 July 1996, 33 *ILM* (1994) 1309
· Convention on Co-operation for the Protection and Sustainable Use of the Danube River, in force 22 October 1998
· Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Washington D.C.), in force 8 December 1995
· Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris), in force 26 December 1996, 33 *ILM* 1328 (1994)
· Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (Lisbon), in force 16 April 1998, 33 *ILM* 360 (1995)

1995 · Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the

Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks New York), in force 11 December 2001, 34 *ILM* 1542 (1995)
- Agreement on Co-operation for the Sustainable Development of the Mekong River Basin (Chiang Rai, Thailand)
- Protocol on Shared Watercourse Systems in the Southern African Development Community (Johannesburg), in force 29 September 1998
- Treaty of Amsterdam on European Union (Amsterdam), in force 1 May 1999, 1997 OJ C340

1996 · Convention on the International Commission for the Protection of the Oder (Wroclaw), in force 22 August 1999

1997 · Convention on the Law of the Non-Navigational Uses of International Watercourses (New York), not yet in force, 36 *ILM* 719 (1997)
- Protocol to the United Nations Framework Convention on Climate Change (Kyoto), not yet in force, 37 *ILM* 22 (1998)

1998 · Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters (Aarhus), in force 30 October 2001, 38 *ILM* 517 (1999)

1999 · Agreement between Iceland, Norway and Russia Concerning Certain Aspects of Cooperation in the Area of Fisheries (St. Petersburg, Barents Sea Agreement), in force 15 July 1999
- Convention on the Protection of the Rhine (Bern), OJ L289 (16 November 2000)
- Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes (Protocol to the Basel Convention), not yet in force
- Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London) not yet in force, UN Doc. MP.WAT/AC.1/1999/1
- Treaty for the Establishment of the East African Community (Arusha), in force 7 July 2000

2000 · Australia-New Zealand Arrangement for the Conservation and Management of Orange Roughy on the South Tasman Rise
- Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal), in force 11 September 2003, 39 *ILM* 1027
- Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Honolulu), 40(2) *ILM* 277

2001 · Convention on Persistent Organic Pollutants (Stockholm) not yet in force, 40 *ILM* 532 (2001)
· Convention on the Conservation and Management of the Fishery Resources of the South East Atlantic Ocean (Windhoek), not yet in force, 41(2) *ILM* 257 (2001)
· International Treaty on Plant Genetic Resources for Food and Agriculture, in force 29 June 2004
· Protocol for the Sustainable Development of Lake Victoria Basin (Arusha), not yet in force, http://www.eac.org

2003 · Convention for the Strengthening of the Inter-American Tropical Tuna Commission, adopted at the 70th Meeting of the IATTC (Antigua)

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ABBREVIATIONS

ACP	Group of developing countries in Africa, the Caribbean and Pacific Ocean
AJIL	American Journal of International Law
Am.U.Int'l L. Rev.	American University International Law Review
APEC	Asia Pacific Economic Co-operation
AsYIL	Asian Yearbook of International Law
ASEAN	Association of South East Asian Nations
AU	African Union
BISD	Basic Instruments and Selected Documents
BYIL	British Yearbook of International Law
CFCs	Chlorofluorocarbons
CBD	Convention on Biological Diversity
CERDS	Charter of Economic Rights and Duties of States
CDF	Comprehensive Development Framework
CDM	Clean Development Mechanism
CITES	Convention on International Trade in Endangered Species
CML Rev.	Common Market Law Review
COMESA	Common Market for Eastern and Southern Africa
CSD	UN Commission on Sustainable Development
DRD	UN Declaration on the Right to Development
EC	European Community
ECE	Economic Commission for Europe of the UN
ECOSOC	Economic and Social Council of the UN
EAC	East African Community
EIA	Environmental Impact Assessment
EPL	Environmental Policy and Law
EJIL	European Journal of International Law
EPL	Environmental Policy and Law
EU	European Union
FAO	Food and Agriculture Organisation of the UN
FSA	Fish Stock Agreement

GA	General Assembly of the UN
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
GHGs	Green house gases
GMO	Genetically Modified Organisms
GNP	Gross National Product
GSP	Generalised System of Trade Preferences
HIPC	Heavily Indebted Poor Countries
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Rep.	ICJ, Reports of Judgments, Advisory Opinions and Orders
IGOs	Intergovernmental Organisations
IJIL	Indian Journal of International Law
IPCC	Intergovernmental Panel on Climate Change
INEA	International Environmental Agreements: Politics, Law and Economics
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
IJIL	Indian Journal of International Law
ILA	International Law Association
ILM	International Legal Materials
IMF	International Monetary Fund
IMO	International Maritime Organisation
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
ITLOS	International Tribune for the Law of the Sea
IUCN	International Union for the Conservation of Nature/World Conservation Union
LOSC	Law of the Sea Convention
MAI	Multilateral Agreement on Investment
MEAs	Multilateral Environmental Agreements
MFN	Most-Favoured Nation Treatment
MIGA	Multilateral Investment Guarantee Agency
MMSD	Mining, Minerals and Sustainable Development
MNCs	Multinational companies
MSY	Maximum sustainable yield
NATO	North Atlantic Treaty Organisation
NAFTA	North American Free Trade Association
NAAEC	North American Agreement on Environmental Co-operation
NEPAD	New Partnership for African Development
NGO	Non-governmental organisation

NIEO	New International Economic Order
OAU	Organisation of African Unity
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Community
OPEC	Organisation of Petroleum Exporting Countries
PCA	Permanent Court of Arbitration
RdC	Recueil des Cours de l'Academie de droit international de la Haye
RGDIP	Revue generale de droit international public
RFOs	Regional Fisheries Organizations
SAARC	South Asian Association for Regional Co-operation
SAELR	South-Asian Environmental Law Review
STABEX	Stabilisation of export earnings from commodities
TRIMs	Trade-Related Aspects of Investment Measures
TRIPs	Trade-Related Intellectual Property Rights
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCITRAL	United Nations Commission on International Trade Law
UNFPA	United Nations Fund for Population Activities
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNITAR	United Nations Institute for Training and Research
UNTS	United Nations Treaty Series
UNYB	United Nations Year Book
WFD	Water Framework Directive
WBCSD	World Business Council for Sustainable Development
WEHAB	Water and Sanitation; Energy; Health Care; Agriculture; Biological Diversity
WMO	World Meteorological Organisation
WTO	World Trade Organisation
WWF	World Wildlife Fund

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PART I

SUSTAINABLE DEVELOPMENT: THE EVOLUTION OF PRINCIPLES

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INTRODUCTORY NOTE BY THE EDITORS TO PART I

"Principles" have played a key role in the evolution of international law relating to sustainable development. Building on the UN Charter provisions governing international economic and social co-operation (Articles 55-56), principles of international law relating to development of newly-independent countries evolved gradually. Often global conferences played a significant role in their formation. Thus, the first United Nations Conference on Trade and Development (UNCTAD I, 1964) gave rise to the emergence of such principles as the preferential treatment of developing countries in international trade, transfer of technology and sovereignty over natural resources. Similarly, the 1972 Stockholm Conference on the Protection of the Human Environment, the first-ever conference which considered environmental conservation an issue of global concern, initiated principles such as rational use of natural resources, the correlation between the environment and development and State responsibility for transboundary environmental damage of resource use. The United Nations Conference on Environment and Development held in Rio de Janeiro in 1992, commonly known as the Earth Summit, resulted in the adoption of the so-called Rio Declaration on the Environment and Development. This Declaration contains twenty seven principles which are often considered as "launching pads" for relevant standard setting in these areas of international law.

Indeed, international law-making on sustainable development has proceeded apace since the Earth Summit in 1992. A host of new multilateral treaties have been concluded and some others relevant to sustainable development, such as the UN Convention on the Law of the Sea, had entered into force. There appears to be a need for due weight to be given, in a more balanced way, to both the

N. Schrijver and F. Weiss (Eds.), *International Law and Sustainable Development Principles and Practice*,
 pp. 3-5.

developmental and environmental concerns, in order to achieve a comprehensive and integrated set of prescriptions of international law for sustainable development. At present developmental concerns are clearly given considerably less prominence and weight in both international law-making and in academic discourse than environmental concerns. Whereas some impressive follow-up can be noted in the field of international environmental law, in terms of standard-setting through new conventions and through their implementation, little progress can as yet be discerned in the field of international law relating to development. This is illustrated in the contribution by *Ximena Fuentes* (Chile) on 'International law-making in the field of sustainable development: the unequal competition between development and environment'.

International law-making is still very much based on the assumption of sovereign equality of States, as recorded in the first principle in Article 2 on Principles of the Charter of the United Nations. While many proposals have been made to give more weight to the powerful and/or affluent, populous or large countries, *Chris Pinto* (Sri Lanka) critically examines the relationship of power to rule-making since the Congress of Vienna of 1815. Het points out that the modern practice of decision-making by consensus, which has become the guiding principle at inter-govermental meetings, barely disguises the fact the power rather than the equality of states still rules in international rule-making, especially in the field of international environmental law. The pursuit of sustainable development, also through international law, is not just a matter of inter-State co-operation but also requires the involvement of intergovernmental organisations, peoples and individuals, industrial concerns and other non-governmental organisations. *Duncan French* (United Kingdom) focuses on the role of the State and international organisations in reconciling sustainable development and globalisation. The author makes a passionate plea for recognising the continued relevance of public governance. It would hence be wrong to diminish the role of the State and of international organisations in reconciling the tensions between globalisation and sustainable development.

Sustainable development is a matter of concern both to developing and industrialised countries. The latter bear a special burden for reducing and ultimately eliminating unsustainable patterns of consumption and production. This is well illustrated by the chapter of *Yoshiro Matsui* (Japan) on the principle of common but differentiated responsibilities. Apart from the common set of responsibilities for all countries, the author identifies two main legal consequences of this principle: 'double' or different' standards in favour of developing countries and the responsibilities of developed countries to assist developing countries in their efforts to achieve sustainable development. This elaboration

of sustainable development into more specific principles and their consequences in practice is further illustrated in the chapter by *Gerhard Loibl* (Austria) on the evolution of the climate change regime. On the one hand this regime embarked in an innovative way on new roads to implement sustainable development commitments. On the other, these have also become subject to the criticism that they may have a negative rather than positive impact, especially those allowing to achieve limitations and reductions of emissions abroad rather than through domestic action to change unsustainable production and consumption patterns. Meanwhile, the fate of the Kyoto Protocol is highly uncertain in view of the current non-ratification by key countries such as the United States and Russia.

Part I is concluded by a critical essay by *Thomas Wälde* (United Kingdom), who deplores that the sustainable development discourse has been excessively driven by good intentions, often at the expense of 'good consequences'.

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INTERNATIONAL LAW-MAKING IN THE FIELD OF SUSTAINABLE DEVELOPMENT: THE UNEQUAL COMPETITION BETWEEN DEVELOPMENT AND THE ENVIRONMENT*

Ximena Fuentes

Sustainable development has become a key concept in the field of international environmental law and it is gaining increasing importance in the context of international trade law and human rights law. However, it is not always easy to grasp its normative content and its practical implications. Nevertheless, there is ample consensus that sustainable development involves the idea of an integration of environmental protection and economic development.[1] The 1992 Rio Declaration on Environment and Development recognizes this element of integration of environmental and developmental aspects, particularly in Principles 3 and 4:

1 The concept was propounded by the World Commission on Environment and Development (WECD), which defined it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs': *Our Common Future* (Oxford, 1987), p. 43. On the issue of integration of environment and development see: Sands, 'International Law in the Field of Sustainable Development', *The British Year Book of International Law*, 65 (1994), p. 338-9; Boyle and Freestone (eds.), *International Law and Sustainable Development* (Oxford, 1999), pp. 10-11. The work of the Committee on Legal Aspects of Sustainable Development of the International Law Association is also relevant in this respect. Resolution No.15/2000 states that the Committee is convinced 'of the role that international law could play in clarifying the concept of sustainable development and in promoting the development of a balanced and comprehensive international law in the field of sustainable development and according due weight to both the developmental and environmental concerns': ILA, *Report of the Sixty-ninth Conference* (London, 2000), p. 38.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 7-37.*

Principle 3
The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4
In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Sustainable development, therefore, is based on the idea that due regard ought to be paid to the protection of the environment, imposing some sort of constraint upon the right of States to choose and apply their own developmental policies. On the other hand, sustainable development also involves the idea that economic and social development cannot be completely conditioned by environmental concerns.

Various international instruments have introduced the notion of sustainable development. In the field of the protection of the environment, the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, states in Article 1(1) that:

> The Contracting Parties, within the framework of their respective national laws, undertake to adopt singly, or where necessary and appropriate through concerted action, the measures necessary to maintain essential ecological processes and life-support systems, to preserve genetic diversity, and to ensure the sustainable utilization of harvested natural resources under their jurisdiction in accordance with scientific principles and with a view to attaining the goal of sustainable development.

The concept gained full recognition at UNCED and many post-1992 environmental treaties and declarations refer to it. The 1994 Convention to Combat Desertification in those Countries Experiencing Drought and/or Desertification admits that '... sustainable economic growth, social development and poverty eradication are priorities of affected developing countries, particularly in Africa, and are essential to meeting sustainability objectives.'[2] With regard to international watercourses, the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River between Cambodia, Laos, Thailand and Vietnam was concluded precisely with the aim of co-operating in all fields of sustainable development, utilization, management and conserva-

2 Text in Birnie and Boyle, *Basic Documents on International Law and the Environment*, hereinafter, *Basic Documents,* (Oxford, 1995), pp. 513 ff.

tion of water and related resources of the Mekong River Basin.[3] Article 2(3) of the 1995 Protocol on Shared Watercourse Systems in the Southern African Development Community speaks of sustainable development, stating that:

> Member States lying within the basin of a shared watercourse system shall maintain a proper balance between resource development for a higher standard of living for their peoples and conservation and enhancement of the environment to promote sustainable development.

In a more general context regarding shared water resources, Article 24 of the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses provides that watercourses states shall enter into consultation concerning the planning of the sustainable development of international watercourses.[4]

In the field of international trade law, the text of the treaty constituting the World Trade Organization, in contrast to the previous GATT treaty, now mentions sustainable development in its preamble. There has been some changes in the approach that WTO Panels have adopted towards the relationship between free trade and the protection of the environment, which is evidenced in the Shrimps/Turtles decision (1998).[5] In this decision the Panel takes note of the Preamble of the WTO and underscores that it 'endorses the fact that environmental policies must be designed taking into account the situation of each Member, both in terms of its actual needs and in terms of its economic means'.[6] It is also worth noting that NAFTA (North American Free Trade Agreement between the United States, Canada and Mexico) mentions sustainable development in its preamble and contains various provisions concerned with the environment. For example, in Article 1114.2 the parties recognize, though in soft terms, that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. And, Article 104 provides that, in case of a contradiction between NAFTA and certain environmental agreements, the latter ought to prevail.

In the field of human rights law and international development law, it has been recognized that sustainable development can work as a link between the

3 Text in *International Legal Materials* 34 (1995), pp 866 ff.
4 Not yet into force. Text in *International Legal Materials,* 36 (1997), pp. 700 ff.
5 WT/DS58/R, 15 May 1998.
6 *Ibid*, para.52.

right to a healthy environment and the right to development.[7] Despite discussions about the normative status of the so-called right to development, this concept seems to contain the basis for reconciliation between social and economic development, on the one side, and the protection of the environment, on the other. Accordingly, the 1993 Vienna Declaration on Human Rights states that 'the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations'.[8] In addition to this, poverty has frequently been identified as one of the causes of environmental degradation. In this connection, Principle 8 of the Stockholm Declaration states that:

> Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

In a similar vein, the 1994 Convention to Combat Desertification stresses that 'desertification is caused by complex interactions among physical, biological, political, social, cultural and economic factors'.[9]

Since 1992, the tension between environmental and developmental concerns has been a central element in international law-making process which has resulted in the adoption of various treaties and international instruments in the field of sustainable development. During the discussion which preceded the adoption of the Rio Declaration it was clear that developing countries feared that the Declaration could become a purely environmental text.[10] They succeeded, though, in the incorporation of developmental aspects, most notably in Principles 3, 5, 7 and 12, and in the Preamble which affirms that one of the aims of UNCED is the establishment of 'a new and equitable global partnership through the creation of new levels of cooperation among States, key sector of

7 Cançado Trindade, 'Environment and Development: Formulation and Implementation of the Right to Development as a Human Right', in Cançado Trindade, *Human Rights, Sustainable Development and the Environment* (San José, 1992), p. 43. The Draft Principles on Human Rights and the Environment adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994 (UN Doc. E/CN.4/Sub.2/1994/9) recognize 'that sustainable development links the right to development and the right to a secure, healthy and ecologically sound environment'.

8 A/CONF.157/123, Vienna Declaration on Human Rights, para. 11.

9 Preamble of the Convention. Text in Birnie and Boyle, *Basic Documents*, p. 515.

10 Report by Schrijver, ILA, *Report of the Sixty-sixth Conference* (Buenos Aires, 1994), p. 115.

societies and people'. However, later developments in the law pertaining to sustainable development show that equilibrium is not easy to achieve and the balance seems to tip in favour of the protection of the environment. This has already been pointed out by Professor Schrijver in his Third Report to the Committee on International Legal Aspects of Sustainable Development of the International Law Association (1998):

> This report provides further indication that the international law in the field of sustainable development as it is emerging in recent years does not succeed in giving due weight to both developmental and environmental concerns. During the period under review (1996-1998) further progress could be noted in the field of international environmental law, for example through the conclusion of new conventions such as the Convention on International Watercourses (1997) and the Kyoto Protocol (1997) to the Climate Change Convention and through improved ratification and entry-into-force records of existing conventions. In contrast little progress can be reported on international law relating to development.[11]

In his Fourth Report, Schrijver states that it has been proved extraordinarily difficult to integrate developmental and environmental concerns.[12] He describes this negative situation in the following terms:

> We cannot but note the erosion of some "traditional" principles of the law of international development cooperation: equality is increasingly being replaced by conditionality, partnership by "take or leave it", preferential treatment in favour of developing countries by graduation and integration into the GATT regime and by common, but differentiated obligations in international environmental regimes. Similar trends can be inferred from an analysis of the discussions in the context of the WTO on a new Millenium Round and in the context of IMF/World Bank on a new international financial architecture.[13]

One could attempt to explain the advantageous position that environmental concerns are gaining, as compared to the slow pace of the developmental aspects of sustainable development, by emphasizing the inadequacies of the international law-making process in the fields of international economic and cooperation law, which tends to discriminate against developing countries in various respects. In particular, note must be taken of the existing inequalities at fora

11 ILA, *Report of the Sixty-eighth Conference* (Taipei, 1998), pp. 684-5.
12 ILA, *Report of the Sixty-ninth, Conference* (London, 2000), p. 669.
13 *Ibid.*

such as IMF and the World Bank. Differences in economic achievement levels of States, coupled with an unequal distribution of political power, result in developing countries only playing a secondary role in the setting of the international agenda. Perhaps the paradigm of a non-participatory instrument was the draft Multilateral Agreement on Investment negotiated under the auspices of OECD, which was intended to be a global treaty on investment but excluded non-OECD countries from the negotiation table. It is not surprising that it was doomed to fail. However, besides all the problems that may be identified in relation to the establishment of more equitable conditions in the fields of trade and cooperation, the present unequal situation might also be explained on the basis of certain features of international environmental law itself.

This chapter explores how some of the 'well-established' principles and concepts of international environmental law, as well as some new developments in this field, may have contributed to the tendency of excluding conditionality and equitable considerations from the elaboration and application of an increasing number of obligations taken by States in the field of the protection of the environment. This, in turn, might translate into a loss of negotiating power by developing countries in the context of international economic law and cooperation law.

A. The democratic deficit in international environmental law

International law-making processes are not democratic, an observation which also applies to international environmental law. Many commentators have written on the democratic deficit that characterizes the international legal system, I shall not, therefore, re-open this subject here. However, it would be useful to bear in mind some aspects of this democratic deficit and how international environmental law has attempted to overcome problems of legitimacy. It will be argued that efforts to open the international environmental law-making process to greater participation by the so-called 'transnational civil society' may have been highly inefficient in bringing more democracy into the process. Nonetheless, environmental law benefited from a beneficial side-effect of that democratic deficit in that it had developed faster compared to international development law.

States are still the principal actors in the international law-making process and this is illustrated by their central role in the negotiation and ratification of treaties and the creation of customary international law. In addition to this, it must be borne in mind that international law-making in the context of inter-

national organizations is also lead by States. In so far as the State performs this preponderant role in international law-making, individuals might not feel adequately represented by the decision taken.

Democracy is a concept that entails the idea that all citizens have a right to participate in the decision-making processes that lead to the adoption of policies that are applicable in their societies.[14] It also involves the idea that there are some limits on majority decision-making and, therefore, that certain rights should be protected.[15] Although political participation of citizens in their own countries and the existence of basic human rights have been recognized by international law, the international legal system as such is not based on the idea of public democratic participation. As Crawford points out, there are a number of features that evidence the lack of democracy in international law.[16] Among these, it is interesting to underline the fact that international law-making lies essentially on the executive branches of the government. This predominant role of the executive in the international arena makes the whole process of international law-making less transparent to the public, with the immediate consequence that decisions may be taken without an open discussion, disregarding the views of the various sectors of society.

Another aspect of the international legal system that contributes to this democratic deficit is the principle of sovereign equality of States. Of course, this equality is essentially a legal concept, as opposed to an economic and political equality which does not exist. Although very often this principle is waived, the general idea is that each State is legally equal to others, despite, sometimes obvious, differences in territorial extension, number of population, military capacity, diplomatic power and so forth. Notwithstanding some views that refer to the General Assembly of the United Nations as the most democratic organ within the organization, it is not clear that such a system, in which each State has one vote, may be described as really democratic. If democracy is understood as the citizens' right to political participation, one has to concede that the voting system at the General Assembly does not promote this idea. The advantages, therefore of the "one State, one vote" system, if compared to a system of weighted voting, are far from clear. The distortion is evident if

14 See Article 25 of the International Covenant on Civil and Political Rights; Article 3 of Protocol I to the European Convention on Human Rights; and Article 23 of the Inter-American Convention on Human Rights.

15 J. Crawford, 'Democracy and the body of international law', in Fox and Roth (eds.), *Democratic Governance and International Law* (Cambridge, 2000), pp. 92-3.

16 *Ibid*, pp. 95ff.

one considers that countries differ in many respects, in particular, in population. Bodansky describes the "one state, one vote" system as illegitimate, 'since it gives individuals in small states a greater influence on decision making than individuals in large ones, and it creates the possibility that decisions could be made by states representing a tiny fraction of the world's population'.[17] This situation would be less serious if international norms were only to apply to the rights and duties of States as such, without compromising rights and duties of private individuals. However, one of the main characteristics of globalization is that common people are touched by international norms each time more frequently.

Sovereign equality notwithstanding, international law-making is not immune to economic and political differences between States. This is another factor that contributes to the democratic deficit in international law. It is evident that in particular fields of international law, industrialized countries have more decision-making power than developing countries. International monetary and development law provide a good example. This is demonstrated by the FMI and the World Bank. In more general terms, differences in power have also an impact on international law making, after all "the capacity to determine the international agenda has rightly been identified as a particularly effective form of power".[18]

The creation of international organizations and other cooperative schemes also poses some questions about democratic participation in decision-making. Again, the preponderant role of States and, in particular, their executive branches might contribute to distancing decisions from the public. This point has been elaborated in depth in the context of the European Community. In this line, it is said that:

> The existence of the Community has involved the transfer of competence on many issues to Brussels and away from the nation state. This has meant that, in a literal sense, matters are further removed from the citizen. It has also been a factor in questioning the Community's legitimacy: why should 'those people over there' be making decisions which affect me 'over here?'.[19]

17 Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', *American Journal of International Law* 93 (1999), p. 614.

18 Hurrell and Kingsbury, *The International Politics of the Environment* (Oxford, 1992), p. 37.

19 Craig, 'The Nature of the Community: Integration, Democracy, and Legitimacy', in Craig and De Búrca, *The Evolution of EU Law* (Oxford, 1999), p. 23.

All the problems referred to above are exacerbated if international rules are ascribed supremacy and direct effect within national legal systems. This criticism has also been put forward in relation to European law. Constitutionalization of international rules may contradict, in principle, some basic elements of democracy:

> ... while the doctrines of direct effect and supremacy are often hailed as core elements of the 'constitutionalization' of European law, they have also meant that rules may be imposed on persons who did not participate, through their representatives, in the making of those rules, and this is at odds with a central principle of European constitutionalism.[20]

As has been already observed, international environmental law suffers from a lack of democratic legitimacy. Bodansky identifies some aspects of this legitimacy problem that affects environmental rules: (i) the creation of non-consensus decision-making mechanisms and (ii) the domestication of international environmental law.[21] The need to tackle environmental problems urgently calls for the establishment of more authoritative institutions, which are capable of taking decisions by a majority or weighted voting procedure. The adjustment procedure contained in the Montreal Protocol on Substances that Deplete the Ozone Layer illustrates this point by authorizing a process in which decisions are taken by a qualified majority and are imposed on the minority.[22] With regard to the domestication of international environmental law, Bodansky is not precisely thinking of the mechanisms available to apply international law directly in the domestic legal systems; he refers only to the fact that international environmental law tends to resemble domestic law in that it purports to regulate the behaviour of private actors such as shipbuilders, ship owners, fishermen and industrialists.[23] He argues that 'the more international law resembles domestic law, the more it should be subject to the same standards of legitimacy that animate domestic law'.[24] But domestication should not be understood exclusively in these terms. There is a general tendency to domesticate international law in a constitutional sense which should not be

20 De Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in *ibid*, p. 208.

21 Bodanky, *loc.cit*, p. 607-11.

22 *Ibid*, p. 608. See Article 9 of the Montreal Protocol. Text in Birnie and Boyle, *Basic Documents*, pp. 226-7.

23 *Ibid*, p. 610.

24 *Ibid*, p. 611.

overlooked. This means that international law, including environmental law, is finding its way to influence domestic legal systems through the doctrines of direct (or self-executing) effect and supremacy.[25] In a more subtle way, but a way which is more difficult to control by the legislative, international law is also finding its way into domestic law also through judicial interpretation, when national judges use international law in the interpretation and application of domestic norms, or even base their decisions on it.

With this picture in mind, in which the decision-making process in international law is to a great extent dominated by developed States, it is not difficult to see that in the case of a conflict of interests the concerns of industrialized States would tend to prevail. The history of the search for more equitable trade and economic relations between States, shows that the promotion of development in developing countries has not been a priority for developed States. By contrast, environmental concerns have figured more prominently in their international agenda. Developed States have pushed forward the regulation of the global environment which requires broad participation of States and they have also promoted the upgrading of environmental standards in developing countries, in part, to prevent the so-called 'environmental dumping'.

At present, some efforts are being made to overcome the democratic deficit in the international process. In so far as this democratization of international law involves giving developing countries more negotiating power in the elaboration of international norms, the outcome of this trend might be the establishment of more equitable economic relations between States. However, efforts toward democratization, generally speaking, have focused on the enlargement of the so-called 'transnational civil society'. In particular, this can be evidenced in the field of international environmental law. It is contended here that these new developments in international environmental law have also contributed to the dynamism experienced by environmental rules.

One of these efforts is the intensification of NGO participation in the law-making process. This has been described as a positive step toward more participation by transnational civil society in international law. In the European context, for example, the beneficial effects of broader participation in law-

25 In this connection, mention should be made of constitutional developments in some domestic legal systems which give international law, in particular international treaties, direct effect and supremacy over national legislation. This is a trend that is spreading in the legal systems of Latin American countries. In the European context, see: Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions' in *American Journal of International Law* 88 (1994), pp. 427 ff.

making have been recognized by the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which compels State Parties to improve access to information and public participation in environmental decision-making. Art.3(7) provides that:

> Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.[26]

However, the growth experienced by NGOs participation does not in itself solve disparities in access to international fora existing between different countries and different sectors of civil society.[27] Many NGOs may not have in place internal democratic processes for the election of their authorities or for the adoption of decisions. Another problem associated with NGO participation in the international law-making process relates to their dependence on financial resources for gaining access to international fora, which makes them prone to succumb to their financiers' interests. Lack of transparency in the selection of their agenda, coupled with no clear mechanism to improve accountability, make NGO participation a complex issue, the close examination of which may help to demystify the idea that more NGO participation will increase democratic legitimacy in international environmental law.

But what is more serious perhaps is that enhancing NGOs participation at an international and national level, without taking into account material differences in their capability to influence decision-making bodies, may exacerbate the North/South divide. A study on the involvement of NGOs within the climate change debate in Brazil and India shows how governmental policy in these countries has to a large extent been shaped by the influence exerted by foreign

26 Text in *International Legal Materials* 38 (1999), p. 517 ff.

27 For a good account of the problems associated with NGOs participation in the field of human rights, which may also be valid to other areas of international law, see: Chinkin, 'Human Rights and the Politics of Representation: Is there a role for international law?, in Byers (ed.) *The Role of Law in International Politics* (Oxford, 2000), pp. 142 ff. See also Mertus, 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society', *American University International Law Review* 14 (1999), pp. 1372 ff.

interests.[28] In her study, Jakobsen attempts to demonstrate that while foreign NGOs have succeeded in pressing national governments, national interest groups have been largely absent from the debate:

> These patterns of transnational policy-making have brought with them the agendas, discourses and interests of researchers and activists from the industrialised North. Research on climate change has been dominated largely by North American and West European scientists... In both India and Brazil, it remains consistently under-prioritised, underfunded and marginalised, relying extensively on financial and institutional collaboration with European and North American research institutions and programmes. As a result, Brazilian and Indian researchers are, at least to some extent, likely to produce preferences and interests developed by researchers and political priorities in the North. The Indian government in particular, by relying heavily on the insights and advice of transnationally informed domestic researchers and activists, came indirectly to lock themselves into a policy-making process where the response to a largely Northern government agenda would be shaped with the help of Northern-dependent domestic knowledge.[29]

Environmental NGOs have also succeeded in bringing their cases before international adjudicative bodies. For example, in the Shrimps/Turtles case the United States attached to its submission "*amicus curiae* briefs" by some environmental NGOs. The Appellate Body found that it was within the powers of the panels to decide whether or not to take these briefs into consideration and, reversing the original decision of the panel, decided that the admittance of the briefs was not inconsistent with the provisions of the DSU.[30]

Apart from the increasing participation of environmental NGOs in international environmental law-making, industries and companies have also been able to make their way into the environmental debate in industrialized countries. Given the fact that developed countries are usually in a better position to influence decision-making in areas such as international trade law, industries and companies have indirectly been able to introduce the issue of environmental regulation in free trade agreements. It is known that domestic business interests are worried about the so-called social and environmental dumping by developing

28 Jakobsen, 'Transnational environmental groups, media science and public sentiment(s) in domestic policy-making on climate change', in Higgot, Underhill and Bieler (eds.), *Non-State Actors and Authority in the Global System* (London and New York, 2000), pp. 274 ff.

29 *Ibid*, p. 282.

30 WT/DS58/AB/R, para. 109.

countries. In this context, Gelder asserts that the 'US certainly used trade to promote its preferred labour, humanitarian and environmental standards.'[31] To prove his point Gelder quotes the following question put by the Chairman of the US Senate Finance Committee to Trade Representative Mickey Kantor, in relation to the possible entrance of Chile into the NAFTA scheme: 'what are you going to do about Labor and Environment in Chile'.[32]

The NAFTA agreement helps to illustrate this point. Article 1114.2 provides that:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. Accordingly, a Party should not waive or otherwise derogate from or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.

Unfortunately, NGOs concerned with poverty alleviation and those propounding more equitable economic relations between States seem not to have acquired the same degree of influence as environmental NGOs, industries and businesses.

B. 'Rights and Duties' Framework and its impact on questions of allocation and responsibility

Environmental law, in contrast to international development law, has proved particularly suitable for the use of a 'rights and duties' language. 'Rights and duties' language provides law with autonomy. This means, it is said, that policy considerations are generally excluded from the interpretation and application of the law. Thus, rules that are imbued with this type of language, such as the rule that States have responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction, tend to work on the basis that policy decisions about the allocation of property rights between States have already been taken so that it is not the task of a responsibility rule to settle, incidentally, such policy questions. Indeed, a responsibility rule should not get itself involved with questions of allocation of resources. However, it is important to be aware

31 Gelder, *Sovereignty through Interdependence* (London, The Hague, Boston, 1997), p. 187.

32 *Wall Street Journal*, 17 April 1995, p. 1, cited by Gelder in *ibid*, p. 318, note 59.

of the fact that not all resources have been allocated between States. Therefore, before applying rules of responsibility it is necessary to answer the question of allocation first.[33]

The distinction between rules concerning the allocation of property and of responsibility respectively means that the application of responsibility in the field of international environmental law does not encroach upon questions concerning the distribution of natural resources between States. However, it is necessary to stress that this does not mean that one can ignore allocation issues altogether. In fact, to apply a rule of responsibility it is necessary to know what and whose rights are being protected through the operation of rules of responsibility. Therefore, responsibility and allocation rules are complementary rather than mutually exclusive. To think otherwise may have a significant effect as can be evidenced in the case of transboundary natural resources. With regard to the allocation of transboundary natural resources many States and commentators suggest that environmental considerations should not be included in the allocation process but should be given separate application. Therefore, environmental considerations are linked automatically to responsibility rules. This perspective puts environmental considerations in a privileged position as it would not be necessary to assess their relevance alongside other concerns. Indeed, according to this view environmental considerations would be given supremacy over the allocation process. Of course this may happen as the result of the application of specific norms which may impose stringent environmental obligations upon States, the application of which would transcend the protection of particular entitlements to natural resources. However, the present state of international law in this field indicates that these are specific environmental obligations created to solve specific environmental problems. To contend, on the contrary that there is a general obligation to protect the environment excluding allocation issues entirely, would amount to negating the integration element involved in the concept of sustainable development: environmental protection would always override developmental issues and, instead of relying on the 'fundamental' principle of integration, sustainable development should call for a modification of already established environmental rules.

If those called upon to interpret and apply environmental principles turn a blind eye to allocation issues, the danger could arise that environmental protection and developmental concerns may continue to follow separate paths.

33 This part follows Calabresi and Melamed's framework for the analysis of property and torts: 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', *Harvard Law Review* 85 (1972), pp. 1089 ff.

Distributive elements which should play a central role in the utilization of transboundary natural resources, may finally yield to the predominant role of environmental protection.

This is not to say that there is no principle of State responsibility for environmental damage in international law. However, this general principle admits to flexibility in application. It should not be applied in isolation, but it has to be interpreted in the context of the particular fields in which it is to be applied.

Recognition of the principle of State responsibility for environmental damage can be found in the case-law of the International Court of Justice. In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapo*ns (1996) the Court stated that:

> The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[34]

The same assertion is repeated in the *Gabcikovo/Nagymaros* decision (1997)[35] and the position of many authors seems to agree, at least in principle, with this view.[36] However, following more detailed scrutiny important differences may be found between doctrinal views, on the one hand, and international case-law and the evidence provided by State practice, on the other. International tribunals and State practice adopt a more flexible view about responsibility. In this connection, it is interesting to emphasize that in its advisory opinion on *The Legality of the Threat or Use of Nuclear Weapons* the International Court admitted that the application of environmental responsibility may involve weighing up the need to protect the environment with other interests of the States concerned. The Court was of the view that,

> the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

34 ICJ, *Reports* 1996, para. 29, pp. 241-42.

35 ICJ, *Reports,* 1997, para. 53.

36 Sands, *Principles of International Environmental Law* (Manchester and New York, 1995), vol. 1, pp. 190 and 632. See also Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague. London, Boston, 1996), pp. 19 ff.

> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defense under international law because of its obligation to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[37]

For its part, in the *Gabcikovo/Nagymaros* case, acknowledging that a general obligation of States to ensure that activities within their jurisdiction and control respect de environment of other States or of areas beyond national control is part of the corpus of international law, the Court also admitted the possibility of effecting an accommodation of the opposing interests of Hungary and Slovaquia. In this regard, the Court stated that:

> ... even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise if necesssary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though ... the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.[38]

Any examination of the question of State responsibility for environmental damage should begin with Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. The two principles state that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

In support of the customary law status of this principle commentators quote the decisions of the ICJ in the *Corfu Channel* case and of the Arbitral Tribunal

37 ICJ, *Reports*, 1996, para. 30.
38 ICJ, *Reports*, 1997, para. 55, p. 36.

in the *Trail Smelter* arbitration. The International Court in the Corfu Channel case stated that a State is under the obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[39] The Arbitral Tribunal in the Trail Smelter arbitration held that:

> no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.[40]

In the *Corfu Channel* case the unlawful behaviour consisted of the fact that Albania 'neither notified the existence of the minefield, nor warned the British warships of the danger they were approaching'. In this context, the obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States' did not exist in a vacuum, but depended on the finding by the Court that the United Kingdom was entitled to the protection of two rights: (a) its right of innocent passage through an international highway through which passage could not be prohibited by a coastal State in time of peace,[41] and (b) its right to receive from another State a treatment according to elementary considerations of humanity.[42]

For its part, the Arbitral Tribunal in the *Trail Smelter* arbitration recognized that, with regard to the duty that a State ought to protect other States against injurious acts from within its jurisdiction, the real difficulty consisted in the determination of 'what *pro subjecta materia*, is deemed to constitute an injurious act'. In this context, the duty was described as 'relative'. The injurious act, in the opinion of the arbitrators, was an act of encroachment on the territory of the neighbouring State which prejudiced the latter's natural use of its territory. Therefore, the Arbitral Tribunal assumed the existence of a right on the part of the US to exclude others from the use of its own territory.

In these two decisions, therefore, it is possible to see that the principle that States ought to refrain from causing damage to other States required the application of complementary rules identifying the rights of other States in a particular situation. Hence, caution should be employed when trying to interpret Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration as

39 ICJ, *Reports*, 1949, p. 22.
40 *United Nations Reports of International Arbitral Awards*, vol. 3, p. 1965.
41 ICJ, *Reports*, 1949, pp. 29-30.
42 *Ibid*, p. 22.

capable of establishing a customary rule that States should refrain from causing material damage to other States in all circumstances. Behind the issue of damage and reparation, there was an implicit question about allocation of rights which was to be clarified first. In the *Corfu Channel* case the ICJ worked on the basis of Great Britain's entitlement to a right of innocent passage through the channel and a right to receive from other States treatment according to elementary considerations of humanity. In the Trail Smelter arbitration the decision-making body worked on the basis of an allocation of territory, and thus of property rights, already effected by the drawing of an international boundary between Canada and the United States. But this allocation of rights is not applicable in all situations. In fact, with regard to shared natural resources international boundaries do not in themselves solve the allocation problem. Therefore, it is in this area that there is room to integrate environmental and developmental concerns. If the allocation issue is not addressed together with the environmental aspects involved, there is a risk that responsibility for environmental damage would hide the developmental issues that may be involved.

Recognizing that the present state of the law does not contemplate a rule of equitable sharing of the land territory of States, it should also be emphasized that this is not necessarily the case of shared natural resources, such as watercourses, fisheries and oil and gas deposits, in which the drawing of international boundaries has not simultaneuously effected the allocation of these resources. However, the fact that Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration have been read by many as establishing a rule that prohibits the infliction of material damage on all sorts of natural resources, irrespective of whether or not there are supplementary rules of environmental protection and irrespective of complementary rules about allocation of rights upon those resources, can be blamed for the tendency to separate environmental protection from the allocation issues involved in the utilization of shared natural resources.

Global environmental treaties seem to have followed a different trend. Indeed, in this type of treaty, such as the 1985 Vienna Convention on the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete de Ozone Layer instead of attempting to establish individual responsibilities for the depletion of the ozone layer, States have agreed to establish a regime for the equitable control of substances that contribute to this depletion. Of course this can be explained, in part, by the impossibility to establish individual responsibilities where there is no scientific certainty of the link between particular emissions and damage caused to the ozone layer. However, what is interesting to point out, is not the reason that has inspired the

establishment of a gradual and flexible regime for the control of emissions, but the fact that this regime is presented or described as an implementation of Principle 21 of the Stockholm Declaration. While the 1985 Vienna Convention recalls in its Preamble 'the pertinent provisions of the Declaration of the United Nations Conference on the Human Environment, and in particular principle 21', the 1987 Montreal Protocol states in its Preamble that the parties are 'determined to protect the ozone layer by taking precautionary measures to *control equitably* total emissions of substances that deplete it ... taking into account technical and economic considerations and bearing in mind the developmental needs of developing countries'.[43] Therefore, by introducing an element of 'equitable control' it is clear that the parties to the Montreal Protocol understand Principle 21 of the Stockholm Declaration as compatible with the consideration of the economic and social conditions of the parties.

With regard to global environmental problems the idea of reconciliation between the obligation not to cause damage to the territory of other States or to areas beyond national jurisdiction and the legitimate pursuit of economic development has been encapsulated in the principle of common but differentiated responsibilities. Although its inspirational impact on the distributive objective may be doubtful,[44] 'common but differentiated responsibilities' have had, nonetheless, some distributive effect: the cost of preventive measures is not met equally by all States. But the main reason why this principle has been incorporated in treaties dealing with global environmental problems seems precisely not to be that of the promotion of development. As French has pointed out:

> ... it may well be a mistake to tie the notion of differentiated responsibility too closely with the concept of a global partnership as the latter's status in international environmental law and policy is not yet secured. Moreover, as with the notion that differentiation is based on the requirement to take into account the special needs of developing States, developed States would reject any argument that the concept of a global partnership has any status in customary international law.[45]

43 Emphasis added.

44 For a discussion of diverse interpretations of the principle of common but differentiated responsibilities see: French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities', in *International and Comparative Law Quarterly*, 49 (2000), pp 35 ff.

45 *Ibid*, p. 56.

There are good reasons to think that one of the principal aims of the inclusion of common but differentiated responsibilities has been to secure ample participation by all States, which is considered essential to tackle global environmental problems effectively. But, despite the many grounds that may explain the inclusion of differentiated responsibilities in global environmental treaties, the interesting point is that this demonstrates that Principle 21 of the Stockholm Declaration admits interaction between the notion of responsibility and the consideration of social and economic conditions.

Unfortunately, in other contexts, where the importance of the distributive or allocative elements is evident, as is the case with transboundary natural resources, the relevant practice and the literature show a certain inclination to separate allocation problems from environmental ones. This can be illustrated by reference to the situation of international watercourses.[46] On the one hand, the resolution of disputes concerning the non-navigational uses of international watercourses, including the allocation of volumes of water, has to be done in accordance with the well-established principle of equitable utilization which calls for the consideration of all relevant factors, including social and economic criteria. On the other hand, whether or not environmental impact caused by the utilization of an international watercourse should enter into the equitable assessment alongside other relevant criteria has been a controversial point.

The 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, while adopting the rule of equitable utilization, has also included certain provisions regarding the protection of the environment. Thus, article 7 provides that:

> 1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
> 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

46 The ideas explored here are based on: Fuentes, 'Sustainable Development and the Equitable Utilization of International Watercourses', *The British Year Book of International Law*, 69(1998), pp. 119 ff.

And Articles 20 and 21 provide that States shall protect the ecosystems of international watercourses and prevent, reduce and control pollution:

> *Article 20*
> *Protection and preservation of ecosystems*
> Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.
>
> *Article 21*
> *Prevention, reduction and control of pollution*
> 1. For the purpose of this article, pollution of an international watercourse means any detrimental alteration in the composition or quality of the waters of an international watercourses which results directly or indirectly from human conduct.
> 2. Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.
> 3. Watercourse States shall, at the request of any of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse, such as:
> (a) Setting joint water quality objectives and criteria;
> (b) Establishing techniques and practices to address pollution from point to non-point sources.
> (c) Establishing lists of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

The meaning of these provisions has been the subject of much discussion. There is an apparent contradiction between the principle of equitable utilization, which in principle requires consideration of the environmental impact of the utilization of an international watercourse along with other criteria, and Articles 7, 20 and 21 which might be interpreted as having the effect of putting environmental impact outside the scope of application of the principle of equitable utilization.[47] The latter interpretation results, in practice, in a restriction upon the operation of the principle of equitable utilization. According to this interpretation, environmental impact will not be subject to distributive (or developmental) considerations.

47 Brunnée and Toope, 'Environmental Security and Freshwater Resources: A Case for International Ecosystem Law', *Yearbook of International Environmental Law* 5(1994), p. 64.

It could be objected that this assertion is not true because, in so far as the obligation not to cause environmental damage to other States or to areas beyond national jurisdiction is an obligation of due diligence, the economic and social conditions of a State would in any case be considered when evaluating the real possibilities of compliance available to the State.[48] The International Law Commission, in its work on Injurious Consequences Arising Out of Acts Not Prohibited by International Law, seems to share the view that due diligence includes an assessment of the economic capacity of States:

> It is the view of the Commission that the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence.[49]

However, two levels should be distinguished in the application of the standard of due diligence. At one level due diligence operates as an abstract standard of conduct which serves to decide whether an activity should be allowed to be undertaken on an international watercourse. At another level, due diligence operates as a concrete standard of conduct, which must be evaluated once the activity is actually performed. Therefore, even if it is accepted that due diligence involves an assessment of the economic capacity of States, this economic element does not always apply. Indeed, it would only apply to the second situation. But at the moment when a decision has to be taken as to which activities might be allowed on an international watercourse, due diligence cannot take into account the economic conditions prevailing in the State concerned, otherwise due diligence, a typical standard of responsiblity, would operate as a rule of allocation of entitlements. Indeed, it is not advisable to mix allocation rules and responsibility rules, as this might bring too much uncertainty to the protection of the rights and entitlements of States. The aim of this chapter is not to encourage the integration of allocation issues and responsibility, but to show that the concept of sustainable development can benefit greatly from the integration of environmental concerns into allocation processes concerning transboundary natural resources. If environmental concerns are integrated into the

48 P. Birnie and A. Boyle, 'Codification of International Environmental Law and the International Law Commission: Injurious Consequences Re-Visited', Chapter 4 of *International Law and the Environment* (Oxford, 2nd ed., 2002).

49 *Report of the Working Group on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*: Commentary attached to Article 4 of the 1996 Draft Articles, para. 10. See also, *Report of the International Law Commission on the work of its fiftieth session*, A/53/10, 1998, para. 12, p. 36.

allocation process, responsibility rules will still play their essential role as separate rules that protect States' entitlements. It is against this background that the words of the ILC should be interpreted when it advises that, even if the economic level of a country is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence, 'a State's economic level cannot be used to discharge a State from its obligation under the present articles'.[50]

What does all this demonstrate? It demonstrates that a "rights and duties"-framework has helped to convey the idea that, in principle, environmental obligations are not subject to an equitable balancing of competing interests. However, as it has been shown, this apparently well-established rule may suffer important modifications if there is the political will to do so. This political will has been present in a number of multilateral environmental treaties addressing global environmental problems. Industrialized countries, aware of the need to attract the participation of developing countries have, therefore, consented to the inclusion of the principle of common but differentiated responsibilities. However, in other areas of international law, such as the allocation of transboundary natural resources, the idea that environmental impact should be one more criterion to be taken into account in the establishment of equitable regimes for the utilization of shared natural resources has run into considerable opposition.

C. A New Weapon for More Environmental Protection: Environmental Rights

How well is the idea of the integration of developmental and environmental concerns served by the creation of a right to a decent or healthy environment? Certainly, environmentalists have shown sympathy for this idea, after all it may strengthen their claims in so far as rights may adequately be described as trump cards that override other competing interests. For this reason, one of the advantages of a human rights approach to environmental protection has been described in the following terms:

> ... a human rights approach is a strong claim, a claim to an absolute entitlement theoretically immune to the lobbying and trade-offs which characterize bureaucratic

50 *Ibid.*

> decision-making. Its power lies in its ability to trump individual greed and short-term thinking.[51]

But in these terms, the notion of environmental rights may contradict the very idea of sustainable development, shifting the balance in favour of the protection of the environment and pushing developmental aspects into the background. Therefore, a fundamental objection can be immediately advanced: a human right to a healthy environment may exclude economic and social elements from the debate about the implementation of sustainable development.

The right to a decent environment, with diverse intensity, is contained in various human rights treaties and declarations. Principle 1 of the Stockholm Declaration states that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being ...' For its part, Principle 1 of the Rio Declaration on Environment and Development states that human beings 'are entitled to a healthy and productive life in harmony with nature'.

Employing more legal language, Article 24 of the African Charter on Human and People's Rights provides that: 'All peoples shall have the right to a general satisfactory environment favorable to their development.' In the Latin-American context, Article 11 of the Additional Protocol to the American Convention on Human Rights states that:

1. Every one shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.

The establishment of a human right to a healthy environment is controversial in many respects. The controversy usually revolves around the ambiguity of the concept, the difficulties in the identification of the holder of the right, its classification as an individual or collective right and so forth.[52] An additional ground for controversy is explored in this section: as has already been pointed

51 Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle and Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford, 1996), p. 21.

52 See Handl, 'Human Rights and the Protection of the Environment: A Midly 'Revisionist' View', in Cançado Trindade, *Human Rights, Sustainable Development and the Environment* (San José, 1992), pp. 117 ff. Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle and Anderson, *op.cit.,* pp. 43 ff.

out, through the establishment of a human right to a healthy environment, environmental considerations may be given priority over mere economic and social interests. In this context, the very idea of environmental rights can defeat the central nucleus of sustainable development: the achievement of integration between development and the environment.

The objection could be raised that this is not the case because it disregards that human rights coexist with other human rights and that the need for reconciliation means that most rights cannot be described in absolute terms. However, rights admit this balancing process to take place only with regard to other rights. One should not lose sight of one of the basic aims of rights: to exclude mere interests or preferences from the debate. Therefore, in normal situations, a human right to a decent environment might only admit restrictions necessary to strive for a reconciliation between itself and other rights. The balancing between rights may not be entirely flexible. Differences in legal traditions may explain the adoption of more or less stringent views in the field of restrictions upon the balancing process. For some, the accommodation between competing rights should never undermine some fundamental features of rights which should be kept untouched: this is what the doctrine of the 'essential content' of fundamental rights states. As explained by Alexy, basic rights are restricted or are liable to restriction upon the basis of other conflicting rights, but restriction is limited in the sense that the essential content of the right should not be affected.[53] It would appear that the German doctrine of the 'essential content' of rights has not had much influence on Anglo-American tradition, however, it has been favorably received by the Spanish[54] and the Latin-American constitutional systems.[55]

Despite differences between diverse legal traditions, the resolution of conflicts between rights admits less flexibility than the resolution of disputes concerning non-rights based claims (preferences). In this context, it is useful to recall Dworkin's conception of rights as 'trumps over some background justification for political decisions that states a goal for the community as whole'.[56] On this basis, Merrills rightly states that: 'if a preference can be

53 Alexy, R, *Teoría de los Derechos Fundamentales*, [*Theorie der Grundrechte,* 1986, trans. by Ernesto Garzón Valdés] (Madrid, 1986), pp. 286-291.

54 See art. 53 of the Spanish Constitution. See also: Peces-Barba, *Curso de Derechos Fundamentales. Teoría General* (Madrid, 1995), pp. 593, 596-7.

55 Bidart Campos, G., *Teoría General de los Derechos Humanos* (Buenos Aires, 1991), pp. 406-8.

56 Dworkin, 'Rights as Trumps', in Waldron, J (ed.), *Theories of Rights* (Oxford, 1984;1992), p. 153. See also, *Taking Rights Seriously* (Cambridge, Massachusetts, 1977).

turned into a right the position of the new rights-holder is greatly strengthened, especially when contending with an adversary whose preference has not been so transformed".[57] Therefore, the creation of a right to a healthy environment may be at odds with the idea of an accommodation of environmental concerns and socio-economic interests. This can be particularly worrisome in the Latin-American context, in which there is a marked tendency towards narrowing the possibilities of accommodation between competing interests and competing rights. In the European context, national authorities and tribunals have recognized a certain 'margin of appreciation' which in the case of the establishment of a right to a decent environment may well serve to reconcile this right and other pressing social needs in a given situation. But in the Latin-American context, the "margin of appreciation"-doctrine has not been developed by the supervisory organs of the Inter-American system of human rights. This is explained by the fact that the Inter-American system is based on a deep distrust of domestic governments. It is significant in this respect that Cançado Trindade, President of the Inter-American Court of Human Rights, has praised the rejection of the margin of appreciation doctrine in Latin-America in the following terms:

> "This doctrine could only have been developed in a European protection system which was believed to be exemplary, appropriate for a relatively homogeneous Western Europe (before 1989) in terms of its views on a shared historical experience ... It is no longer possible to assume, with the same apparent confidence of the past, that all States integrating this regional system of protection comply really with the Rule of Law [Estado de Derecho: *Rechtsstaat*] ...
>
> Taking this into account, the doctrine of the margin of appreciation requires a serious reappraisal. Fortunately, that doctrine has not found an explicit equivalent development in the case-law under the Inter-American Convention on Human Rights."[58]

Apart from this rejection of the margin of appreciation doctrine in the Latin-American context, it is important also to bear in mind that, according to the Inter-American Convention on Human Rights, rights should be interpreted so

57 Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects', in Boyle and Anderson (eds.), *op.*cit, p. 29.

58 Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (Barcelona, Buenos Aires, México D.F., Santiago de Chile, 2001), pp. 386-7. My translation.

as to maximize their protection.[59] This principle of interpretation is established in Article 29 of the Convention, which provides that:

> *Restrictions Regarding Interpretation*
> Article 29
> (a) No provision of this Convention shall be interpreted as: permitting any State Party, group, or person to supress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
> (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.
> (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
> (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

These two factors which coexist in Latin-American human rights discourse, the rejection of the margin of appreciation doctrine and the promotion of a system of interpretation that may exacerbate the natural tendency of rights to extend the boundaries of their contours, explain why the idea of a human right to a healthy environment gives rise to some apprehensions, especially in connection to its possible negative impact on the integration of environmental and developmental aspects.

Of course, the power of a rights-based argument would depend on the particular form in which the right to a healthy environment is couched, whether as a civil and political right, an economic and social right, or a 'third generation' right. The main concern of this section is not with environmental rights as solidarity rights because, by adopting this form, the right to a decent environment would entail primarily inter-State obligations to cooperate and give financial and technical assistance to developing countries. In this regard it can rightly be said that '[i]ts main beneficiaries would be developing states whose participation in environmental treaties is particularly desirable if global coverage is the objective, but it would scarcely be a 'human right' in any orthodox sense'.[60] Rather, this part is concerned with the right to a decent environment as a political and civil right, or as an economic and social right. Either of these two

59 *Ibid*, pp. 30-1

60 Boyle, 'Environmental Rights and International Law', chapter 5 of Birnie and Boyle, *International Law and the Environment* (Oxford, 2nd. ed. 2002).

forms strengthen the potential of a right to a healthy environment to take precedence over non-rights based interests. Arguments to prove the existence of this 'strong' right to a healthy environment can be found in the Ksentini Report and this view is reflected in the Draft Principles on Human Rights and the Environment adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities,[61] especially when it states that:

5. All persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries.
6. All persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.
7. All persons have the right to the highest attainable standard of health free from environmental harm
8. All persons have the right to safe and healthy food and water adequate to their well-being.
9. All persons have the right to a safe and healthy working environment.
10. All persons have the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment.

It could be contended that to achieve the integration of development and the environment, instead of opposing to the establishment of environmental rights, the most sensible thing would be to promote the establishment of a human right to development. However, it is not clear that this would contribute to the attainment of sustainable development. A dispute between rights may take us back to the original position in which preference confronts preference. Therefore, the creation of rights would have been irrelevant in the achievement of integration of developmental and environmental concerns. But the effect may also be a negative one. In this connection, Merrills, quoting Lomasky, underscores the fact that the creation of rights might make the accommodation process more difficult, as it would be harder for the right-holders to accept a compromise solution.[62]

61 UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. *Human Rights and the Environment. Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, E/CN.4/Sub.2/1994/9.

62 Merrills, *loc.cit*, p. 29, quoting Lomasky, *Persons, Rights and the Moral Community*, p. 5.

The suggestion that the strategy toward the achievement of sustainable development entails parallel advocacy of a right to a healthy environment and of a right to development, is faced by an additional problem: it has not been easy to clarify the content, legal implications and the right-holder of the right to development. The 1986 Declaration on the Right to Development[63] defines this right in the following broad terms:

> *Article 1*
> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy eonomic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
> 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

There is some consensus as to its characterization as a 'third generation' right. As such, the right to development has been described as a right of peoples and the State,[64] which would comprise the comprehensive and integrated application of all pertinent human rights standards.[65] Among its principal elements, Brownlie emphasizes that the right 'reinforces or implies the exercise of the right of peoples to full sovereignty over their natural wealth and resources' and that it 'constitutes a general affirmation of a need for a programme of international economic justice'.[66] These seem to be the elements which, some years before the adoption of the Declaration, the Arbitral Tribunal in the *Guinea-Guinea-Bissau* arbitration had in mind when stating, that while the economic inequalities between the parties could not justify a modification of the delimitation line, it could not completely lose sight of the legitimate claims by virtue of which economic circumstances are invoked, nor contest the right of the

63 UNGA Res. 41/128, 1986, adopted by 146 votes in favour, 1 against and 8 abstentions.

64 Bedjaoui, 'Some Unorthodox Reflections on the "Right to Development"', in Snyder and Slinn, *International Law of Development. Comparative Perspectives* (Abingdon, 1987), p. 90.

65 For an examination of the legal status of the right to development and its problems of identity, see: Brownlie, *The Human Right to Development*, Study prepared for the Commonwealth Secretariat, Human Rights Unit Occasional Paper, 1989, p. 10-15.

66 *Ibid*, p. 8.

peoples concerned to a level of economic and social development which fully preserves their dignity.[67]

However, despite its clear relation to economic justice between States, the right to development has not succeeded in the establishment of an obligation to provide financial and economic assistance to developing States. In this connection, Brownlie points out that:

The right to development, as presented in the Declaration of 1986 and elsewhere, reflects the idea of entitlement and the corresponding duties, particularly of States. This is of major significance. However, it fails, almost completely to give structure and content to the concept of economic justice. The *modus operandi* offered is fairly obscure but, in so far as it can be discerned, it consists partly on the insistence of the implementation of existing human rights standards, and partly of the duty of States to co-operate with each other in order to create conditions favourable to the realisation of the right to development.[68]

Concluding remarks

In July 2000, at the London meeting of the International Law Association, the Committee on Legal Aspects of Sustainable Development, adopted Resolution 15/2000, in which it shows its confidence on the important role that international law can play 'in promoting the development of a balanced and comprehensive international law in the field of sustainable development and according due weight to both the developmental and environmental concerns'.[69] But this chapter tells us to be cautious. International law, as happens with law in general, can be instrumental in effecting social, economic and political changes, but it can also constitute an obstacle, a very difficult and stubborn one.

These pages have explored certain features of international environmental law that have helped to promote a more effective protection of the environment. However, environmental protection entails additional costs. Obviously, the improvement of preventive and remedial environmental measures entails financial costs. But, environmental protection has also developed to a certain extent at the expense of international economic law relating to development. This effect, though obviously unintended, has been an incidental consequence of, at least, the three elements that have been discussed here: the movement toward

67 *Guinea—Guinea-Bissau* arbitration (1983), 77 ILR 636, para.123.
68 Brownlie, *op.cit,* pp. 22-3.
69 ILA, *Report f the Sixty-ninth Conference* (London, 2000), p. 38.

more participation of transnational civil society in the international environmental law-making process; the use of a rights and duties language which helps to mask the developmental aspects sometimes involved in the prevention of environmental damage; and, the attractiveness of the establishment of a right to a healthy environment.

All these factors have contributed to some extent to the unbalanced development of international law in the field of sustainable development. Therefore, part of the future work that still has to be done in this area, implies that developing countries must revise their strategy with regard to international environmental law.

* This article is part of a research project on sustainable development (project No. 1020182), funded by the Chilean National Fund for Scientific and Technological Research.

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SOME THOUGHTS ON THE MAKING OF INTERNATIONAL ENVIRONMENTAL LAW: A CAUTIONARY TALE

Christopher Pinto

This chapter contains a cautionary tale for those concerned with the shaping of complex rules to protect and preserve the environment. Inevitably, in doing so they seek to regulate State conduct. Such regulation may concern (1) activities that can directly affect the economic interests of the affluent and powerful, and thus their place in a perceived world hierarchy; and (2) rules restraining State conduct by reference to its effects on future generations – anathema at once to national decision-makers among the affluent, and to their diplomatic representatives, to whom only rules for the here-and-now, and, at most, for the short-term, may be relied upon to safeguard their interests. In these areas, the policies of the presently affluent appear to stand in conservative contrast to the projects of the great majority of States engaged in a struggle to achieve prosperity over the long term, and concerned that if the conduct of the affluent and the powerful were not to be restrained in their habits of consumption, the earth's very capacity to sustain life would be gravely, and perhaps irreparably, impaired.

1. Power and rule-making

Thus, perhaps more than in any other field of international law, efforts to establish rules to protect and preserve the environment and to exact compliance with them, are confronted by the often inflexible and persuasive positions of the powerful, concerned to maximize current competitive advantage. While the

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 39-51.*

number and variety of actors in the process of international rule-formation has grown apace, the feature of such confrontation is not new. It will be remembered that the fabric of international law developed out of international custom, or the more or less consistent conduct engaged in among States accounted the most powerful at a particular time.[1] "Customary international law" is still with us in the form of rules that the world of States perceives as "evidence of a general practice accepted as law", still essentially reflecting conduct that is approved or tolerated by the powerful, while inhibiting the development of State conduct not so approved or tolerated. For over the centuries, powerful States have come to understand well the wisdom eventually expressed by Jean-Jacques Rousseau, that:[2]

> "Le plus fort n'est jamais assez fort pour être toujours le maître, s'il ne transforme sa force en droit et l'obéisance en devoir."

The International Court of Justice has itself remarked the possible impetus to be imparted to the formation of customary international law through participation in the process by "States whose interests were specially affected".[3]

1 As Schachter describes the process: "As a historical fact, the great body of customary international law was made by remarkably few States. Only the States with navies – perhaps 3 or 4 – made most of the law of the sea. Military power, exercised on land and sea, shaped the customary law of war and, to a large degree, the customary rules on territorial rights and principles of State responsibility. 'Gunboat diplomacy' was only the most obvious form of coercive law-making. Economic power, like military power, is applied often through implicit, if not open, threats in support of claims over a broad range of inter-State action. The more powerful the economy, the greater the presence of its government and nationals in international transactions. Trade, foreign investment, and technical know-how emanate disproportionately from the advanced economic powers; they carry with them, as a rule, the political views of their respective States, together with social attitudes bearing on international relations. Moreover, for these reasons the affluent States are objects of attention by others. Their views and positions are noticed and usually respected. Their official legal opinions and digests of State practice are available along with international law treatises that influence professional opinion and practice outcomes. In De Visscher's words, 'the great powers after imprinting a definite direction upon a usage make themselves its guarantors and defenders'." Schachter, O., "New Custom: Power, *Opinio Juris* and Contrary Practice", in Makarczyk, J. (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996), at 531.

2 See Rousseau, J.-J., *Du Contrat Social*, Chapitre III, 1762. "The strongest man is never strong enough to be always master, unless he transforms his power into right, and obedience into duty."

3 *North Sea Continental Shelf Cases, ICJ Reports 1969*, at para. 73.

"Specially affected" has been taken to imply the existence of a substantial economic investment needing protection through the rule, and therefore reference to already well-endowed and economically powerful States, e.g. in the case of the Law of the Sea, States with large military and merchant fleets, and with ready access to advanced marine technologies; as to the law of the air, outer space and the "celestial bodies", States with large fleets of military and civilian aircraft and access to advanced jet and rocket propulsion technologies. Correspondingly, if such "specially affected" States were *not* to support, or participate in the formulation of a rule affecting their interests, their inaction or opposition could undermine and possibly terminate the development of the rule. But the criterion "specially affected" is equivocal. When the interests involved relate to an investment of the powerful, their political "weight" will ensure that rules for the protection of those interests become part of the law. Where the poor countries' interests – e.g. their long-term interests in protection of the environment and the sparing use of natural resources – are "specially affected", and are so affected by the very activities endorsed by the law, their opposition is of little account.

Thus, rules of customary international law which are the result of that conversion of power into right and obedience into duty, still govern or have the potential to govern, the conduct of States in every field, from diplomatic relations to the uses of the oceans and outer space; from the environment to the combat of terrorism, from the use of force, to intellectual property law and "cyber law". Transforming power into right and obedience into duty, even today seems the natural order of things.

2. Participation in rule-making in the twentieth century

But is it, indeed, the natural order of things? And if so, is this a part of the natural order that is to remain untouched by evolution? Clearly, the answer must be negative: conversion of power into right, and obedience into duty is no longer the only, or even the generally favoured means by which international law is created. Article 38 of the Statute of the International Court of Justice directs the attention of the Court first to "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States". Some would see the beginning of the development of such participatory and consensual techniques for creating international law in the Congress of Vienna of 1815, when the victors in the wars against Napoleon invited a number

of European States to endorse their decisions on several basic legal principles. However, as C.K. Webster observed:[4]

> "… the Congress of Vienna as a congress of all Europe was never constituted. It remained a Congress of the great Powers who for their convenience had summoned the smaller Powers of Europe to meet them. The idea of a constituent assembly, imagined by some … was found to be impossible. The large number of small States made such an assembly impracticable in any case. But the wishes of the masters of Europe were from the first clear and unbending on this point. They considered themselves as 'Europe', and at the Congress they asserted successfully the ascendance of the Great Powers. The smaller States were only to be admitted at such terms as suited those who had great resources and armies at their command."

The beginning of the twentieth century saw what we might well come to remember as "The Hague Spring" in the development of participatory "legislative" techniques for the adoption of rules to govern the conduct of States. Some 24 States took part in The Hague Peace Conference of 1899, and some 47 States attended its sequel in 1907. While the great majority was from Europe and North America, a few Latin American States attended in 1907. There were even four States from Asia, but none from Africa. General acceptance of the notion of the juridical equality of States, whether great or small, meant that their preferences were counted at plenipotentiary conferences. Voting took place on a one-State-one-vote basis, but unanimity was required for the adoption of a proposal. There were 27 original Members of the League of Nations, and 13 other States were "invited to join", and in conferences convened in the aftermath of World War I, participation was somewhat broader than before. The process of codification of international law, begun in private associations like the *Institut de Droit International* and the *International Law Association*, came to be sponsored at the inter-State level with the establishment, by the Council of the League of Nations, of the Committee of Experts for the Gradual and Progressive Codification of International Law.

Major developments in the participatory process came at the end of World War II with the creation of the United Nations and the rapid increase in the number of sovereign States with opinions on legal issues seeking the right to express them. The International Law Commission was established, and the

4 See Webster, C.K., *The Congress of Vienna 1814-1815*, London, OUP, 1919, p. 77.

practice developed of convening "universal" plenipotentiary conferences on legal issues under the auspices of the United Nations, sometimes styled "law-making", or, more accurately, "treaty-making" conferences. The first of them, in 1958, was attended by some 86 States. It dealt with the Law of the Sea and adopted as the basis for its deliberations the meticulous preparatory studies carried out by the International Law Commission. It did not apply the unanimity rule, but took decisions on the basis of specified pluralities of votes. Since then, many, but not all, such conferences have followed that careful practice. One of the most significant and acclaimed Conferences in the series, the UN Conference on the Law of Treaties (1968/9), took as its "basic" text (*i.e.*, a text that would stand unless changed by a prescribed majority of votes) the product of nearly two decades of consideration by the International Law Commission. Significantly, that Conference, which was attended by some 110 States and produced the "treaty on treaties", also took decisions in accordance with prescribed majorities. It seemed that unanimity, while still a desirable objective, was no longer required, and that the will of the majority of States would prevail. The Conference went on to declare that multilateral treaties which deal with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole, should be open to *universal participation*.

Following the development and application of complex voting rules in the drafting and adoption of the United Nations Convention on the Law of the Sea (1982), the General Assembly commissioned a study of such rules, and in 1983 reviewed "Draft Standard Rules of Procedure for the United Nations Conferences". But it seemed that a watershed had been reached in member States' assessment of the efficacy of decisions taken by prescribed majorities. The study was not completed, and may never be.[5] Decisions taken on the basis of prescribed voting rules throughout a decade of negotiation and compromise that produced the 1982 *UN Convention on the Law of the Sea*[6] endorsed by the

5 On procedures for the conduct of such conferences, see generally *Draft Standard Rules of Procedure for United Nations Conferences* (UN doc. A/38/298 dated 8 August 1983) which "follows closely the rules of procedure of numerous United Nations conferences convened during the past decade, whose procedures, which were generally based on those of the General Assembly and to some extent on those of the Economic and Social Council, have to a considerable extent become standardized". Referred to the Sixth Committee, consideration of the Draft has yet to be completed.

6 See the Rules of Procedure of the Third United Nations Conference on the Law of the Sea (adopted 27 June 1974, as amended, A/CONF.62/30/Rev.3), chapter VI (Decision-making), which provides *inter alia* for deferment of voting for specified "cooling-off"

overwhelming majority of States were firmly set aside in 1994 by the subsequent adoption of the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.* This unprecedented action was taken under pressure from a small group of economically powerful States with the avowed objective of achieving "universal" adherence to the Convention – in this context a coded reference to cleansing the 1982 text of provisions that had made the most powerful of their number reject a "package deal" concluded with their collaboration. Eventual acquiescence in this unusual process demonstrated how *power* is able to subvert the deliberate and orderly search for ways to establish rules which would give expression to what the overwhelming majority had believed to be in the general interest. Power had been an obvious factor, which naivety, youthful enthusiasm, and the *hubris* generated by the multilateralist spirit of times had tended to obscure. The crowning irony: the State for whose adherence laboriously negotiated texts had been swept aside through the exercise of power chose to remain outside a Convention that was hailed as a "Constitution for the Oceans", and that recalls, in every significant aspect, the influence of its leadership and persuasive capability.

"Consensus" has since become the guiding principle at inter-governmental meetings. As now applied, "consensus" seems to amount to a resurrection of the unanimity rule and brings to mind Lorimer's comment that "Unanimity was possible only by the majority giving way to the minority".[7] Thus, in a little

periods, notice of voting, and presidential mediation, all intended to ensure that "The Conference should make every effort to reach agreement on substantive matters by way of consensus, and there should be no voting on such matters until all efforts at consensus have been exhausted". (*Declaration incorporating the "Gentlemen's Agreement"*, made by the President and endorsed by the Conference at its 19th meeting on 27 June 1974, and approved by the UN General Assembly at its 2169th meeting on 16 November 1974). A leading authority describes the operation of this "qualified consensus rule" as follows: "It may be defined briefly as taking a decision only when no participant opposes it so strongly as to insist on blocking it; a consensus can thus bridge wide, though not all to deep, differences. But since an unqualified consensus rule still permits any participant to exercise a veto, and thus, if determined and independent enough, to exact a high price for its agreement, the now frequently used qualified rule maintains the possibility of reverting to voting if the consensus process breaks down. This alternative is, however, resorted to only if the dissenters are considered to constitute a small, unreasonable and substantively overrideable minority. In practice, the threat to revert to voting is one merely maintained in the background to prevent any egregious abuse of the general desire to do business by consensus." Szasz, P.C., "Improving the International Legislative Process", in Szasz, P.C., *Selected Essays on Understanding International Institutions and the Legislative Process* (2001), at p. 16.

7 Lorimer, J., *The Institutes of the Law of Nations*, London, Vol. I, 1983, p. 47.

over a hundred years, participation in treaty-making and the development of decision-by-majority at inter-State gatherings had come full circle. Power, it seemed, succeeded in turning the clock back, and resumed unfettered control of the development and interpretation of international law.

The latter years of the twentieth century, and the early years of the twenty-first, were marked by State initiatives including the use of military force, which, though undertaken under the guise of humanitarian or arms control aims, manifestly contravened the existing law, including law to protect and preserve the environment. They raised several questions. Had extra-legal action by the powerful actually brought about a change in the law, i.e. the instant creation of customary international law?[8] Had we been wrong to treat international law, as "law" at all? Could one continue to proclaim international law's generalized, if sometimes faltering efficacy, when confronted almost daily by State action starkly at variance with its most basic tenets? Had the "equality of States" doctrine, utopian at best, been finally abandoned? Should it be assumed that the affluent (= the powerful few) of the world have a monopoly of wisdom, and that support for their convictions as to what is to be done would bring peace, order and development to all? Are multilateral conferences on legal issues like those of the last century to be considered merely a waste of time and other precious resources, and not to be repeated? Do the rules of procedure, especially those on decision-making among States, give undue weight to the opinion of the majority? Should the great majority of States accept a benevolent hegemony as perhaps the only effective way to maintain order in the unruly world of States and be willing to pay a price through voluntary acceptance of secondary status?[9]

3. Collaborative rule-making: no way back

To answer any of these questions in the affirmative would be to concede, surely, that the century that began with "The Hague Spring" of participatory action for the establishment and administration of international law, had ended in a

8 See Toope, S., "Powerful but unpersuasive: the role of the United States in the evolution of customary international law", and Skordas, A., "Hegemonic custom?" in *United States Hegemony and the Foundations of International Law* (2003), pages 287-347.

9 See Weiss, F., "WTO Decision Making: Is it Reformable?", in *Essays in Honor of Robert E.Hudec, The Political Economy of International Trade Law*, Cambridge University Press, 2002, pp.68-80.

"winter of disillusion", if not discontent. Power, which had been the creator of international law, seemed now to be responsible for its destruction, or unsolicited and self-serving transformation.

It seems inevitable that, for the foreseeable future, international law will continue to falter when confronting the unlawful or misguided exercise of power. Nevertheless, there are still ways open to the overwhelming majority of States, declared to be both "sovereign" and "equal", to strengthen rules of international law and minimize the incidence of such situations.

They ought, in the first instance, to give their resolute support to continuing the twentieth century practice of elaborating the rules of international law through State interaction in negotiation and compromise, leading to the adoption of intergovernmental agreements reflecting the will of the overwhelming majority of States, and governed by the Vienna Conventions on the Law of Treaties of 1969 and 1986. This would seem to require that the UN General Assembly proceed, with all deliberate speed, to complete its study of conference procedures begun in 1983, with a view to facilitating that process.

a) Cost of participation

Universal participation in the making of treaties on subjects of general interest is of the first importance. The cost of participating in the lengthy treaty-making conference may strain the resources of the developing countries, preventing their attendance, or making their participation dependent on funding from friendly countries in ways that could influence the expression of their preferences on the issues. When contemplating participation in a treaty-making conference, a State would need to assess *inter alia* the investment called for, in relation to the impact of the possible outcome on its policies and interests, particularly where the conference may lead to the establishment of a new international institution, and thus to the continuation of its investment. Enhanced internal consultation and preparation, reduced and more selective representation, and continuous access to policy directives from capitals, could also reduce costs.

The UN Secretary-General, or a committee of the General Assembly, could be charged with devising ways and means of reducing the costs of the intergovernmental negotiation process. The actual gathering of persons in face-to-face interaction could be kept to a minimum, while arrangements for teleconferencing and written exchanges of views should become routine, creative modifications being made to the rules of procedure. The role of the International Law Commission in the production of "basic" texts designed to facilitate the work of the treaty-making conference should be re-affirmed and strengthened. A broader framework of rules may be needed to govern the composition and deliberative

procedures of preparatory bodies where the International Law Commission is unable to deal with the matter, or the "basic text" must deal with highly technical issues. The work of the *Third UN Conference on the Law of the Sea*, and of the preparatory bodies responsible for drafting the *Convention on Biological Diversity* and the *Framework Convention on Climate Change* offer a wealth of experience on which to base such rules.

b) Decision-making

Among the areas that warrant consideration by the majority of countries are voting procedures to be applied at treaty-making conferences, as well as to decision-making within any institutions established by the resulting treaties; and the structure and staffing of such institutions. Voting has, in general, been provided for on a one-State-one-vote basis. Acceptance of a treaty rule takes place at an initial or "committee" stage by simple majority, while final approval at a plenary stage would be by qualified majorities, such devices offering basic safeguards for minority positions. Another such device "weighted" voting (alone, or in combination with one-State-one-vote) has usually been rejected by the majority of States for the reason that "weight", as traditionally associated with institutional voting, has been determined on a single basis viz., "ability to pay", and the actual regular contribution assessed against a particular State, a practice that allots voting power to the affluent, and leaves them in control.[10] This

10 As early as 1945, Jenks noted the challenge faced in the search for a more complex and sensitive system: "Weighted voting is most readily attainable in an organization the functions of which are sufficiently circumscribed and well-defined to afford some simple basis for the selection of criteria of relative importance capable of securing general acceptance. Where an organization has a wide range of responsibilities, the factors to be taken into account in assessing the relative interest of its members either in its work as a whole or in particular decisions are likely to be too varied and imponderable and the relative weight to be attached to the different factors is likely to be the subject of acute controversy." Jenks, W., "Some Constitutional Problems of International Organizations" in 22 (1945), *British Yearbook of International Law* 41. See also Eagleton, C., *International Government* (Third edition, 1957), p. 578; Sohn, L.B., "The Role of the General Assembly and the Problem of Weighted Voting", in Commission to Study the Organization of Peace, *Charter Review Conference*, Ninth Report and Papers presented to the Commission (1955), pp. 107-29; See also, Clarke, G., and Sohn, L.B., *World Peace through Law* (1962) pp. xix-xxii; MacIntyre, E., "Weighted voting in international organizations", *International Organization* 8 (1954), 484-97. Senf Manno, C., "Selective Weighted Voting in the UN General Assembly: Rationale and Methods", in 20 (1966) *International Organization*, pp. 37-62. In general, most such proposals treat the factor of finance as central, if not controlling, but try to mitigate the resulting disproportionate weight allocation by reference to other factors, mainly population. A proposal by the

would seem to be a carry-over from the commercial world, where the greater the investment, the greater the risk, the opportunity for profit, and the corresponding right of control. But inter-governmental institutions are essentially co-operative enterprises from which no profits are expected, and whose operations entail no hidden risks. Accordingly, there seems no compelling reason why higher contributions should carry greater voting rights. Consideration might be given to assessing all Member States for the *same contribution*, fixed at a level affordable by all but the poorest States (for whom special arrangements could be made), and giving each State one vote or the same number of votes. States should be prepared to construct far smaller organizations in terms of staff, and no State would be allotted preponderant voting rights. The affluent, confident of the wisdom of their preferences, as of their right to control decision-making, may balk at the prospect, and prefer to remain outside such institutions. The majority on the other hand, should be ready for such an outcome, and, with faith in their convictions, to build upon them and prove their worth.

On the other hand, systems of "weighted" voting might be considered, in which "weight", or numbers of votes, would be allotted, not on the basis of level of contribution (or not exclusively on that basis), but by application of a range of value-adjusted criteria such as size of a State's population; the extent of territory for which a State is responsible; a State's adherence to, and implementation of, specified multilateral treaties enshrining core human values recognized by States generally,[11] implementation of multilaterally agreed rules

Center for War/Peace Studies would treat as *binding* a decision by the General Assembly based on a "binding triad" of votes, i.e. a decision that attains, "notwithstanding Article 18 [of the Charter] each of the following percentages of votes cast by the members of the General Assembly present and voting: (a) a two-thirds majority, with one vote assigned to each member; (b) a [simple or qualified] majority with votes assigned to each member in proportion to its population, with no member assigned votes in excess of 15% of the world population; and (c) a [simple or qualified] majority with votes assigned to each member in proportion to its assessed contribution to the regular budget of the Organization, with no member assigned votes in excess of (15%) of the Budget, see Hudson, R., *Quick calculator for estimating outcomes of votes in the UN General Assembly under the binding triad system for global decision-making* (1995), CW/PS Special Study No. 8.

11 A starting point for determining the treaties to be taken into consideration, could be the "core group of multilateral treaties deposited with the Secretary-General, representative of the organization's key objectives", so described in the UN Secretary-General's letter to Member States inviting ratification or approval of them by the close of the twentieth century, and in celebration of the dawn of the twenty-first. That group includes multilateral treaties on (1) human rights, (2) refugees and stateless persons, (3) international criminal law, (4) disarmament, and (5) the environment. But there are several

for the protection of the environment and sustainable development of natural resources world wide; quality of domestic governance indicated by adherence to democratic principles regarding regular elections, administrative transparency and accountability; provision for the implementation of civil liberties; law and policy directed at developing gender empowerment; level of affluence; and level of poverty. An index (a "global co-operation index") determined by reference to such criteria would also determine the "weight" (or number of votes) allotted to a State, whatever the context in which votes are cast. A vote so "weighted" may make it more likely that the preference expressed would not be based on selfish considerations alone, but would also take into account the good of all.

c) Representation

Finally, as to the treaty-making conference, States should recognize the need to study in depth the nature of their *representation*. Today, most States send to such conferences "high-level" political personalities or the multifunctional public officer, in either case charged to advocate the sending government's positions. As one author, contemplating a "theory of representation", eloquently comments:

> "The result [is] the stunted and primitive reality of an international society in which only the voices of governments are heard, and those voices evoke only a weak and distant resonance of the infinitely rich internal social processes of the state-societies,

other treaties that may be said to belong to such a "core group", including the two Vienna Conventions (1969, 1986) on the Law of Treaties; the Vienna Conventions on Diplomatic (1961) and Consular (1963) Relations; the 1982 United Nations Convention on the Law of the Sea, and its 1994 "Implementing Agreement"; and the four 1949 Geneva Conventions on the Laws of War, and their two 1977 Protocols. Of the relevance of legal commitment, represented by adherence to a treaty, to the existence of an "international morality", one scholar has observed: "… only those rules of international morality are universally relevant which are incorporated into the body of contemporary international law. In other words, they are coterminous in international relations. This understanding has a number of merits: (*a*) it avoids the high degree of cognitive uncertainty which would otherwise accompany international morality; international law provides well-defined procedures for reaching agreement on its content; (*b*) it ensures that international morality will not serve as an instrument for the subversion of the international legal system; and (*c*) it compensates for the weaknesses of an autonomous international morality through offering the institutionalised mechanisms of international law for their interpretation and enforcement." Chimni, B.S., *International Law and World Order* (1993), p. 67.

> of the self-creating willing and acting of the internal social process of the state-societies."[12]

Contemplation of a "theory of representation" raises issues of some complexity for the making of international law, and in particular for the making of international environmental law, which requires the participation not only of a variety of actors other than States, but must also determine how the interests of future generations should be represented. In 1758 Vattel, among the most influential of classical publicists, effectively assimilated "man" and "State", and having derived State equality from human equality declared the sovereignty of each State to be equal to that of every other State.[13] Some two centuries thereafter the UN Charter endorsed this conception when, in 1945, it affirmed that "The Organization is based on the principle of the sovereign equality of all its Members" (Article 2(1)).

A few years later the poor countries as a group (the Group of 77) carried the Vattel man-State assimilation a stage further in declaring that they attached "cardinal importance to democratic procedures which afford no position of privilege in the economic and financial, no less than in the political sphere", and insisted that the Board of the UN Conference on Trade and Development (UNCTAD) take decisions by a two-thirds majority. But transference of the concept of "democracy" from its use in relation to a collectivity of human beings to apply to a collectivity of State-persons encounters a gap in the reasoning that has yet to be satisfactorily bridged: are the multifarious interests of human populations properly transmitted through *government* representation? Are States the proper representatives of unborn human generations? Even when States are democratically organized, representation through government spokesmen, usually subject to time-sensitive policy biases may, depending on the subject-matter, be less than optimal; but representatives of a State not democratically organized may well fail to take account of important interests of its population, let alone of future generations.

12 Allott, P., *Eunomia: New order for a New World*, Oxford, OUP, 1990, p. 303.

13 He said: "Since men are naturally equal, and perfect equality prevails in their rights and obligations … Nations composed of men … are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." *The Law of Nations* (trans. Joseph Chitty, London 1834), paragraph 18.

d) Universal values and the promotion of compliance

Parallel with efforts to review and improve collaborative methods of law-creation through international agreement, there would seem to be a need to remedy the widespread erosion of confidence in the efficacy, if not the very existence of an "international legal order", and to re-vitalize and strengthen the will, world wide, to act in accordance with the law as so fashioned. One reason for this erosion of confidence in the legal order is surely the fault lines that divide systems of values causing the exclusionary and conflicting interpretation of rules – even when jointly formulated and explicitly agreed to at State level. What could help might be worldwide collaboration among distinguished individuals with impeccable ethical credentials, and selected so as to represent a broad spectrum of cultures, in the formulation of culture- and ideology-free human values. These might include: compassion, non-violence, friendliness and co-operation, integrity/honesty/sincerity, social service, commitment and responsibility, generosity and sharing, openness to change and a deep caring for all life in an optional environmental context. The work of such an eminent group – a *World Commission on Human Values* – when introduced into every educational system (say, by a treaty concluded under the auspices of UNESCO) may, in a few generations penetrate upward to re-orient political thinking and behaviour, first at the national level, and in time, internationally.

Religious leaders from east and west (Sri Sri Ravi Shankar's *International Association for Human Values* (Bangalore, 2000); the work of Dr. Hans Küng and his colleagues at Tübingen University in formulating a *Global Ethic*, 1995) and eminent scholars (Samual Huntington, Harvard, 1995) have urged the search for the *commonalities* that exist across all cultures and civilizations. From the world of business to the world of governments, emphasis on strengthening fidelity to common human values is reaching the top of the agenda. It is surely time for legal science to make its contribution, and in so doing, expand the reach of human values and establish a common understanding of their implications, in particular among those who undertake responsibility for preserving the international legal order.

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THE ROLE OF THE STATE AND INTERNATIONAL ORGANISATIONS IN RECONCILING SUSTAINABLE DEVELOPMENT AND GLOBALISATION

Duncan A. French

1. Introduction

One of the most important issues pertaining to the continued relevance of sustainable development to the political debate is its relationship, both conceptually and on a practical level, with the notion of globalisation. Globalisation, in all its various manifestations, is often considered as an inevitable force; a largely corporate-led movement towards greater interdependence between nation States and, to a lesser extent, their harmonisation primarily in terms of their economic systems, but also socially and politically. Of particular note is the diffuse nature of the causes of globalisation, which has provided it with much of its apparent normative justification. In an international society where the vast majority of States endorse the principle of market liberalisation and seek to encourage rather than hinder the use of their territory by transnational corporations and business networks, globalisation is considered unavoidable. At the same time, however, the international community continues to grapple with the implications of sustainable development, recognizing that the present international system continues to engender structural inequalities and environmental damage. And unlike globalisation, sustainable development is perceived less as an inevitability, and more of a policy choice. This chapter seeks to explore the tension between these two paradigms and examines whether they can – in any meaningful way – be reconciled. The chapter concludes by noting that whilst there are no simple solutions to uniting globalisation and sustainable development, little is achieved by maintaining the supposed conceptual dichot-

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 53-71.*

omy between the 'unchangeable' and 'corporate' nature of globalisation and the 'optional' and 'public' nature of sustainable development. What is certain, however, is that for there to be any possibility of reconciliation, the role of public governance – as developed by both nation States and international organisations – will be pivotal in attempting to maintain a necessary balance between the numerous competing interests that such paradigms inevitably generate.

2. Sustainable Development and Globalisation: Same Issues, Different Perspectives?

Globalisation is difficult to define, but quite easy to appreciate. The porous nature of traditional national boundaries – cultural, political, socio-economic and regulatory – is a key element of globalisation. Economic deregulation is a central part of the drive towards globalisation, but it is not the only aspect. As Professor Anthony Giddens noted when giving the prestigious 1999 BBC Reith lectures, '[some] see the phenomenon almost solely in economic terms. This is a mistake. Globalisation is political, technological and cultural, as well as economic'.[1] Critics of globalisation would agree with this statement, suggesting that globalisation has two fundamental characteristics; the corporatism of global society and, equally damaging, the creation of a global homogenous culture based predominantly on corporate-driven consumer values.[2] Of course, as a concept 'globalisation' is heavily over-used.[3] Shifts in socio-economic trends, technological advances and changes in political thinking are all now measured by reference to globalisation. The actions of States are carefully scrutinised to determine whether or not they are promoting globalisation. If

1 See http://news.bbc.co.uk/hi/english/static/events/reith_99/ for the full text of Professor Giddens' 1999 BBC Reith lectures.

2 T. Athanasiou, *Slow Reckoning: The Ecology of a Divided Planet* (London: Secker & Warburg) (1996) 220-221: 'Today's future is marked by brutal globalism and disoriented localism, by high technology and dismal village poverty, by planetary TV, computerized back-office sweatshops, and frustrated, furious youth. It is a transnational future of nationalist backlash, in which twentieth-century institutions and twenty-first-century technology combine to yield an almost nineteenth-century capitalism'.

3 See D. Held *et al*, *Global Tranformations* (Cambridge: Polity) (1991) 1: 'globalisation is in danger of becoming, if it has not already become, the cliché of our times: the big idea which encompasses everything from global financial markets to the Internet but which delivers little substantive insight into the contemporary human condition'.

not, the assumption is made – often arguably incorrectly – that States are acting in a protectionist manner. Globalisation, in short, is the new yardstick by which both public administrations and the corporate sector are tested. Nevertheless, regardless of its ubiquity, the notion of globalisation represents an attempt to encapsulate something of the present global situation.[4]

Whether globalisation is a force for good or bad remains unclear. As the International Law Association's 2000 Report on the Legal Implications of Sustainable Development notes, '[s]ome view this process as the "dollarisation" and the onward march of global capitalism, whereas others consider globalisation as ultimately the most effective way to achieve sustainable development, through eradication of poverty, protection of the environment and promotion of respect for human rights'.[5] The report continues by rhetorically asking whether we are 'witnessing a globalisation without a human face?'.[6] Globalisation presents many challenges, particularly to the nation State. Some suggest that if globalisation implies only liberalisation and deregulation, non-trade public policy goals such as social development and environmental protection are likely to be jeopardized. The lack of meaningful provisions on these issues in the now-defunct draft Multilateral Agreement on Investment (MAI) negotiated within the Organisation for Economic Co-operation and Development (OECD) is an often-used example of this.[7] For supporters of sustainable development, globalisation poses a real danger of undermining everything that they have worked for over the last two decades; the commercial imperative of global business being a much more aggressive opponent to the developmental and environmental tenets of sustainable development than simple political disinterest and institutional intransigence. On the other hand, globalisation, which has so far dealt swiftly with most opposition (including, some would say, the very notion of sovereignty itself), sees in sustainable development a remnant of belief in the

4 *Ibid*: 'Clichés, nevertheless, often capture elements of the lived experience of an epoch'.

5 *Report of the Sixty-Ninth Conference of the International Law Association (ILA)*, (held in London 2000) (London: ILA) (2000) 655-656.

6 *Ibid*, 656.

7 B. Stern, 'How to Regulate Globalization' in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press) (2000) 249: 'the MAI would allow total liberalization, not only for international trade which transcends the State's frontiers by itself, but also for investment and therefore production, an activity rooted within the State's territory. This, then, ultimately constitutes an attack against the State's territorial sovereignty, and for this reason has met with very negative reactions from the majority of European countries, and even greater majority of developing countries'.

benevolent power of the State. Sustainable development – by its very nature – relies on the organisational ability of the State to manage change and to promote a particular vision of public policy. This dependence, if only partial, on the machinery of the State is regarded by critics as the elaboration of further unnecessary bureaucratic burdens.

The potential for conflict between the globalizing society and sustainable development is therefore quite clear. However, to truly understand the relationship between them (or more accurately, to surmise how this relationship might be improved) it is important to move beyond the usual rhetoric that is often part of such discussions. The first point of rhetoric that must be jettisoned is that globalisation and sustainable development are separate debates. It might be assumed that whereas globalisation is a corporate drive towards a more open and inter-connected world economy (the ultimate beneficiaries of which are 'consumers'), sustainable development centres upon public goals of improving environmental standards and the position of the world's poor. The former clearly focused on the reach of the global market, whilst the latter focused on issues of environmental degradation and global poverty. But to suggest that globalisation and sustainable development are separate debates is to miss the point. Even if one ignores the arguments based on a causal relationship between the globalizing economy and the existence of negative externalities,[8] it is important to recognise that globalisation and sustainable development are the same debate, because they both focus on the same issues – if from slightly different perspectives. In short, both are attempts to understand a changing world, where increasing opportunities for commerce, communication and the linking of cultures exist alongside ever-worsening environmental problems and increasing social inequities. Or to put it slightly differently, whilst globalisation presents the international order with a new future, sustainable development tempers this with a realism of past experience. As the Programme for the Further Implementation of Agenda 21 adopted by the UN General Assembly in Special Session in 1997 noted,

> 'The five years that have elapsed since the United Nations Conference on Environment and Development have been characterized by the accelerated globalisation

8 Such externalities arguably include the exploitation of cheap labour in many developing States and a perceived 'race to the bottom' as multinational corporations seek to locate in territories with lower environmental safeguards. Other externalities, such as the rise in pollution through increased transfrontier movement of persons and goods, are also considered to be consequences of the globalizing society.

> of interactions among countries in the areas of world trade, foreign direct investment and capital markets. Globalisation presents new opportunities and challenges. It is important that national and international environmental and social policies be implemented and strengthened in order to ensure that globalisation trends have a positive impact on sustainable development, especially in developing countries.'[9]

Moreover, whilst it is true that the debate on globalisation has up to this point largely focused on the 'private' and the 'corporate' and the debate on sustainable development has remained largely within the realm of public policy, this is an artificial – and ultimately, damaging – divide.[10] And though an inevitable suspicion of regulation seems to be a key feature of globalisation,[11] in contrast with the perceived importance of regulation in contributing to the attainment of sustainable development, this is – I would submit – a current trend rather than a permanent dichotomy. Political reality demands a much more integrated approach from both the private and public sectors if either globalisation or sustainable development is to become a viable global proposition.

Of course, ultimately, the challenge is one of reconciliation, of ensuring that the benefits of both globalisation and sustainable development are achieved, without losing the benefits of either. The second piece of rhetoric to reject, therefore, is that it is a question of either/or, that globalisation and sustainable development are mutually exclusive, and cannot be made to co-exist in any meaningful manner. However, as the above quotation from the General Assembly strongly argued, globalisation and sustainability can be made – must be

9 UN Doc. A/RES/S-19/2 Annex (1997) paragraph 7.

10 This reference to a 'public/private' dichotomy is distinct from the traditional division often rejected in feminist jurisprudence. In that instance, 'private' refers primarily to the domestic sphere. This is not to say that a feminist perspective cannot assist in our understanding of international society's response to globalisation and sustainable development. As Charlesworth and Chinkin note, 'the boundary [between the public and private spheres] is constantly shifting in response to economic and social developments such as national 'privatisation' policies and globalisation' (H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press) (2000) 30).

11 Martti Koskenniemi, 'The Wonderful Artificiality of States' in *The Transformation of Sovereignty* (American Society of International Law Proceedings) (1994) 25: 'The neo-right critique of the social welfare state is increasingly prominent in Europe and elsewhere. Voices stress the function of the market in creating acceptable conditions for social life. For them, states and state organisation create artificial boundaries that hamper the creation of efficient financial and commodity markets. According to these critics, a workable system of production and distribution of economic values can be attained only by doing away with state bureaucracies' (footnotes omitted).

made – to work together effectively. For those that are suspicious of the claims of global capitalism and unconvinced of its ability to protect the weak and the unrepresented,[12] there must come a moment, within serious debate,[13] when there is recognition that change is only possible from within the present structure. As equal manifestations of internationalism and global governance, globalisation and sustainable development must both be accommodated. Moreover, as the General Assembly went on to note, globalisation itself can play a part in assisting developing countries in reducing the amount and level of poverty within their territories, though at present this was recognised to be an exception to the more usual negative trend.[14] What is very clear, however, is that in the globalizing society, successful implementation of sustainable development will require 'the creation of new levels of cooperation among States, key sectors of societies and peoples'.[15] Specifically, much will depend upon the nature and extent of the pressures exerted by forces beyond the boundaries of a State's jurisdiction. As the 1997 Programme for the Further Implementation of Agenda 21 noted, '[a]s a result of globalisation, external factors have become critical in determining the success or failure of developing countries in their national efforts'.[16] This issue of the relationship between the State and external factors is one that this chapter will return to later; the key point at this stage to note is that whilst the relationship between globalisation and sustainable development may be difficult (with particular reference to the present uneven nature of the global distribution of the benefits of globalisation), it should not be presumed that they are mutually exclusive.

The third – and final – piece of rhetoric that must be rejected is that whilst globalisation is concerned with ensuring open markets, a central feature of sustainable development is the protection of domestic markets, especially in developing countries. Many developing countries remain concerned that the present international trading system is weighed against them; that whilst access to many of their markets are subject to low tariffs and strict world trade rules, the markets of developed States remain disproportionately outside the remit

12 Including that which cannot represent itself, *viz.*, natural resources and future generations.

13 As compared with the violence that has characterized many recent anti-globalisation protests at international conferences and meetings of world leaders.

14 *Supra*, n.9 paragraph 8: 'Although economic growth – reinforced by globalisation – has allowed some countries to reduce the proportion of people in poverty, for others marginalisation has increased'.

15 1992 Rio Declaration on Environment and Development, preamble.

16 *Supra*, n.9 paragraph 25.

of the rules of the World Trade Organisation.[17] Sustainable development, on the other hand, as the successor in many ways to the New International Economic Order[18] is seen as promoting a more equitable global system, where trade preferences and differentiated treatment are an intrinsic feature of sovereign equality.[19] This is a key tension within the globalisation/sustainability debate, but it is wrong, I would suggest, to argue that sustainable development requires – potentially even obliges – *a priori* protectionism. It is undoubtedly the case that many developing States require greater external assistance to move away from the cycle of abject poverty and environmental degradation that they find themselves in. Further changes to the world trade regime which recognise that it is self-defeating to expect countries such as Burkina Faso to live up to the same standards as set for countries of the OECD would be one aspect of such assistance. But it is wrong to claim that 'true' sustainable development is only possible through a rejection of the principle of free trade. As the 1992 Rio Declaration correctly emphasises, what is required is 'a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation'.[20] Economic protectionism can never ultimately be environmentally sustainable as it is premised upon an inefficient use of resources; *viz.*, a use of resources that stifles diversification, promotes perverse incentives and perpetuates irrational decision-making. Such an approach is also unsustainable in broader socio-economic terms, as wealth-generation – essential

17 A. Cassese, *International Law* (Oxford: Oxford University Press) (2001) 410: 'some specific standards prove of little benefit or even disadvantageous to emergent countries. Thus, for instance, the Agreement on Subsidies and Countervailing Measures prohibit subsidies normally used by developing countries, whereas they exempt from the prohibition *agricultural subsidies* used by developed States' (author's italics).

18 For reference purposes, see the 1974 Declaration on the Establishment of the New International Economic Order (UNGA Doc. A/RES/3201 (S-VI) (1974)) and the 1974 Charter on Economic Rights and Duties of States (CERDS) (UNGA Res. 3281 (XXIX) (1974)).

19 1986 ILA Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order: '[w]ithout ensuring the principle of equity there is no true equality of nations and states in the world community consisting of countries of different levels of development' (*Report of the Sixty-Second Conference*, (held in Seoul, South Korea 1986) (London: ILA) (1987) paragraph 3.1. See also the Committee Report: 409-487).

20 Principle 12 Rio Declaration.

to poverty reduction – is similarly restricted.[21] And contrary to more radical positions, development that is based largely on subsistence livelihoods is not sustainable as it downgrades human welfare in favour of perceived environmental preservation.[22] Moreover, as has already been noted, for change to the global system to be politically realistic it will usually have to be incremental and modest, rather than the pretence that one can start with a blank ideological canvas on which radical idealism can be wrought. International trade is a transnational reality, and those seeking to promote sustainable development must seek to operate within it. However, the aim should now no longer simply be the maintenance of the *status quo ante*, but rather the need to work towards a trading system that represents a fairer balance between developed and developing States.

3. Sustainable Development and Globalisation: The Functional State

It is generally accepted that the present situation, in terms of environmental degradation and the social-economic situation of the majority of the world's population, is not positive; 'the overall trends with respect to sustainable development are worse today than they were in 1992…the implementation of Agenda 21 in a comprehensive manner remains vitally important and is more urgent now than ever'.[23] Such a negative outlook might lead us to one of two conclusions. Either one can argue that sustainable development is a relatively meaningless concept (that the reason that it has had little or no effect is because

21 Moreover, as the following quotation highlights, whilst trade is obviously not value-neutral in terms of the generation of negative externalities (on which, see n.8), it is not necessarily international trade *per se* that is the major reason for unsustainability within a society: 'trade may give the appearance of being the fundamental cause of environmental degradation, but the actual role of trade is generally one of reinforcing the lack of appropriate market signals, effective policies and institutional mechanisms that are the true underlying causes of many environmental problems' (D. Pearce and E. Barbier, *Blueprint for a Sustainable Society* (London: Earthscan) (2000) 138). This reasoning applies equally, of course, to many of the social problems confronting such countries.

22 Similar tensions between preservation and sustainable utilisation can be seen in the debates within the Convention on International Trade in Endangered Species (CITES) as regards the protection of the African elephant.

23 *Supra*, n.9 paragraph 4.

it is devoid of conceptual and political substance)[24] or one can argue that whilst the notion of sustainable development is in itself conceptually justifiable, there has been a distinct lack of political will amongst those most able to promote its elaboration. Both are potentially valid arguments, and I think each contains a certain amount of truth. I would want to suggest, however, that the reality is much more complex. The remainder of this chapter will focus on two factors that will prove pivotal if sustainable development and globalisation are, in any way, to be reconciled, *viz.*, the continuing relevance of the nation State, and the important subsidiary role of international organisations.[25]

The nation State is changing; it is losing its inherent superiority amongst global entities and becoming just another actor on the international stage, or so the argument goes. For many, the breakdown of artificial notions of sovereignty and the creation of new associations and networks – governmental, corporate and private – are a sign of significant and real developments in international relations.[26] It signifies the end of the centralisation of political, socio-economic and, in some cases, military power by governments and the dispersion more widely of this authority. Others see the changing nature of the State as a positive step towards the creation of a global civil society, where the individual as the ultimate unit of law is more likely to find active expression and, equally important, protection.[27] Concurrently, the rejection of a *Westphalian* concept of sovereignty and the consequent impact that this has on the legitimacy of public authority inevitably promotes greater opportunities for those

24 Cf. See W. Beckerman, ''Sustainable Development': Is it a Useful Concept?' (1994) 3 *Environmental Values* 205: '"sustainability" should be interpreted as a technical characteristic of any project, programme or development path, not as implying any moral injunction or over-riding criterion of choice'.

25 *Supra*, n.9 paragraph 22: 'While it is the primary responsibility of national Governments to achieve the economic, social and environmental objectives of Agenda 21, it is essential that international cooperation be reactivated and intensified'.

26 Cf. A. Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 538: 'The world of liberal States…is a world of individual self-regulation facilitated by States; of transnational regulation enacted and implemented by disaggregated political institutions – courts, legislatures, executives and administrative agencies – enmeshed in transnational society and interacting in multiple configurations across borders; of double-edged diplomacy and inter-governmental agreements vertically enforced through domestic courts. Such a world is neither a utopia nor a panacea'.

27 International Criminal Tribunal For The Former Yugoslavia: Decision in *Prosecutor v. Dusko Tadić* (Establishment Of The International Tribunal) 35 ILM 32 (1996): 'the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the

that would seek to take advantage of the perceived fading of the State. Whether it is the increase in the fragmentation of traditional States along ethnic lines, the rise of multinational corporations or the emergence of supranational networks such as the European Union and NAFTA, the collapse of self-confidence in the power of the State to provide genuine solutions to the wants and desires of its population is a prominent factor.[28] Moreover, the diminution of national boundaries and the rise of an encroaching global market mean that States cannot now rely upon simplistic and artificial notions of sovereignty to prevent unwanted external interference. From the outside, the actions of States are increasingly subject to international supervision and censure (whether initiated by States, often at the behest of corporate interests[29] or directly by multinational corporations).[30] And within States themselves, the fundamental message of global capitalism has been internalized, with States recognising the need to maintain their international competitiveness, sometimes at any cost.[31]

This analysis, however, is misguided if it leads one to assume – or expect – that the State has become, or soon will be, redundant. The State remains an

approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach'.

28 There is, of course, the danger that governments-qua-States will often use the pretence of globalisation to justify unpopular policies, such as the refusal to adopt higher domestic environmental and labour standards or the decision not to increase investment in social welfare provision. Nevertheless, the fact that administrations are prepared to use such arguments highlights once again the ubiquitous nature of globalisation.

29 In the original WTO panel decision between the United States *et al* and the European Communities relating to the latter's allegedly discriminatory practices as regards the importation, sale and distribution of bananas, the EC unsuccessfully argued that 'interest of companies, such as Chiquita and Dole Foods, was not the same as a legal interest of the United States in bringing a case under the GATT' (WT/DS27/R/USA (22 May 1997) paragraph 11.22).

30 P. Sands and P. Klein, *Bowett's Law of International Institutions* (London: Sweet and Maxwell) (2001: 5th edn) 369: 'The essential aim of ICSID [International Centre for the Settlement of Investment Disputes] is to foster private foreign investment by providing a mechanism for settlement of investment disputes, but without elevating such disputes to an inter-state confrontation. This necessarily means that the private investor is directly a party to the dispute with a state, litigating on the international plane'.

31 D. Korten, 'Sustainable Development: A Review Essay' (1992) 9 *World Policy Journal* 173 (as quoted by O. Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1997) 36 *Columbia Journal of Transnational Law* 9): 'Often governments must borrow to finance the social and physical infrastructure needed to attract private investors. Having pushed the almost entire social and environmental costs of production onto the community, many firms are able to turn a handsome profit. Having bargained away their tax base and accepted low wages for their labour, many

important cornerstone of international affairs, simply because, even with the significant changes that are taking place, it remains the most complete nexus of relationships that continues to exist within the international order. Whether it be for reasons of culture, patriotism, socio-economic welfare, the need for legal certainty[32] or simply subconscious allegiance (in fact, probably a seamless combination of all of the above) the State continues to be recognised as a vital institution possessing both important symbolism and real authority. And if this is the case, this leads us on to ask what role the State can and should still play in international affairs, particularly for the purposes of this chapter, reconciling globalisation and sustainable development? This, in turn, requires recognition of the changing nature of sovereignty; sovereignty shaped in terms of the functions that a State should legitimately pursue, rather than simply based on a legal fiction. A sovereignty derived and legitimated not through abstract juridical principle, but constituted with reference to a new normative framework[33] and perceived as valid only when utilized to accomplish certain objectives deemed to be for the public good.[34] An important part of this process of change is the need for States to reflect upon, *inter alia*, their place in the global system, the necessity of appropriate, yet active, relations with non-governmental and corporate actors, and the imperative of promoting human welfare. By asking such questions and finding creative answers thereto, States can maintain their prominence within the international order. It is wrong to view sovereignty as a static notion, but rather as a flexible tool through which States

communities reap relatively few benefits from the foreign investment, however, and are left with no evident way to repay the loans contracted on the firms' behalf'.

32 Schachter, 'The Decline of the Nation-State' 23: 'the juridical state, with its territorial base, [is] a necessary structure of authority, capable of affording protection to all its people on the basis of equity and justice. I do not believe that its reduced autonomy portends its demise'.

33 The protection of human rights being a central component of this new normative framework. As the tribunal in the *Tadić* case (*supra* n.27) noted when discussing why certain rules of humanitarian law traditionally applicable only to international conflict should also apply to rules of internal armed conflict: '[i]f international law, while of course duly safeguarding the legitimate interests of States, *must gradually turn to the protection of human beings*, it is only natural that the aforementioned dichotomy should gradually lose its weight' (italics added).

34 The nature and extent of these objectives remain, of course, the key battleground as regards how far the traditional functions of the State should be diminished in the face of liberalisation and deregulation.

can more effectively act – whether unilaterally, regionally or multilaterally – in an increasingly interdependent global society.[35]

For many developed States a key challenge is how to achieve sustainable development without a return to centralized planning, an anathema to most States with developed market economies.[36] Such States have internalized the message of globalisation (indeed, have embraced and exported it to developing States) and, as a consequence, seek to implement sustainability through a restricted public-sphere paradigm which places great emphasis on the corporate imperative. Namely, the belief that the reach of the State must not extend beyond that which is absolutely necessary, so as to prevent the State itself jeopardising the competitiveness of domiciled corporate interests in the wider globalized economy. Of course, it is undoubtedly the case that globalisation has produced many societal benefits, many of which either are, or can be made, sustainable. However, what is more debatable is whether an inherent distrust of public policy on issues of common concern, such as environmental degradation and socio-economic deprivation, which characterises much of the anti-globalisation discourse, is equally sound, both politically and in terms of ensuring respect for broader notions of fairness and equity.[37] The role of the State in the process of sustainable development is therefore both controversial and absolutely central to this debate. There is a balance to be drawn somewhere between overly prescriptive regulation, on the one hand, and the withdrawal of the State from the debate all together, on the other. It is certain that the market, left on its own without appropriate institutional direction, can neither sufficiently achieve public goods (such as poverty eradication and environmental conservation), nor meet wider societal objectives (such as sustainability and

35 Many developing States remain, at best, ambivalent as to the changing nature of sovereignty within international affairs. The notion of sovereignty, as traditionally constituted, provided an important legal principle during the development of the New International Economic Order. As the ILA Seoul Declaration (*supra* n.19) states very clearly, 'Permanent sovereignty, which emanates from the principle of self-determination, is inalienable. A State may, however, accept obligations with regard to the exercise of such sovereignty, by treaty or by contract, *freely entered into*' (paragraph 5.2) (italics added).

36 Of equal – if not greater – concern, of course, is how developing States and particularly the least developed are to promote sustainable development without an infrastructure as elaborate as that available in developed States.

37 Indeed, it can be strongly argued that ultimately an approach to globalisation and market liberalisation that is premised on a minimalist State is not efficient either, if one accepts the view that the market is unable by itself to internalize the cost of externalities, as such externalities will inevitably damage the very market that failed to recognise the societal – and thus market – relevance of such externalities.

intergenerational equity – key aspects of sustainable development). But nor can the State hope to be able to prescribe a sustainable future through general edict and regulation. As noted above, sustainable development raises fundamental questions about the public/private – public/corporate – divide, and requires a much more collaborative approach if the benefits of both globalisation and sustainable development are to be attained. Nevertheless, the continued existence (even pre-eminence) of a pro-active State is essential, particularly if the intergenerational and intragenerational aspects of sustainability are to be respected. As Stern notes generally about the role of the State within a globalizing world, not only can a State play the part of arbitrator between market and society, '[o]nly a State can correct the negative consequences of globalisation for the community of individuals living on its territory…[and] ensure a minimum of social sharing of wealth and national solidarity'.[38]

4. International Organisations: International Governance and Globalisation

Whilst the role of States is vital in reconciling globalisation and sustainable development, what is less clear – and something that has not been as readily discussed – is the role of international organisations within this process. How should we consider international organisations?[39] Are they the agents of globalisation, through which individual national regulatory schemes are transformed into a harmonized global approach? Many would look at such texts as the Sanitary and Phytosanitary Agreement and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – both concluded within the World Trade Organisation (WTO) – as examples of this multilateral harmonisation.[40] Alternatively, some international organisations may be seen not

38 Stern, 'How to Regulate Globalisation', *supra* note 7, 267.

39 The term 'international organisations' is used loosely to also include what Churchill and Ulfstein call 'autonomous institutional arrangements' (see R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623-659).

40 Of course, individual national action often remains permissible, but must be justified in international forums, rather than being accepted as an intrinsic aspect of State sovereignty. An often-used example within international economic law is Article XX of the GATT, which permits unilateral action in a number of specific areas so long as 'such measures are not applied in a manner which would constitute a means of arbitrary or

as agents of globalisation and change, but rather as a further level of bureaucracy and State control. It is not the nation State itself which is the impediment to globalisation, but regulation *per se*, whatever its guise. Whether it is national or international regulation, the *effect* is to impede – rather than facilitate – globalisation and economic growth. US industries' dislike of the 1997 Kyoto Climate Change Protocol and the 2000 Cartagena Biosafety Protocol fall, for example, within this category. The perceived bureaucratic burden imposed by the European Union is another. Of course, an alternative perspective is that global regulation is neither attractive nor heinous, just a necessary aspect of international public governance.[41]

One of the most important aspects of reconciling sustainable development and globalisation is the issue as to how best to ensure that the concept is appropriately incorporated within international and regional organisations and programmes. Whether one views sustainable development in terms of a goal to be achieved or as a process through which the international community must continually refashion itself, the elaboration of what sustainable development means and how this is to be implemented alongside globalisation are of key importance. Whilst some changes have been made to the structures and policies of many bodies,[42] there remains an ambivalence as to what sustainable development means, and what it entails for the bodies concerned. Rather than suggesting a comprehensive picture, I pick out four key areas where change is necessary.

First, international organisations must reflect the will and diversity of their membership. Whether one sees globalisation as an inevitable force or not, the nature and extent of its impact is not beyond the control of the international community. The international community must seek to utilize the corporate drive towards globalisation in a way that reflects the concerns and interests

unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.

41 Schachter, 'The Decline of the Nation-State' 10: 'Global capitalism and more integrated investment and trade may bypass state control, but they require international "public goods" that go beyond the province of the nation-state…International markets require regimes for telecommunication and transportation, rules and procedures for financial stability and performance of contractual obligations, industrial and product standards, environmental protection rules, and much more'.

42 The United Nations, European Union and the World Bank are amongst those organisations that have tried to integrate sustainable development both within their structures and in terms of policy development.

of States, particularly developing States. The rationale for international organisations is that they provide a forum for common issues to be debated and appropriate solutions hopefully found. Rather, therefore, than arguing whether international organisations promote or hinder globalisation, the question should be whether such organisations achieve what their members seek from it. Who is setting the political agenda, and is it an agenda to which most of the international community can subscribe? Sustainable development is about – if it is about anything – ensuring that legitimate human needs are met without sacrificing environmental resources in the process. If one is to believe that States have 'adopted' sustainable development as the way forward, this needs to be reflected in what goes on within international organisations of which they are a part. International organisations must be active, not passive, players in global developments reflecting the interests of their members.

Second, as the international community reflects a diversity of views and socio-economic and political opinions, international organisations are a principal means through which deals are 'brokered', compromises found and action taken. In terms of international governance, therefore, there is no single institutional model that can be shown to facilitate these aims over-and-above any other.[43] Much depends upon the context of the situation. What may be right in some situations will be inappropriate in others. However, whilst efficacy is an important criterion in determining whether a particular international organisation is an appropriate venue for taking action, there must be an outer limit to such a relativist approach. Though not a particularly helpful term as regards international governance, 'democracy' nevertheless has a crucial part to play in determining appropriate institutional frameworks. The UN General Assembly, for instance, may not be the most effective of organisations, but its emphasis on universalism and one-State-one-vote at least recognises the continued import-

43 The international community has long struggled with questions of structure and form, and today one can still see the various models that international governance may take. These include the universalism of the UN General Assembly, the trusteeship of the UN Security Council, the multilateralism of international environmental Conference of the Parties, the technocratic specialisation of the *Codex Alimentarius* Commission on food safety, the weighted voting system used by the World Bank and others, the symbolic impartiality of the International Court of Justice, and so we could go on. This is evidence – if any was needed – that one size has not fitted all. State sovereignty jostles with technocratic rationality and the existence of a quasi-homogenous international civil service in a system that is institutionally diverse and conceptually inconsistent. And it is into this system that sustainable development must find expression.

ance of formal State sovereignty within the international system. What relevance is all of this to sustainable development? A central component of any international approach to sustainable development is the active participation and involvement of all affected States. This requires a careful balance between the imperative of sovereign equality on the one hand, and the need for efficiency in operation, on the other. In particular, formal equality does not mean equity. Developing States must be given the chance to present their views, have their arguments heard, their suggestions discussed, and – on a substantive level – have their issues addressed. Implementation of sustainable development will require international organisations – above all else – to be able to manage disagreement effectively. The first point made was that international organisations must be active, not passive, in the process of global change, reflecting member States' interests. The second point is supplementary to that; international organisations must be able to both 'absorb' the differences and disagreements between States, and be able to manage them effectively.

The third issue – in the light of the protests in such cities as Seattle against the World Trade Organisation, in Washington and Prague against the World Bank and International Monetary Fund, in Quebec against a 'Free Trade for the Americas' and in Genoa against the G-8 – is that there is a growing sense of antagonism between international organisations and the general public. To some extent – without condoning the violence – this is a good thing. International organisations have for too long hidden behind the veil of the sovereignty of their member States; few in the general population or the media knew or cared about what these institutions did. They were seen as simply the conduit through which States carried out their international 'business' – value-neutral and procedural. Now whilst it is important not to ignore the fundamental fact that their effectiveness is largely dependent upon the will of their members, organisations themselves must take some of the responsibility for their own failure to recognise and react to the growing concern about their lack of transparency and the generally secretive way that they operate. In addition, the apparent reticence of, particularly, the international economic institutions to engage in the sustainability debate and integrate social and environmental issues within their work appeared to highlight still further their distance from particular's political agendas.[44] Attempts by international organisations to defend

44 The World Bank is hoping that recent attempts to more fully integrate environmental, social and developmental issues within it policies may assuage some of its critics. However, such criticism – particularly the more vociferous anti-globalisation criticism –

themselves through cries of 'no legal mandate', *ultra vires* and 'lack of resources' were never likely to halt the wave of opinion against them. Third, therefore, international organisations must find ways to be more open, to appreciate the importance of – at least listening – to non-State actors, and to be more responsive – as far as their sovereign constituencies will allow them – to the concerns of such people and non-governmental organisations.

The fourth point is the need for greater synergies between international organisations.[45] Ever since the emergence of the United Nations system, there has been a trend towards the increased fragmentation and simplification of international law into subject-specific fields. The *de facto* separation of the Bretton Woods system from the rest of the United Nations system is an obvious example.[46] Of course, such fragmentation has generally proven to be beneficial in the development of international law, with the emergence of an international civil service both knowledgeable in the general workings of the international community and specialized in particular areas of international law and policy. And through this, the international legal system has become both more efficient and ultimately more comprehensive. However, a negative aspect of this development has been the general lack of integration between subject areas; not only in terms of the substantive content of international law, but also, just as importantly, between the personnel who make up the international system. This lack of integration is particularly evident between economic policy and non-economic policy objectives, where the international system has not been conducive to the cross-fertilisation of ideas, or personnel. Sustainable development, on the other hand, demands much greater integration in policy-making and implementa-

often relates as much to the existence of the World Bank as it is does to any particular policies.

45 Some of the ideas in this paragraph first appeared in D. French, ''The Changing Nature of Environmental Protection': Recent Developments regarding Trade and the Environment in the European Union and the World Trade Organisation' (2000) XLVII *Netherlands International Law Review* 1-26.

46 The 'Bretton Woods' group were to be the three main international financial institutions established after the Second World War, *viz.*, the World Bank (formally the International Bank for Reconstruction and Development), the International Monetary Fund and the International Trade Organisation. Only the first two were ever established. The International Trade Organisation never came into being – with the General Agreement on Tariffs and Trade [GATT 1947] only ever being applied provisionally. However, since the entry into force of the 1994 Uruguay Round, the World Trade Organisation now provides the revised GATT and its related instruments with an institutional structure as was originally envisaged in 1944.

tion. Principle 4 of the 1992 Rio Declaration states that '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.[47] This general principle is not restricted in context and applies as much to international institutions and programmes as it does to national and local situations. Moreover, its effect is two-fold. First, it requires individual organisations to ensure that what they are doing is compatible with sustainable development (so, for example, the World Bank must be able to justify its approach internally). But secondly, Principle 4 does not talk about integration in terms of individual organisations but in terms of the 'development process' – a 'process' that involves a myriad of institutions and programmes. There is, in addition, an implied responsibility on institutions collectively to try to manage their affairs so that the international effort towards sustainable development is not undermined.

5. Moving Forward: The Continued Relevance of Public Governance

The aim of this chapter has been to examine some of the points of contact between what superficially appear to be two very different paradigms, *viz.*, globalisation and sustainable development. In particular, it was the purpose of this chapter to reject the often espoused rhetoric that globalisation is an inevitable progression for international society, without recognising that sustainability must also be seen as an integral part of this global movement. Of course, the integration of these two ideals will rarely be an easy task; however, it is an essential one if international society is to achieve both greater interdependence amongst its component parts and a more equitable and sustainable global order. Whilst the nation State may be undergoing a transformation in its nature and form, with the consequent implications that that has for international public governance, it would be wrong to diminish the role of the State and, by implication, international organisations in reconciling the various tensions inherent within the globalizing society.[48] And whilst at a particular

47 See also Article 6 EC Treaty (as amended): 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities…in particular with a view to promoting sustainable development'.

48 United Nations Development Programme, *1999 Human Development Report* (New York: Oxford University Press) (1999) 12: 'An essential aspect of global governance, as of national governance, is responsibility to people – to equity, to justice, to enlarging the choices of all'.

level of idealism one cannot but agree with Phillip Allott in the virtue of creating an international legal system 'for disaggregating the common interest of all humanity, rather than a system merely for aggregating the self-determined interests of so-called States',[49] in an ever-changing world, it would be unwise and short-sighted to fail to recognize – and consequently devalue – the core of certainty that nation States and international organisations represent. In the attempts to codify and progressively develop the present state and future direction of international law in the field of sustainable development, it is imperative that the international community continues to uphold public governance as being of pivotal importance in the attainment of balanced and global sustainable development. Without this, the globalizing society faces a much more uncertain, insecure and inequitable future.

49 P. Allott, 'The Concept of International Law' in Byers (ed.), *The Role of Law*, 88.

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4

THE PRINCIPLE OF "COMMON BUT DIFFERENTIATED RESPONSIBILITIES"

Yoshiro Matsui

Introduction

In a way, the concept or principle of "common but differentiated responsibilities" is not new to international law. In the field of international economic law in particular, a special status for developing countries has been recognized in, for instance, Part IV of the General Agreement on Tariffs and Trade (GATT), introduced under its revision in 1966,[1] and Part XI of the United Nations Convention on the Law of the Sea (UNCLOS),[2] adopted in 1982 and in force since 1994. In fact, preferential treatment for developing countries was one of the underlying ideas of the New International Economic Order prevalent in the United Nations during the 1970s and 1980s.[3]

With the strengthening of the practice of market economies in the 1990s, the idea of the New International Economic Order has faded away. This fact was symbolized by the adoption in 1994, by the UN General Assembly, of the Agreement relating to the implementation of Part XI of the United Nations

1 4 I.L.M. 121 (1965).

2 21 I.L.M. 1261 (1982).

3 See, Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, adopted at the 62nd Conference of the International Law Association (ILA) held in Seoul in 1986, International Law Association, Report of the Sixty-Second Conference, Seoul, 1986, 2; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties,* Cambridge University Press, 1997.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 73-96.*

Convention on the Law of the Sea of 10 December 1982,[4] which introduced some substantial modifications in favor of developed countries. However, in practice there has been no narrowing of the wide and widening gap between developed and developing countries.

This reality, together with the growing concern about environmental degradation throughout the world, gave rise to a new concept, namely, the concept of "sustainable development". This concept, though not necessarily a novel one, was first popularized by a report entitled Our Common Future,[5] published by the World Commission on Environment and Development in 1987, and was the main theme of the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, in 1992.

The international legal implication of sustainable development has not been defined in full.[6] However, it may safely be said that integration and interrelation are at the heart of sustainable development. They constituted the underlying theme of the Rio Declaration and Agenda 21,[7] adopted at the UNCED, and have been the guiding principles of international law for sustainable development since then. As a report by the Secretary-General presented to the Commission on Sustainable Development argues, together they reflect the interdependence of social, economic, environmental, institutional and human rights issues that define sustainable development.[8]

In order to attain this integration and interrelation, the Rio Declaration emphasized a new and equitable global partnership on the one hand, and the priority to be given to the special situation and needs of developing countries, on the other.[9] Thus, there emerged a concept of "common but differentiated

4 UN Doc., A/RES/48/263, Annex, adopted on 17 August 1994.

5 The World Commission on Environment and Development, Our Common Future, Oxford University Press, 1987.

6 See, International Court of Justice, Case Concerning Gabcíkovo-Nagymaros Project (Hungary/Slovakia), judgement of 25 September 1997, and separate opinion by Vice-President Weeramantry, ICJ Reports, 1997, 77-78, 92-95. See also, Patricia W. Birnie and Alan E. Boyle, International Law and the Environment, Clarendon Press, 1992, 122-124; Philippe Sands, Principles of International Environmental Law, Vol. I, Manchester University Press, 1994, 198-208.

7 Report of the United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Rio de Janeiro, Brazil, A/CONF.151/26/Rev.1, Vol.1.

8 Commission on Sustainable Development, Overall progress achieved since the United Nations Conference on Environment and Development: Report of the Secretary-General, Addendum, International legal instruments and mechanisms, E/CN.17/1997/2/Add.29, 21 January 1997, para. 3.

9 Preamble and Principle 6 of the Rio Declaration. See also, para. 2.1 of Agenda 21.

responsibilities", which is defined in Principle 7 of the Rio Declaration as follows: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command".

The international legal significance of sustainable development in general, and that of the concept or principle of "common but differentiated responsibilities" in particular, has not yet been fully defined. In light of an underlying common concern for both the abortive effort of the New International Economic Order and the present quest for sustainable development, the principle of "common but differentiated responsibilities" seems to be one of the key concepts of sustainable development.[10] But, the purpose here is not to elucidate the full legal implication of this principle, but instead to pinpoint some of its aspects and to attempt a tentative legal analysis of them.

1. Grounds for "Common but Differentiated Responsibilities"

1.1 Common Responsibilities

The concept or principle of "common but differentiated responsibilities" includes two elements: common responsibilities and differentiated responsibilities.[11] The former element stems clearly from "the integral and interdependent nature of the Earth, our home" and the consequent recognition of global partnership.[12] Given the reality of ecological interdependence, and the concomitant recognition

10 On the influence of the idea of the New International Economic Order on the concept or principle of "common but differentiated responsibilities", see, Daniel Barstow Magraw, "Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms", 1 Colo. J. Int'l L. & Pol'y 77-79 (1990); Alan Boyle, "Comment on the Paper by Diana Poce-Nava", in, Winfried Lang, ed., Sustainable Development and International Law, Graham & Trotman, 1995, 137-138; Philippe Cullet, "Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations", 10 EJIL 564-567 (1999); Duncan French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities", 49 ICLQ 52 (2000), pp. 35-60.

11 Sands, *op.cit.*, *supra* note (6), 217-218.

12 Preamble of the Rio Declaration.

of the global nature of environmental problems, the protection of the global environment has come to be seen as the common concern of humankind, and not solely a matter of domestic jurisdiction of each individual State.[13] The common responsibilities and the resultant obligation of cooperation are provided for in many recent international instruments in the fields of the environment and development.[14]

As a consequence of common responsibilities, all States concerned, especially developing countries, are required to participate actively in the formation and implementation of international law for sustainable development. Thus, paragraph 39.1 (c) of Agenda 21 states: "At the global level, the essential importance of the participation in and the contribution of all countries, including the developing countries, to treaty making in the field of international law on sustainable development [should be taken into account]. Many of the existing international legal instruments and agreements in the field of the environment have been developed without adequate participation and contribution of developing countries, and thus may require review in order to reflect the concerns and interests of developing countries and to ensure a balanced governance of such instruments and agreements".

In order to attain this objective, Agenda 21 recognized the necessity "to promote and support the effective participation of all countries concerned, in particular developing countries, in the negotiation, implementation, review and governance of international agreements or instruments, including appropriate provision of technical and financial assistance and other available mechanisms for this purpose, as well as the use of differential obligations where appropriate" (para. 39.3 (c)).

This objective has been realized, at least in part. The UN General Assembly established a voluntary fund for the purpose of assisting developing countries

13 Department for Policy Coordination and Sustainable Development, Report of the Expert Group Meeting on Identification of Principle of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September 1995, paras.82-83; See also, Philippe Sands, "International Law in the Field of Sustainable Development", 65 BYIL 343-344 (1994); idem, "International Law in the Field of Sustainable Development: Emerging Legal Principles", in, Lang, ed., *supra* note (10), 63-64; Alexandre Timoshenko, "From Stockholm to Rio: The Institutionalization of Sustainable Development", *ibid*., 154; Jacob Werksman, "Consolidating Governance of the Global Commons: Insights from the Global Environment Facility", 6 YIEL 40-41 (1995).

14 For example: paragraph 7, Principles 9, 12, 20, 22 and 24 of the Stockholm Declaration; Preamble, Principles 5-7, 9, 12-14, 18, 19 and 27 of the Rio Declaration; Preamble and Articles 3-6, 11 and 12 of the FCCC; Preamble and Articles 5, 8, 9, 12, 14-21 of the CBD.

to participate fully and effectively in the UNCED and its preparatory process.[15] For example, assistance was provided to enable developing countries to participate effectively in the negotiating process of the United Nations Framework Convention on Climate Change (FCCC),[16] the Convention on Biological Diversity (CBD),[17] both opened for signature at the UNCED, the United Nations Convention to Combat Desertification in Those Countries Experiencing Drought and/or Desertification, Particularly in Africa (Desertification Convention),[18] adopted in 1994, and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Agreement on Straddling Fish Stocks),[19] adopted in 1995.

However, a report by the Secretary-General made a critical comment on the inadequacy of assistance being given: "the support is insufficient for the task, particularly in view of the complexity of integrative instruments which demand greater expertise in a wide range of areas".[20] Despite this, it seems to be important that "the precedent has surely now been set for other negotiations relating to natural resource and environmental issues".[21] And, this experience points to the fact that common responsibilities can never be separated from differentiated responsibilities. As was pointed out in a Report of the Expert Group Meeting, "'common' connotes solidarity in protecting the global environment, and thus implies the sharing of burdens in achieving the pursued goals in a manner which reflects equity. This in turn may imply, in particular circumstances, the acceptance of differentiated responsibilities between the various actors".[22]

15 Paragraph II-15 of resolution 44/228, adopted on 22 December 1989 without vote.

16 31 I.L.M. 857 (1992).

17 31 I.L.M. 822 (1992).

18 33 I.L.M. 1328 (1994).

19 34 I.L.M. 1542 (1995).

20 E/CN.17/1997/2/Add.29, *supra* note (8), para. 20.

21 Sands, *op. cit.*, *supra* note (6), 356. See also, Anita Margrethe Halvorssen, Equality Among Unequals in International Environmental Law: Differential Treatment for Developing Countries, Westview, 1999, 86-87. Cf., Werksman, *op.cit.*, *supra* note (13), 29-30, criticizing that "(i)n negotiations that involve an intense level of North-South bargaining, it is not ideal to have the presence of developing-country delegations so dependent on the generosity of their industrialized counterparts".

22 Report of the Expert Group Meeting, *op.cit.*, *supra* note (13), para. 84. See also, Sands, *op.cit.*, *supra* note (6), 344; *idem*, *supra* note (13), 63-64; French, *supra* note (10), 45-46; Cullet, *op.cit.*, *supra* note (10), 577-578.

1.2 Differentiated Responsibilities: Dual Grounding

As seen from the expression of Principle 7 of the Rio Declaration, "(common but) differentiated responsibilities" stem from two grounds: one is "the different contributions to global environmental degradation", namely, "the pressures [the developed countries'] societies place on the global environment"; and the other is "the technologies and financial resources they command". By the same token, the FCCC refers to the fact that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, [and] that per capita emissions in developing countries are still relatively low", and therefore, stipulates that "the developed country Parties should take the lead in combating climate change and the adverse effects thereof".[23]

Needless to say, the first ground of differentiated responsibilities, namely, developed countries' contributions to global environmental degradation, has been stressed mainly by developing countries. Thus, the Beijing Ministerial Declaration on Environment and Development, adopted by 41 developing countries in 1991, declared: "While the protection of the environment is in the common interests of the international community, the developed countries bear the main responsibility for the degradation of the global environment. Ever since the industrial revolution, the developed countries have over-exploited the world's

23 Preamble and Article 3 (1) of the FCCC. Almost all the authors who argue about "common but differentiated responsibilities" refer to these two grounds, though with different emphasis. See, e.g., Cullet, *op.cit*., *supra* note (10), 577; French, *op.cit*., *supra* note (10), 46-52; Timoshenko, *op.cit*., *supra* note (13), 154; Halvorssen, *op.cit*., *supra* note (21), 28; Ileana M. Porras, "The Rio Declaration: A New Basis for International Cooperation", in, Philippe Sands, ed., Greening International Law, Earthscan, 1993, 29; Subrata Roy Chowdhury, "Common but differentiated State responsibility in international environmental law: from Stockholm (1972) to Rio (1992)", in, Konrad Ginther, Erik Denters & Paul J.I.M. de Waart, eds., Sustainable Development and Good Governance, Martinus Nijhoff, 1995, 333-334; Henry Shue, "Global environment and international inequality", 75 Inter'l Aff. 533-540 (1999); Lavanya Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", 9 RICIEL 121-124 (2000). Sometimes, ecological differences in countries are also referred to as a ground for differentiated responsibilities (e.g., Richard B. Stewart, "Environmental Regulation and International Competitiveness", 102 Yale L. J. 2052-2053 (1993); David Hunter, James Salzman and Durwood Zaelke, International Environmental Law and Policy, Foundation Press, 1998, 358). However, this ground may be disregarded here, because it is a subsidiary ground in any case, and because ecological differences between developed and developing countries are mainly due to the formers' past developmental policy (Even England was once covered with woods!).

natural resources through unsustainable patterns of production and consumption, causing damage to the global environment, to the detriment of the developing countries".[24]

On the basis of this first ground, there might emerge a legal responsibility on the part of developed countries to take measures in order to tackle global environmental degradation. This responsibility of developed countries may be characterized as a kind of application of the polluter-pays principle. Though the context appears to be different, the underlying rationale of the polluter-pays principle "is reflected in those provisions referring to the historic responsibility of developed countries for the problem of climate change and the loss of biodiversity", as Philippe Sands argues.[25] Or, as is pointed out by some scholars, differentiated treatment for developing countries may be characterized as a kind of "international affirmative action".[26]

By far the most persuasive argument, in terms of international law, for differential responsibility in favor of developing countries seems to be the application of the principle of equity. Henry Shue argues: "When a party has in the past taken an unfair advantage of others by imposing costs upon them without their consent, those who have been unilaterally put at a disadvantage are entitled to demand that in the future the offending party shoulder burdens that are unequal at least to the extent of the unfair advantage previously taken, in order to restore equality".[27] To be sure, the principle of equity is the most often relied-upon ground in support of legal obligations incumbent upon developed countries in this respect.[28]

24 Beijing Ministerial Declaration on Environment and Development (Adopted on 19 June 1991), para. 7, UN Doc., A/CONF.151/PC/85, Annex, 13 August 1991. This standpoint was reflected explicitly also in General Assembly resolution 44/228 convening the Rio Conference, adopted on 22 December 1989. See also, Tang Chengyuan, "Legal Aspects of the Global Partnership between North and South", in, Najeeb Al-Nauimi and Richard Meese, eds., International Legal Issues Arising under the United Nations Decade of International Law, Martinus Nijhoff, 1995.

25 Sands, *op.cit.*, *supra* note (13), 347. See also, Sands, *op.cit.*, *supra* note (6), 213; Rajamani, *op.cit.*, *supra* note (23), 122. Cf. Shue, *op.cit.*, *supra* note (23), 534, where the author argues that the polluter-pays principle is considerably weaker in that it requires only the future costs of pollution to be internalized.

26 E.g., Cullet, *op.cit.*, *supra* note (10), 571-572; Halvorssen, *op.cit.*, *supra* note (21), 28.

27 Shue, *op.cit.*, *supra* note (23), 534.

28 E.g., Cullet, *op.cit.*, *supra* note (10), 557-558; Report of the Expert Group Meeting, *op.cit.*, *supra* note (13), para. 38; Sands, *op.cit.*, *supra* note (13), 63-64; Halvorssen, *op.cit.*, *supra* note (21), 28, 75; Chowdhury, *op.cit.*, *supra* note (23), 330, 335; Rajamani, *op.cit.*, *supra* note (23), 122-123; Porras, *op.cit.*, *supra* note (23), 29.

In contrast to this, the responsibility of developed countries that stems from the second ground, namely, "the technologies and financial resources they command", may only be of a moral or political nature. Thus, it is quite natural that this position has consistently been adhered to by developed countries, as exemplified by the following interpretative statement by the US delegation to Principle 7 of the Rio Declaration: "The United States understands and accepts that principle 7 highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities. The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries".[29]

Notwithstanding this fervent denial by the developed countries, "the pressures their societies place on the global environment" is an undeniable historical, as well as contemporary, fact. Moreover, in the case of environmental protection, we can discern a remarkably different position taken by developing countries *vis-à-vis* developed countries, compared with the case of the New International Economic Order. This is because, in the present case, the developing countries have a strong leverage to induce the developed countries to accept, at least to some extent, differentiated treatment in their favor.

As stated above, the protection of the global environment has come to be recognized as the common concern of humankind. However, States have clearly different priorities within the framework of this common concern. Though the most developed countries' priorities consist of problems of environmental degradation such as the depletion of the ozone layer and air pollution, the attainment of sustainable development and the eradication of poverty are the priorities for developing countries. Therefore, the reciprocity of rights and obligations, which underlies the normal exercise of international law-making, does not operate here. This fact makes it necessary for developed countries to offer some *quid pro quo* in order to secure the participation of developing countries in an international environmental agreement concerning their own

29 Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1, Vol.II, Chap.III, para. 16. See also the US statement on Principle 3 (*ibid.*).

priorities. Thus, the concept or principle of "common but differentiated responsibilities" has come to be reflected in some international legal instruments.[30]

From the principle of "common but differentiated responsibilities", two legal consequences may be deduced: one is "double standards" in favor of developing countries, and the other is the responsibility of developed countries to assist developing countries' sustainable development. We are going to analyze these two consequences in turn in the following two Sections.

2. "Double Standards" in Favor of Developing Countries

"Double standards" in this context means applying different standards for environmental protection to developed and developing countries. Standards may be national or international. Regarding national standards, Principle 11 of the Rio Declaration declares: "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries".[31] As for international standards, paragraph 39.3(d) of Agenda 21 makes it an objective to promote "international standards for the protection of the environment that take into account the different situations and capabilities of countries".[32]

As is well known, these "double standard" have become reflected, to some extent, in various conventions on the environment and development.[33] The nature of "double standards" may be classified in two types: one differentiates substantive rights and obligations, and the other differentiates the timing of the application of substantive provisions.

In the context of sustainable development, the former type of "double standards" is reflected, for instance, in many conventions. The FCCC classifies

30 See, e.g., Cullet, *op.cit*., *supra* note (10), 559-562, 569-571; French, *op.cit*., *supra* note (10), 52-59; Halvorssen, *op.cit*., *supra* note (21), 71. 79; Günther Handl, "Environmental Security and Global Change: The Challenge to International Law", 1 YIEL 9, 28-29 (1990).

31 See also, Principle 23 of the Stockholm Declaration; paras.2.22 (g), 6.39 and 8.2 of Agenda 21.

32 See also, paragraphs 39.1 (c) and 39.2. See generally, Sands, *op.cit*., *supra* note (13), 360-364.

33 See, e.g., Magraw, *op.cit*., *supra* note (10), 73-76, 90-97; Halvorssen, *op.cit*., *supra* note (21), 87-92; Rajamani, *op.cit*., *supra* note (23), 125-130.

contracting Parties into three categories: all Parties; developed country Parties and Parties with economies in transition (Annex I Parties); and developed country Parties (Annex II Parties: OECD members), and stipulates the differentiated "commitments" for each of the categories (Article 4). All Parties make general commitments, inter alia, to develop and update national inventories of emissions by sources and removals by sinks of greenhouse gases, to formulate and implement national and regional programs to mitigate climate change, and to promote and to cooperate in scientific, technological, socio-economic and other research (Article 4(1)). The commitment to communicate information related to implementation to the Conference of the Parties (COP) is common to all Parties (Article 4(1)(j)), but the contents of the information to be communicated are differentiated (Article 12). In addition to this, the Annex I Parties commit themselves to return to 1990 emission levels by the year 2000, though stipulated somewhat vaguely (Article 4(2)(a) and (b)). And the Annex II Parties also make a commitment to provide financial and technological assistance to developing country Parties (Article 4 (3)-(5), see the next Section below).

However, the commitment of Annex I Parties under Article 4 (2)(a) and (b) of the FCCC was so vague that it was questioned whether it was really a binding legal obligation or only a hortatory commitment, and as such was generally thought to be inadequate. Thus, the COP-1, held in Berlin in 1995, decided to strengthen this commitment of Annex I Parties by, inter alia, setting "quantified limitation and reduction objectives within specified time frames".[34] On the one hand, acting on this Berlin Mandate, the Kyoto Protocol to FCCC,[35] adopted at the COP-3 held in Kyoto in 1997, obligates the Annex I Parties to ensure their emissions of greenhouse gases do not exceed their assigned amounts, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012 (Article 3), whilst, on the other hand, no commitments for developing country Parties were introduced.

Also, the Convention on Biological Diversity recognizes that each Contracting Party's general measures for conservation and sustainable use of biological diversity shall be "in accordance with its particular conditions and capabilities" (Article 6). Again, the Desertification Convention differentiates general obligations of the contracting Parties, obligations of affected country Parties, and

34 Decision 1/CP.1, The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up, Section II, paragraph 2 (a), 34 I.L.M. 1671 (1995).

35 37 I.L.M. 22 (1998).

obligations of developed country Parties (Articles 4 to 6). It also gives priority in its implementation to affected African country Parties (Articles 7, 20(2)), and one of the Regional Implementation Annexes is devoted to Africa.[36] The Agreement on Straddling Fish Stocks also recognizes the special requirements of developing States in relation to the conservation and management of relevant fish stocks and the development of fisheries for such stocks, and obligates States, duty bound to cooperate in the establishment of conservation and management measures, to take into account, inter alia, the need to ensure that such measures do not result in transferring a disproportionate burden of conservation action onto developing States (Article 24).

The other type of "double standard", in provisions which differentiate the timing of implementation by admitting some period of flexibility for developing country parties, are typical in international economic law, especially in WTO Agreements. In the field of sustainable development, we can observe the following examples. The Montreal Protocol on Substances that Deplete the Ozone Layer, adopted in 1987 and amended in 1990 and 1992 (the Montreal Protocol),[37] allows certain developing country Parties to delay for 10 years their compliance with the control measures set out in the Protocol (Article 5(1)). And the FCCC, in its Article 12 (5), requires the Annex I Parties to make their initial communication within six months of the Convention coming into force for them. However, as for the other Parties, initial communication shall be within three years of the Convention coming into force for them or shall depend on the availability of financial resources in accordance with the Convention, and the least developed country Parties may make their initial communication at their discretion.

These "double standards", especially those differentiating core substantive obligations, have been criticized by some commentators. Günther Handl is of the opinion that such asymmetrical normative standards are undesirable, because, firstly, they invariably entail higher administrative costs, secondly, they inevitably bring about distortions in international trade, and thirdly, they are likely to impede the progress made by developing countries towards an adequate level

36 Regional Implementation Annex for Africa differentiates commitments and obligations of African country Parties (Article 4) and those of developed country Parties (Article 5). Other Regional Implementation Annexes, those for Asia, for Latin America and the Caribbean, and for the Northern Mediterranean, though do not stipulate differentiated obligations, require the particular conditions in the respective regions to be taken into consideration in their implementation .

37 26 I.L.M. 1550 (1987); 30 I.L.M. 537 (1991); 32 I.L.M. 874 (1993).

of local environmental protection.[38] Also, Alan Boyle expresses the scepticism that these provisions containing "double standards" involve only "soft" undertakings of a very fragile kind.[39]

It goes without saying that, in view of the deteriorating global environment and "the integral and interdependent nature of the Earth, our home" (Preamble to the Rio Declaration), these "double standards" are not ideal. Lower standards of environmental protection in developing countries may make them "environmental havens" for multinational enterprises. Some authors doubt whether stringent environmental standards adversely affect international competitiveness, and thus induce the relocation of industries.[40] However, it is a common-sense understanding that the economic competitiveness of a country with lower environmental standards increases to the extent that abatement costs are internalized in the prices of the commodities produced by countries with higher standards,[41] and therefore that, multinational enterprises, characterized by their flexibility and mobility in their quest for profit maximization, tend to relocate to countries with lower environmental standards.[42] A consequence of this might be an environmental disaster such as the Bhopal incident that occurred in India in 1984.[43]

As admitted even by the critics cited above, "double standards" seem to be inevitable considering the present situation in the international community, especially, the ever widening gap between developing and developed countries. However, they must be temporary measures in view of the above-mentioned flaw. Furthermore, it seems evident that the removal of "double standards" will depend on the attainment of sustainable development by developing countries.

38 Handl, op.*cit*., *supra* note (30), 9-10.

39 Boyle, *op.cit*., *supra* note (10), 139-140.

40 See, e.g., Stewart, *op.cit*., *supra* note (23); Charles S. Pearson, "Environmental Standards, Industrial Relocation, and Pollution Havens", in, Charles S. Pearson, ed., Multinational Corporations, Environment, and the Third World: Business Matters, Duke University Press, 1987.

41 Martti Koskenniemi, "Comment on the Paper by Antonia Handler Chayes, Abram Chayes and Ronald B. Mitchell", in, Lang, ed., *op.cit*., *supra* note (10), 93.

42 Thomas N. Gladwin, "Environment, Development, and Multinational Enterprise", in, Pearson, ed., *supra* note (40), 10-11.

43 See, Thomas N. Gladwin, "A Case Study of the Bhopal Tragedy", in, *ibid*.

3. Assistance for Developing Countries' Sustainable Development

3.1 Assistance for the Implementation of Environmental Conventions

Here emerges the importance of the second consequence of "common but differentiated responsibilities", namely, the responsibility of developed countries to assist developing countries' sustainable development. In terms of the implementation of environmental conventions, this responsibility of developed countries has been realized to some extent. Such assistance for developing countries takes various forms. Although capacity-building, including technical cooperation, seems to be very important,[44] the analysis here is confined to developed countries providing financial resources to meet the incremental costs incurred by developing countries when implementing certain conventions, and the "(non-) compliance procedure" under the Montreal and Kyoto Protocols.

In some of the environmental conventions, developed country Parties agreed to provide developing country Parties with new and additional financial resources as agreed to, in order to meet incremental costs in implementing their obligations as established by the conventions.[45] We take up here the Montreal Protocol as an example.

As stated above, Article 5(1) of the Montreal Protocol allows certain developing country Parties to delay their compliance with the control measures set out in the Protocol for 10 years. Furthermore, it establishes a mechanism, including a Multilateral Fund, for the purpose of providing financial and technical cooperation. The mechanism, contributions to which shall be in addition to other financial transfers, shall meet "all agreed incremental costs" of developing country Parties operating under Article 5 (1) in order to enable their compliance with the control measures of the Protocol (Article 10 (1)). The mechanism also supports programmes for the transfer of environmentally safe substitutes and related technologies to developing country Parties (Article 10A).

It is worth noting that the Protocol acknowledges that the implementation of control measures by those Parties "will depend upon the effective implementation" of financial co-operation and transfer of technology (Article 5(5)).

44 See, Chapter 34 of Agenda 21: Transfer of environmentally sound technology, cooperation and capacity-building. See also Dianna Ponce-Nava, "Capacity-building in Environmental Law and Sustainable Development", in, Lang, ed., *op.cit., supra* note (10); Peter H. Sand, "Institution Building to Assist Compliance with International Environmental Law: Perspectives", 56 ZaöRV 774 (1996).

45 E.g., Article 4(3) of the FCCC; Article 20(2) the CBD; Article 20(2)(b) of the Desertification Convention.

Any such Party may notify the Secretariat that, having taken all practicable steps, it is unable to implement their obligations due to the inadequate implementation of Article 10 and Article 10A, and the Secretariat shall forthwith transmit this notification to the Parties, which shall decide upon appropriate action to be taken (Article 5(6)). Thus, the implementation of control measures by certain developing country Parties is linked to the implementation by developed country Parties of their obligation to provide financial and technical cooperation. This seems to be a typical expression of "common but differentiated responsibilities". Furthermore, it is appreciated that funding mechanisms such as this have been successful in securing a high level of participation by developing countries in these environmental conventions.[46]

Another type of assistance for the implementation of environmental conventions is the "non-compliance procedure" first introduced to the Montreal Protocol by amendment in 1992.[47] This procedure applies, on the face of it, equally to all the Parties to the convention, but, upon closer examination, it seems to be addressed mainly to the developing countries. Under this procedure, an Implementation Committee considers a report of possible non-compliance by any Party of its obligations under the Protocol, together with the response, if any, of the targeted Party. Where a Party concludes that, despite having made its best efforts, it is unable to comply fully with the obligation, it may submit to the Secretariat a report explaining the specific circumstances that it considers to be the cause of its non-compliance. The Committee considers all the relevant information with a view to securing an amicable solution to the problem on the basis of respect for the provisions of the Protocol, and submits a report to the Meeting of the Parties including any recommendations it considers appropriate.

After receiving a report by the Committee, the Parties may decide to take steps to bring about full compliance with the Protocol. Measures that might be taken by a Meeting of the Parties may include, the issuing of cautions and suspension of specific rights and privileges under the Protocol, the giving of appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, and information transfer and training. Though not entirely breaking away from

46 Halvorssen, *op.cit.*, *supra* note (21), 107-108. However, we must not lose sight of the fact that the actual operation of the Montreal Protocol Fund, of which the dominant implementing agency is the World Bank, has been heavily criticized by a number of environmental NGOs (see, e.g., Hunter, et al., *op.cit.*, *supra* note (23), 587-589).

47 32 I.L.M. 874 (1993).

traditional methods of securing compliance with treaty obligations, the remarkable feature of this procedure seems to lie in its non-confrontational and facilitative method of operation. It creates conditions conducive to compliance by parties who are willing but incapable of finding solutions themselves.

Procedures and mechanisms relating to compliance under the Kyoto Protocol, adopted by the COP-7 of the FCCC on 7 November 2001 (the Compliance Procedures under the Kyoto Protocol),[48] provide for different kind of procedures, so to speak, "double track" procedures, under the Facilitative and Enforcement Branches, which together constitute the Compliance Committee. The procedures of the Enforcement Branch, which shall not be discussed here, are quite unique.[49] Those of the Facilitative Branch, on the other hand, seem to parallel the non-compliance procedure of the Montreal Protocol.

The Facilitative Branch is responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting their compliance with their commitments under the Protocol, whilst taking into account "the principle of common but differentiated responsibilities and respective capabilities". Within this overall mandate, it is also responsible for addressing questions of implementation relating to Article 3 (14) of the Protocol and the provision of information on the use of "flexibility" mechanisms (Articles 6, 12 and 17 of the Protocol) by an Annex I Party (Sec.IV, paras.4 and 5). The consequences applied by the Branch would be: the provision of advice and facilitation of assistance; including financial assistance, technology transfer and capacity building; and the formulation of recommendations. In deciding on one or more of the above consequences, the Branch takes into account "the principle of common but differentiated responsibilities" (Sec.XIV). Thus, this principle seems to be a corner-stone of the procedures of the Facilitative Branch. However, it must be noted that the Parties mainly concerned here are countries with economies in transition, not developing countries, since these procedures apply only to Annex I Parties.

48 United Nations, Framework Convention on Climate Change, Conference of the Parties, seventh session, Marrakesh, 29 October – 09 November 2001, Agenda item 3 (b)(iv), Draft decision -/CP.7, Procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/CP/2001/L.21, 7 November 2001.

49 Enforcement procedures are thought to be necessary, firstly because binding reduction commitments, to be effective, necessitate some enforcement measures in case of non-compliance, and secondly because "flexibility" mechanisms established by the Kyoto Protocol (Articles 6, 12 and 17) would not operate without efficient procedures followed by predictable consequences of non-compliance.

3.2 Provision of Assistance for Sustainable Development in General

As mentioned in the previous sub-section, a substantial number of environmental conventions have emerged in which developed country parties assume obligations, in various forms, to assist developing country parties in order to secure their compliance with commitments under the convention concerned. This may reflect, at least in part, the principle of "common but differentiated responsibilities". However, we cannot lose sight of the fact that these obligations are only concerned either with "incremental costs" necessary for treaty compliance,[50] or assistance within the confines of (non-)compliance procedures. They have never extended to assistance for sustainable development of developing countries in general. This situation seems to be quite unsatisfactory.

In this respect, Günther Handl points out "the need for alternative mechanisms to redress the problem of underdevelopment".[51] However, "the problem of underdevelopment" is, to be sure, not only developmental but also environmental in character. The Stockholm Declaration stated that: "In the developing countries most of the environmental problems are caused by underdevelopment"; and "(e)nvironmental deficiencies generated by the conditions of underdevelopment ... can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance ..." (para. 4 and Principle 9).

Thus, Chapter 2 of the Agenda 21 is devoted to "International cooperation to accelerate sustainable development in developing countries and related domestic policies", and Chapters 33 and 34 deal with "Financial resources and mechanisms" and the "Transfer of environmentally sound technology, cooperation and capacity building" respectively. In many policy documents, and also in some treaty stipulations, we can find political commitments on the part of developed countries to assist developing countries in their pursuit of sustainable development. However, developed countries have been extremely reluctant up to now to accept legal commitments in this respect.

The repeated commitments of developed countries to reach the accepted United Nations target of 0.7% of GNP for ODA, as reconfirmed in paragraph

50 As for a definition of "incremental costs", see, Copenhagen Amendments to the Montreal Protocol, Annex VIII "Indicative List of Categories of Incremental Costs", reproduced in, Hunter, et *al*., *op.cit*., *supra* note (23), 589-591. See also, Lothar Gündling, "Compliance Assistance in International Environmental Law: Capacity-Building Through Financial Aid and Technology Transfer", 56 ZaöRV 806-807 (1996).

51 Handl, o*p.cit*., *supra* note (30), 10.

33.13 of the Agenda 21, have still not been fulfilled. On the fifth anniversary of the Agenda 21, the UN General Assembly noted with regret that "on average, official development assistance as a percentage of the gross national product of developed countries has drastically declined in the post-Conference period".[52] This reluctance of developed countries to provide developing countries with development assistance may, at least partly, explain the above-mentioned "double standards".

A noteworthy example of assistance for developing countries' sustainable development may be the Clean Development Mechanism (CDM) defined by Article 12 of the Kyoto Protocol.[53] The purpose of the CDM is to help non-Annex I Parties to achieve sustainable development and to assist them in their efforts to contribute to the ultimate objectives of the FCCC, and, at the same time, to help Annex I Parties to achieve compliance with their quantified emission limitation and reduction commitments under Article 3 of the Protocol (Article 12(2)). Thus, the CDM seems to reflect, to all appearances, the principle of "common but differentiated responsibilities". However, this conclusion must be subject to some reservations.

Emission reductions resulting from each project activity shall be "real, measurable, and [have] long-term benefits related to the mitigation of climate change", and be also "additional to any that would occur in the absence of the certified project activity", the latter condition being known as "additionality" (Article 12 (5)). In order to ensure that these conditions are met, there is a need to both measure a project's emissions and to compare these against the emission baseline that would have occurred in the project's absence. Both seem to be difficult to estimate accurately.[54] If the baseline were set too high, overall emissions might be increased.

Use by an Annex I Party of the certified emission reductions accruing from a CDM project for compliance must be a "part" of its quantified emission limitation and reduction commitment (Article 12 (3)(b)). Without defining a proper "cap" or "ceiling" of the use by an Annex I Party of the certified emission reductions, the CDM could become a means for developed countries

52 Para. 18 of General Assembly resolution S/19-2, Annex, "Programme for the Further Implementation of Agenda 21", adopted at the nineteenth special session, 3-28 June 1997.

53 As for the history and content of the CDM, see, Jacob Werksman, "The Clean Development Mechanism: Unwrapping the 'Kyoto Surprise'", 7 RECIEL 147 (1998).

54 Robert Hamwey and Francisco Szekely, "Practical Approaches in the Energy Sector", in, Jose Goldenberg, ed., Issues & Options: The Clean Development Mechanism, UNDP, 1998, 121.

to neglect their domestic efforts of emission limitation and reduction. However, a decision adopted by the COP-6 at its second part in July 2001, agreed that "the use of the mechanisms shall be supplemental to domestic action", but did not establish any such "cap" or "ceiling".[55] It is said that, at this stage of the COP-6, an agreement was reached to interpret a "part" to be a qualitative guide rather than a quantitative cap.

As one commentator pointed out: "The benefits to developed country Parties are clear and specific and can be measured in terms of certified emission reductions. However, those accruing to developing countries are less clear". The latter would depend on how and to what extent a CDM project contributes to sustainable development, for which clear measures or indices of sustainable development need to be defined.[56] Thus, problems of mechanism and governance apart, the consequences of CDM for sustainable development are still to be revealed.

The Multilateral Fund of the Montreal Protocol, referred to in the previous sub-section, was the first such fund established under an environmental convention. However, the main and more general financial mechanism in environment and development is the Global Environment Facility (GEF), established in 1991 by the World Bank as a pilot program,[57] and restructured in 1994 pursuant to decisions of the UNCED.[58] The purpose of the GEF is to provide new and additional grants and concessional funding to meet the agreed incremental costs of measures to achieve agreed global environmental benefits in the four focal areas: climate change; biological diversity; international waters; and ozone layer depletion. Activities concerning land degradation are also eligible for funding in so far as they relate to the above four focal areas. A new GEF Trust Fund has been established, with the World Bank as the Trustee. The organs of the GEF are: an Assembly; a Council; and a Secretariat, and the implementing

55 The Bonn Agreement on the implementation of the Buenos Aires Plan of Action, Decision 5/CP.6, Annex, Core Elements for the Implementation of the Buenos Aires Plan of Action, VI. Mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol, paras.1.5-1.8, in, Report of the Conference of the Parties on the second part of its sixth session, held at Bonn from 16 to 27 July 2001, FCCC/CP/2001/5, 25 September 2001.

56 Mark J. Mwandosya, "From Origin Towards Operations", Goldenberg, ed., *op.cit.*, *supra* note (54), 33. The Bonn Agreement affirmed that "it is the host Party's prerogative to confirm whether a clean development mechanism project activity assists it in achieving sustainable development" (Annex VI, para. 3.1, *supra* note (55)).

57 30 I.L.M. 1735 (1991).

58 33 I.L.M. 1273 (1993). Decisions of the UNCED referred to in the text are: 33.14(A)(iii) of Agenda 21; Article 21(3) of the FCCC; and, Article 39 of the CBD.

Agencies are: the United Nations Development Programme (UNDP); the United Nations Environment Programme (UNEP); and the World Bank.

A remarkable feature of the GEF, as compared with traditional international financial agencies, is its higher degree of democracy and transparency in governance. The Council, the main governing body of the GEF, is composed of 32 members, 16 from developing countries, 14 from developed countries and 2 from the countries with economies in transition. They are appointed by the Participants grouped in 32 constituencies, with 18 "recipient constituencies" and 12 "non-recipient constituencies". Decisions of the Council are taken by consensus, and if no consensus appears attainable, a "double weighted majority" vote is taken, that is, an affirmative vote representing both a 60 percent majority of total Participants and a 60 percent majority of the total contributions.

This system of decision-making is a tactful mixture of a UN model of "one-country one vote" and a Bretton Woods model of "one-dollar one vote", intended to satisfy, at least in part, both recipients and contributors.[59] The GEF, when operating as the financial mechanism on an interim basis for the FCCC as well as for the CBD, also functions under the guidance of, and is accountable to, the COPs which decide on policies, program priorities and eligibility criteria for the purpose of the conventions concerned. This governance of the GEF intends to enable developing countries to participate more effectively in decision-making, reflecting the principle of "common but differentiated responsibilities". Jacob Werksman noted that, in the light of common but differentiated responsibilities, which views areas of development assistance as responsibility rather than generosity, "traditional justifications for allowing donor countries to dominate decision-making within the Bank dissolve".[60]

However, the GEF at its pilot phase had been severely criticized by environmentalists as well as by developing countries for being too closely linked to the World Bank, and therefore, being generally controlled by donor countries.[61] The restructuring of the GEF and the democratization of its structure and governance, mentioned above, was designed to meet these criticisms. However, even after its restructuring, the GEF is said to remain controversial, with many of the issues raised during the pilot phase remaining unchanged. These issues

59 As for the GEF, see, e.g., Halvorssen, *op.cit.*, *supra* note (21), 150-152; Jacob D. Werksman, *op.cit.*, *supra* note (13); idem, "Greening Bretton Woods", in, Sands, ed., *op.cit.*, *supra* note (23), 79-84; Nicholas Van Praag, "Introductory Note", 33 I.L.M. 1273 (1994).

60 Werksman, "Greening Bretton Woods", *ibid.*, 78.

61 Hunter, *et al.*, *op.cit.*, *supra* note (23), 1483.

include: the selection of focal areas considered most important to the donor countries; difficulties in measuring eligible "incremental costs" of global benefits; difficulties in ensuring the "additionality" of the GEF funds; the lack of involvement of local communities and NGOs in GEF activities; and, the lack of apparent effectiveness in aquiring environmental gains in related World Bank projects.[62] Thus, it seems difficult to conclude, at present, that the GEF can effectively contribute to the sustainable development of developing countries.

4. Changing Consumption and Production Patterns

The last but not the least point to be made here is on the problem of "changing consumption and production patterns". Principle 8 of the Rio Declaration stipulates: "To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable pattern of production and consumption and promote appropriate demographic policies". It is said that "with UNCED, the issue of changing consumption pattern was for the first time formally placed on the agenda for multilateral negotiations".[63]

As noted by the Secretary-General in his report to the Commission on Sustainable Development, "Principle 8 represents an area where the concept of common but differentiated responsibilities is clearly applicable, since unsustainable production and consumption patterns are generally found in developed countries, while in contrast, developing countries tend to have a greater rate of increase in population levels".[64] Ileana Porras also states that "(t)his principle achieves one of the most delicate balancing acts of the entire Rio Declaration". Though industrialized countries rarely refer to their activities as "development", and, therefore, seem to be outside the scope of the term, the Rio Declaration provides a reminder that the goal of sustainable development can only be achieved if industrialized countries cease to benefit, to the detriment

62 *Ibid*., 1485-1489.

63 Commission on Sustainable Development, Report on the Second Session, ECOSOCOR, 1994, Supp. No.13, E/1994/33/Rev.1-E/CN.17/1994/20/Rev.1, para. 43. The issue of production patterns is not mentioned here, perhaps because there has been a long history of multilateral negotiations relating to the conservation and management of ocean living resources. Also, trade policy measures applied to process and production methods have been at issue in the trade-environment debates. However, these issues, being somewhat different in context, are excluded from the examination here.

64 Rio Declaration on Environment and Development: application and implementation, Report of the Secretary-General, E/CN.17/1997/8, 10 February 1997, para. 51.

of developing countries, from their ongoing unsustainable practices, she argues.[65]

Thus, the main point at issue here is changing production and consumption patterns in developed countries. A report from the Commission on Sustainable Development affirms that developed countries bear a special responsibility in the context of common but differentiated responsibilities, because the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production in industrialized countries.[66]

It must be conceded that the problem of "changing consumption and production patterns", notwithstanding its extreme importance, is difficult to translate into international legal terms. Firstly, as cited above, Principle 8 of the Rio Declaration used "should", not "shall", in this context. Use of "should" in a policy document, or at best a "soft law" document, seems to indicate a strong negative attitude on the part of States towards any legal characterization of the stated obligation. And secondly, quite a number of policy documents, such as the Agenda 21 and General Assembly resolution S/19-2, recommended to Governments many actions that could be taken to effect a change in production and consumption patterns. However, almost all of these actions belong to the domain of domestic policies, and seem not to be amenable to regulation by international law, though some of them may be regulated by domestic legislation.[67]

It is true that the implementation of a number of international environmental conventions has implications for production and consumption patterns. These conventions now cover such areas as greenhouse gas emissions, the ozone layer, desertification, biodiversity, trans-boundary movements of hazardous wastes, and fisheries and marine pollution. In particular, the implementation of reduction commitments for greenhouse gases under the FCCC and the Kyoto Protocol

65 Porras, *op. cit.*, *supra* note (23), 27. See also, Yoshiro Matsui, "The road to sustainable development: evolution of the concept of development in the UN", Ginther, Denters and de Waart, eds., *op. cit.*, *supra* note (23), 69-70.

66 Commission on Sustainable Development, Report of the Third Session, ECOSOCOR, 1995, Supp. No. 12, E/1995/32-E/CN.17/1995/36, para. 31.

67 According to Halvorssen, the underlying elements of Principle 8 are essentially not new, to some extent the principle "codifies" what has been taking place in industrialized countries (Halvorssen, *op.cit.*, *supra* note (21), 49).

will require substantial changes in production and consumption patterns, especially in developed countries.[68]

However, almost all of these conventions do not regulate production and consumption patterns per se. The latter are merely an indirect consequence of their implementation. An example of direct regulation of production and consumption patterns may be seen in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, adopted in 1989.[69] Recognizing that "the most effective way of protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum in terms of quantity and/or hazard potential" (Preamble), so each Party undertakes to "take the appropriate measures to", inter alia, "ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects" (Article 4(2)(a)).

The Basel Convention applies equally to developed and developing countries. But actually, because the main exporters of hazardous waste are developed countries, the commitment under Article 4(2)(a) is applicable, for the most part, to developed countries. Therefore, this provision may be regarded as a reflection of the principle of "common but differentiated responsibilities". The duty assumed here, however, is only a duty to take "appropriate measures", a very general and indeterminate obligation indeed. At present this may be limitation upon measures purporting to change production and consumption patterns.

But, this limitation must not be seen as inevitable. The Bamaco Convention on the Ban of the Import into Africa and Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa, adopted in 1991 under the auspices of the OAU,[70] though following the pattern of the Basel Convention, goes one step further. It adopts "the preventive, precautionary approach to pollution problems", and requires Parties to cooperate through the application of "clean production methods" applicable to entire product life cycles (Article 4(3)(f) and (g)). This Convention is open only to the OAU Members (Article 21), and therefore, has no relation to the principle of "common but differentiated responsibilities". However, it may be said that this Convention shows how it

68 Commission on Sustainable Development, Comprehensive review of changing consumption and production patterns: Report of the Secretary-General, E/CN.17/1999/2, 13 January 1999, paras.6-7.

69 28 I.L.M. 649 (1989).

70 30 I.L.M. 773 (1991).

is possible for an international convention to regulate production and consumption patterns. This possibility deserves to be pursued further.

5. Legal Character of the Principle of "Common but Differentiated Responsibilities": In Place of a Conclusion

We are going to conclude this chapter by a brief sketch of the legal character of the principle of "common but differentiated responsibilities". We argued in Section I (2) above that, when understood as reflecting developed countries' historical and contemporary responsibility for global environmental degradation, this principle would have a strong legal connotation. This argument does not mean, however, that the principle as such has legally binding force, but, rather it means that the principle has a strong, legally relevant, driving force.

Thus, the principle of "common but differentiated responsibilities" has become reflected in many international instruments in the field of sustainable development. And these instruments include not only "soft law" documents such as the Rio Declaration and Agenda 21, but also international conventions in their operative parts, such as the FCCC and the Montreal Protocol. Therefore, the principle of "common but differentiated responsibilities" may be characterized as a legal principle or a fundamental principle of international environmental law.[71] However, to characterize a principle as a legal principle does not necessarily define its concrete legal operations or consequences. These will depend on its context in the convention concerned as well as on the context of its actual application.

A legal principle may operate as a guiding principle for law-making. The principle of "common but differentiated responsibilities" has actually guided the law-making of such conventions as the FCCC, the Montreal Protocol, and the Kyoto Protocol, which prescribe differentiated commitments to the Parties. Also, this principle, when stipulated in framework conventions, assists in the elaboration of detailed obligations in future protocols. This role of the "common but differentiated responsibilities" principle in the law-making process was

71 Cullet, *op.cit.*, *supra* note (10), 575-579; French, *op.cit.*, *supra* note (10), 41; Report of the Expert Group, *supra* note (13), para. 8; Sands, *op.cit.*, *supra* note (13), 54-57; Gundling, *op.cit.*, *supra* note (50), 797; Howard Mann, "Comment on the Paper by Philippe Sands", in, Lang, ed., *op.cit.*, *supra* note (13), 67-72. Cf. Rajamani, who denies "common but differentiated rsponsibility" to be a principle, but admits an identical legal weight to it (*op.cit.*, *supra* note (23), 124).

highlighted by a recent Report of the WTO Panel, in which the Panel urged: "Malaysia and the United States to cooperate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment".[72]

A legal principle may also operate as a guiding principle for the interpretation and application of conventions. The Parties of the FCCC, in their actions to achieve the objective of the Convention and to implement its provisions, shall be guided, inter alia, by the principle of "common but differentiated responsibilities and respective capabilities" (Article 3(1)). Also, the Facilitative Branch of the Compliance Committee of the Kyoto Protocol, in providing advice and facilitation to Parties in implementing the Protocol, and in promoting compliance by Parties to their commitments under the Protocol, shall take into account "the principle of common but differentiated responsibilities and respective capabilities" (Sec.IV, para. 4 and Sec.XIV of the Compliance Procedures of the Kyoto Protocol).

Though it may be difficult at present to recognize that the principle of "common but differentiated responsibilities" constitutes a customary norm of international law,[73] it would also be difficult to deny altogether its legal implications as mentioned above. In the field of sustainable development, international law-making that does not regard the principle of "common but differentiated responsibilities", or interpretation and application of conventions that does not take this principle into account could not claim legitimacy.

72 United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to article 21.5 by Malaysia, Report of the Panel, WT/DS58/RW, 15 June 2001, para. 7.2, upheld by the Appelate Body, WT/DS58/AB/RW, 22 October 2001.

73 Cullet, *op.cit.*, *supra* note (10), 579.

5

THE EVOLVING REGIME ON CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT

Gerhard Loibl

1. Introduction

Since the concept of "sustainable development" was enshrined in the Rio Declaration on Environment and Development 1992[1] it has become a central issue of the activities on the international, regional and national levels. The Brundtland Report placed it at the very heart of future efforts to achieve an equilibrium between environmental protection, economic development and social concerns.[2] Until today the description of "sustainable development" contained in the Brundtland Report is the only one which gained international acceptance. Efforts for a more detailed definition or description have not been successful so far. Although the concept of "sustainable development" is to be found in a large number of international instruments[3] and has been referred to in inter-

1 See Principle 1 of the Rio Declaration on Environment and Development.

2 On the notion of "sustainable development" see the Brundtland Report (The World Commission on Environment and Development, *Our Common Future* (1987), 43). See also ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development 2002 which lists the main principles of international law which have a bearing on achieving the overall aim of sustainable development. Cf. also the work of OECD in the area of sustainable development.

3 Cf. Birnie/Boyle, *International Law and the Environment*, Oxford, 2nd ed., 2001, 84 ff.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 97-118.*

national judgments,[4] fundamental uncertainties remain about the legal nature of the notion of sustainable development and about its normative implications.[5] Despite this lack of precision, the main elements of this concept, both substantive and procedural, may be identified. The substantive elements are mainly set out in Principles 3 to 8 of the Rio Declaration, such as the sustainable utilization of natural resources (including the change of unsustainable patterns of consumption and production); the integration of environmental protection and economic development; the right to development; the pursuit of intra- and inter-generational equity; and the principle of common and differentiated responsibilities. Moreover, the precautionary approach (Principle 15) and the polluter-pays-principle (Principle 16) are important means for achieving sustainable development. The principal procedural elements are dealing with public participation in decision-making (Principle 10) and environmental impact assessment (Principle 17).[6]

Most agreements concluded in the last decade adhere to the concept of "sustainable development" in general, but they also deal more specifically with some of the above mentioned elements. Relevant agreements include the Convention on Biological Diversity 1992, the Agreement for the Conservation of Straddling and Highly Migratory Fish Stocks 1995, the UN-Convention on Non-Navigational Uses of International Watercourses 1997, and the Stockholm Convention on Persistent Organic Pollutants 2001. The concept of "sustainable development", as well as some of its elements, were also included in the United Nations Framework Convention on Climate Change and in the Kyoto Protocol. This article will scrutinize how the concept of sustainable development and its elements have been incorporated and implemented in the international rules dealing with climate change.

In the last decades the problem of global climate change became a central topic on the international agenda. Scientists have warned for some time that anthropogenic CO_2 emissions have a negative impact on the global climate. They predict an increase of the average annual temperature in many parts of

4 See the Judgment of the International Court of Justice in the *Case Concerning the Gabcikovo-Nagymaros Dam* (*ICJ Reports 1997*, 7, para. 140).

5 Cf. Malgosia Fitzmaurice, 'International Protection of the Environment', *RdC* 293 (2001), 47 ff.

6 Alan Boyle/David Freestone, 'Introduction', in: Alan Boyle/David Freestone (eds.), *International Law and Sustainable Development – Past Achievements and Future Challenges*, Oxford, 1999, 1 ff.

the globe in the next decades which would e.g. lead to the melting of the ice caps around the north and south poles, to the melting of glaciers, to a rise of the sea level and to droughts and floods in many parts of the globe. Thus, climate change has a potential impact on e.g. crops, freshwater resources, animal stocks, biodiversity,[7] and tourism.[8] An increase of the sea level will flood coastal areas and submerge islands.[9] These predictions by the scientific community, extreme weather conditions in many parts of the world and the "El Nino Phenomena"[10] convinced the international community that action was needed to address the problem of climate change on the international level. In the last years more and more scientific evidence has been put forward, both on the impacts of climate change (such as the melting of the polar caps and glaciers) and on the contribution by human-made CO_2 emissions. In particular, the work of the Intergovernmental Panel on Climate Change[11] has provided scientific information on the impact of anthropogenic emissions on the global climate to a broader public.[12]

7 The impact of climate change has been on the agenda of a number of meetings held under the Convention on Biodiversity (see www.cbd.org).

8 Due to climate changes tourism will be affected negatively, e.g. many skiing resorts will no longer have enough average snow coverage a year to be attractive for tourists.

9 Cf. the work of the Intergovernmental Panel on Climate Change which has looked at the impact of sea level rise on a number of countries, e.g. Bangladesh.

10 Cf. e.g. UNGA Res. 56/194.

11 The Intergovernmental Panel on Climate Change (IPCC) was set up by the United Nations Environment Programme (UNEP) and the World Meteorological Organisation (WMO) in 1998. Its mandate is to assess the scientific, technical and socio-economic information relevant for understanding the risk of human induced climate change. Its assessments are based on peer reviewed and published scientific literature. The IPCC's principal activities are undertaken within three working groups and a Task Force:
Working Group I: assesses the scientific aspects of the climate system and climate change.
Working Group II: addresses the vulnerability of socio-economic and natural systems to climate change, negative and positive consequences of climate change, and options for adapting to it.
Working Group III: assesses options for limiting greenhouse gas emissions and otherwise mitigating climate change.
The Task Force on National Greenhouse Gas Inventories is responsible for the IPCC National Greenhouse Gas Inventories Programme. (http://www.ipcc.ch)

12 IPCC has provided three assessment reports until now. The latest, presented in 2001, anticipates a temperature increase of 1.4 to 5.8 degree Celsius over the period 1990 to 2100 leading to a significant sea level rise and a reduction of the permanent snow cover in many parts of the world. See Third Assessment Report of IPCC, Summary for Policymakers (http://www.ipcc.org).

Thus, climate change emerged as one of the most pressing global issues because it would jeopardize efforts undertaken in many parts of the world towards sustainable development. For example, agricultural projects which have lead to an increase of food production in some parts of the world might fail due to climate change. But even projects which have helped to make industrial production more sustainable, e.g. through the use of hydroelectric power, may be jeopardized if power stations along rivers can only operate at reduced levels and thereby increase the dependence on energy from fossil fuels.

2. The Road from Rio to Marrakesh – the evolution of the climate regime

The legal regime addressing climate change has been elaborated since the 1980ies.[13] The landmarks in its evolution were the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, the adoption of the Kyoto Protocol in 1997 and the Bonn political agreements in July 2001 and their implementation in the Marrakesh Accords in November 2001.

2.1 The United Nations Framework Convention on Climate Change (UNFCCC)

The UNFCCC described its "ultimate objective" as follows: "Greenhouse gas concentrations should be stabilised at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."[14]

In working towards this objective, parties should be guided, *inter alia*, by equity, common but differentiated responsibilities and respective capabilities,

13 The UNGA set up an International Negotiating Committee which began its work in 1990 (UN/GA Res. 45/212). The UNGA resolution which dealt with the issue of global climate change was adopted in 1998 following a proposal by Malta (UNGA Res. 43/53 entitled "Protection of global climate change for present and future generations"). For a detailed description of the historic evolution of the climate change regime see the annual reports in the *Yearbook of International Environmental Law* (YbIEL) since 1990.

14 Article 2.

the precautionary approach, the right to promote sustainable development as well as by a supportive and open global trading system.[15] Developed countries should take the lead in combating climate change and the adverse effects thereof.

Consequently, commitments have been undertaken by developed countries ("Annex I parties") to adopt national policies and measures "with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol" and to report on their efforts regularly.[16] Obligations of all parties are rather general.[17] As Article 4 para. 7 states, the effective implementation of these commitments by developing country Parties (non-Annex I parties) "will depend on the effective implementation by developed country Parties of their commitments under UNFCCC related to financial resources and transfer of technology[18] and will taken into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties." Furthermore, Parties shall give full consideration to the needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures.[19]

Thus, UNFCCC clearly underlines that the protection of the world climate is not a goal to be achieved in isolation. On the contrary, when taking measures to address the issue of climate change a number of other factors have to be taken into account, such as the economic and social impact of these measures taken by Annex I parties on non-Annex I parties. UNFCCC has laid down the "cornerstones" for the evolution of the climate change regime, leaving it to future negotiations to elaborate more detailed rules supporting the aim of to achieve sustainable development.

15 Article 3.

16 See Article 4 para. 2 (a) and (b).

17 E.g. to develop, publish and make available to the Conference of the Parties (COP) national inventories of anthropogenic emissions of sources and removals by sinks of all greenhouse gases; to promote and cooperate in the development, application and diffusion, including transfer of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors; to promote sustainable management of sinks and reservoirs of all greenhouse gases.

18 See Article 4 paras. 3, 4 and 5 on providing "new and additional financial resources to meet the agreed full costs incurred by developing country Parties" in regard to their information requirements and the transfer and access to technology.

19 See Article 4 paras. 8 and 9.

2.2 The Kyoto Protocol

The Kyoto Protocol which was negotiated on the basis of the so-called "Berlin Mandate"[20] was adopted in 1997 at COP3 after intensive negotiations in "an open-ended ad hoc group of Parties".[21] The "Berlin Mandate" set out that the negotiating process should aim "to set quantified limitation and reduction objectives within specified time-frames, such as 2005, 2010 and 2020, for their anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol".[22] Furthermore, negotiations should "not introduce any new commitments for Parties not included in Annex I, but reaffirm existing commitments in Article 4 paragraph 1. and continue to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4 paragraphs 3, 5 and 7".[23] Thus, the negotiations were based, inter alia, on the principle of common but differentiated responsibilities and capabilities and focused on commitments to be undertaken by Annex I countries.[24]

The main provisions of the Kyoto Protocol are the following:
(i) Reduction and Limitation Commitments of Annex I Parties: at the centre of the Kyoto Protocol are the reduction and limitation commitments undertaken by Annex I Parties. Article 3 para. 1 in connection with Annex B lays down the obligations undertaken by those States, varying from a reduction of emissions of 8 percent below 1990 levels to a limitation of increases of 10 percent.[25] The overall target is to reduce global emissions by at least 5 percent

20 See Decision 1/CP.1 which is entitled "The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow up" (FCCC/CP/1995/7/Add.1).

21 Decision 1/CP.1, Part III, paragraph 6.

22 Decision 1/CP.1, Part II, paragraph 2 (a).

23 Decision 1/CP.1, Part II, paragraph 5 (b).

24 A proposal to provide for voluntary commitments by non-Annex I countries in the future (i.e. to include commitments by developing countries in Annex B on a voluntary basis) was blocked by G77 and China in the final negotiations in Kyoto. They pointed out that such a provision would go beyond the terms of the "Berlin Mandate" which only referred to commitments by Annex I parties.

25 E.g. the EU member states and most European countries have under taken a commitment to reduce their emissions by 8 percent; Canada, Hungary, Japan and Poland by 6 percent; Croatia by 5 percent; New Zealand, the Russian Federation and Ukraine will stabilize their emissions; Norway may increase its emissions by 1 percent; Australia by 8 percent and Iceland by 10 percent. The United States would have to reduce their emissions by 7 percent below the 1990 level.

in the commitment period 2008 to 2012.[26] These reduction or limitation commitments are not limited to CO_2 but to a "basket" of six gases (listed in Annex A).[27] These commitments are to be achieved through policies and measures on the national level and by using the "mechanisms".

(ii) Policies and measures (Article 2): in order to achieve the quantified emissions limitations and reduction commitments under Article 3 Parties shall implement and/or further elaborate policies and measures on the national level in order to promote sustainable development. Article 2 gives examples of such policies and measures, but does not provide for specific ways and means which parties have to adopt on the national level. Thus, it is left to each party to adopt such policies and measures it regards as most efficient under the national circumstances.

(iii) Mechanisms: The Kyoto Protocol has entered new ground by permitting the use of the so-called "mechanisms": Joint Implementation (Article 6),[28] Clean Development Mechanisms (Article 12)[29] and Emissions Trading (Article 17).[30] The basic idea of these mechanisms is to direct (future) investments (to reduce human-induced emissions) to areas where they would achieve emissions reductions in the most efficient way. The use of the mechanisms is intended to be supplemental to the policies and measures adopted by the parties.[31]

26 This target is unlikely to be achieved as the United States have stated that they are not willing to become a party to the Kyoto Protocol. See in more detail on the position of the United States David Wirth, The Sixth Session (Part Two) and Seventh Session of the Conference of the Parties to the Framework Convention on Climate Change, AJIL 96 (2002), 648 ff., at 655 ff.

27 Annex A lists: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs) and Sulphur hexafluoride (SFs). The emission reduction or limitation commitments undertaken by Parties as listed in Annex B concern „anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A".

28 Joint implementation (Article 6) permits that Annex I parties may undertake projects with the consent of other Annex I parties on the latter's territory. The „emission reduction units" obtained through such projects are to be used to achieve the commitments under Article 3 para. 1.

29 Article 12 provides that Annex I parties may achieve their commitments by investing in projects located in non-Annex I parties (developing countries) generating „certified emissions reduction units".

30 Emissions trading allows for the transfer of "emissions rights" between Annex I parties.

31 The issue of "supplementarity" was one of the most controversial issues during the negotiations.

A number of States argued during the negotiations that they had already reached a level of emissions reductions that any further reductions would require inappropriate high investments. Therefore, it would be more efficient to direct such investments to countries where the same amount of investment would result in higher reductions of emissions.

Although the Kyoto Protocol established these mechanisms, it leaves the elaboration of more detailed rules to future negotiations. In particular, this uncertainty about the operation of the mechanisms was seen as an obstacle to the ratification of the Kyoto Protocol by those States which have undertaken substantive commitments.

(iv) Sinks (Article 3 paras. 3 and 4): the sequestration of carbon by sinks has been a major issue since the beginning of the negotiations on climate change. Reference has been made in the UNFCCC[32] as well as in the Berlin mandate. Preventing deforestation as well as promoting afforestation, forest management and certain changes in agricultural practices have a positive effect on the global climate by sequestering carbon. But due to the uncertainties in the available data as well as in the methodologies of measuring and reporting, the issue of sinks proved to be a very difficult topic in the negotiations. The compromise contained in the Kyoto Protocol needed to be further elaborated.

(v) Compliance (Article 16 and Article 18): following the example of other international environmental agreements, the Kyoto Protocol provides for the establishment of a comprehensive compliance system.[33] Such a system required particular attention under the Kyoto Protocol in order to ensure the functioning of the mechanisms.[34]

(vi) Funding for Developing Countries (Article 11): this provision builds on the relevant rules of the UNFCCC elaborating them further, but leaves more detailed elaboration to further negotiations.

32 UNFCCC defines „sink" as follows: any process, activity or mechanism which removes greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere (see Article 1).

33 It should be noted that Article 16 (provides for the elaboration of a multilateral consultative process as referred to in Article 13 UNFCCC), whereas Article 18 speaks of procedures and mechanisms relating to compliance.

34 It was argued that only if parties will be held accountable for not fulfilling their obligations under the Kyoto Protocol, the mechanisms will be effective means to achieve the goal of the Kyoto Protocol.

2.3 Buenos Aires Plan of Action (COP4)

Although the Kyoto Protocol sets out the framework for its operation, agreement on a number of issues could only be reached in principle. Therefore, the Kyoto Protocol authorised the Conference of the Parties serving as the meeting of the Parties to adopt more detailed rules in order to make the Kyoto Protocol operational (so-called "enabling provisions").

The "Buenos Aires Plan of Action", adopted at COP4 in 1998, stated that the "gaps" in the Kyoto Protocol should be filled until COP6. They included, among other issues, the following topics: financial mechanism, development and transfer of technologies, implementation of Article 4.8 and 4.9 of the Convention, the mechanisms and a compliance mechanism.[35]

2.4 The Hague (COP6), the "political" Bonn Agreements (COP6bis) and their implementation at Marrakesh (COP7)

Between 1998 and 2000 intensive negotiations took place on the issues set out in the Buenos Aires Plan of Action. Although considerable progress was made till COP6 a number of issues remained unresolved. As COP6 in The Hague could not reach a compromise on some main issues (e.g. on the supplementary use of the mechanisms to domestic policies and measures; land-use, land-use changes and forestry issues; compliance system), the conference was suspended and resumed in Bonn in July 2001 (COP6bis). The "political agreements" reached in Bonn concerned the following main issues: funding under UNFCCC and Kyoto Protocol, development and transfer of technologies; mechanisms; land-use, land-use change and forestry (hereafter: LULUCF, formerly known as "sinks"); and procedures and mechanisms relating to compliance under the Kyoto Protocol.[36] At COP7 decisions ("Marrakesh Accords"),[37] incorporating these agreements, were adopted or proposed for adoption to the first Conference of the Parties serving as the meeting of the Parties (COP/MOP1). Thus, the parties having undertaken commitments under the Kyoto Protocol were given

35 Decision 1/CP4 (FCCC/CP/1998/16 (Add.1).

36 The "political Bonn Agreements" are contained in FCCC/CP/2001/L.7.

37 FCCC/CP/2001/13 and Add.1 to 4.

clarity about the operation of the Kyoto Protocol and thereby made it "ratifiable" for them.[38]

3. COP8 at Delhi 2002

COP8 – the first COP to be held after the Buenos Aires Plan of Action was implemented – concentrated on "technical issues". By adopting "the Delhi Ministerial Declaration on Climate Change and Sustainable Development"[39] it underlined the close linkage between the efforts to address global climate change and sustainable development, stating that "climate change and its adverse effects should be addressed while meeting the requirements of sustainable development".

COP8 calls upon all Parties "to continue to advance the implementation of their commitments under the Convention to address climate change and its adverse effects in order to achieve sustainable development."[40] Furthermore, "effective and result-based measures should be supported for the development of approaches at all levels on vulnerability and adaptation, as well as capacity-building for the integration of adaptation concerns into sustainable development strategies".[41] Moreover, it underlines that "international cooperation should be promoted in developing and disseminating innovative technologies in respect of key sectors of development, particularly energy and of investment in this regard, including through private sector involvement and market-oriented approaches, as well as supportive public policies".[42]

38 This fact was recognized in operative paragraph 1 of "The Marrakesh Ministerial Declaration" which reads: "Note the decisions adopted by the seventh session of the Conference of the Parties in Marrakesh, constituting the Marrakesh Accords, that pave the way for the timely entry into force of the Kyoto Protocol". (FCCC/CP/2001/13/Add.1, 3 f.).
Annex I Parties had not ratified the Kyoto Protocol beforehand, as they needed legal certainty on the operation of the some essential elements of the Kyoto Protocol, such as the mechanisms or the compliance system. This was not only a political requirement for most Annex I Parties, but also under most constitutions this was a legal requirement. Since COP7 – in addition to non-Annex I parties – more than 30 Annex I Parties have deposited their instruments of ratification or accession with the Secretary-General of the United Nations.

39 Decision 1/COP.8 (FCCC/CP/2002/7/Add.1, 3 ff.)

40 Operative paragraph d.

41 Operative paragraph e.

42 Operative paragraph h.

The Delhi Ministerial Declaration calls upon parties to strengthen technology transfer, including through concrete projects and capacity-building in all relevant sectors such as energy, transport, industry, health, agriculture, biodiversity, forestry and waste management.[43]

A central issue addressed in the Delhi Ministerial Declaration is "energy": access to reliable, affordable, economically viable, socially acceptable and environmentally sound energy services and resources should be improved. Furthermore, actions are required to diversify energy supply by developing advanced, cleaner, more efficient, affordable and cost-effective energy technologies, including fossil fuel technologies and renewable energy technologies, hydro included, and their transfer to developing countries on concessional terms as mutually agreed. Actions should be taken to increase substantially the global share of renewable energy sources with the objective of increasing their commitments to total energy supply, recognizing the role of national and voluntary regional targets as well as initiatives, where they exist, and ensuring that energy policies are supportive to developing countries' efforts to eradicate poverty.[44]

4. Sustainable development and the climate regime

As the evolution of the climate regime demonstrates, the concept of sustainable development stands at the heart of efforts to combat global climate change. In a large number of instruments reference is made to sustainable development. The importance of climate change as one of the main issues in the context of sustainable development was reaffirmed in the "Plan of Implementation" adopted by the World Summit on Sustainable Development 2002.[45] Paragraph 38 of the Plan of Implementation states that "change in the Earth's climate and its adverse effects are common concern of humankind" and it refers to the UNFCCC as being "the key instrument for addressing climate change, a global concern," and reaffirmed the "commitment to achieving its ultimate objective of stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, within a time frame sufficient to allow ecosystems to adapt naturally

43 Operative paragraph i.

44 Cf. operative paragraphs j and k.

45 See Report of the World Summit on Sustainable Development, *UN Doc*. A/CONF.199/20. On the results of the World Summit cf. Kevin Gray, 'Accomplishments and New Directions', 52 *ICLQ* (2003), 256 ff.

to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner, in accordance with our common but differentiated responsibilities and respective capabilities."[46] Thus, it seems obvious that the concept of sustainable development and the climate regime are closely connected and that measures undertaken within the climate regime are supportive of the aim of sustainable development. One could assume that all efforts undertaken to reduce or limit emissions and mitigation and adaptation measures are to be seen as steps towards sustainable development, as has been stated in the preamble of the "Marrakesh Ministerial Declaration": "Believing that addressing the many challenges of climate change will make a contribution to achieving sustainable development".[47] But is such a general assumption justified under the prevailing circumstances? Although the objective of the climate regime is clearly set out in Article 2 UNFCCC, the climate regime needs to be scrutinized in more detail to see in what manner it furthers the concept of sustainable development. This seems to have been on the mind of the negotiators at COP8 as the "Delhi Ministerial Declaration on Climate Change and Sustainable Development" uses a more cautious wording in its preamble: "resolve that, in order to respond to the challenge faced now and in the future, climate change and its adverse effects should be addressed while meeting the requirements of sustainable development".[48] Thus, the underlying assumption seems to be that there are measures which would reduce the adverse effects of climate change, but would not meet the requirements of sustainable development. This could be envisaged e.g. in the area of sinks: fast-growing trees might sequestrate carbon in the coming years, but – besides the potential of carbon releases in the future – will have a negative impact on biodiversity.

46 It is interesting to compare this language with Article 2 UNFCCC. Although this paragraph parallels the wording used there, it only states that UNFCCC is the key instrument, thus leaving it to countries to undertake activities concerning climate outside the legal framework of UNFCCC. This wording was chosen on the insistance of the USA and other countries which are sceptical of the measures set within the framework of UNFCCC and requested the freedom to take action outside the internally agreed framework. See Kevin Gray, 'Accomplishments and New Directions', 52 *ICLQ* (2003), 256 ff., at 258. The author points out that a similar language is used in regard to the Convention on Biological Diversity (para. 42 of the Plan of Implementation), an agreement which has not been ratified by the USA until now.

47 Preambular Paragraph 3 (FCCC/CP/2001/13/Add.1, 3 f.).

48 Preambular Paragraph 8 (FCCC/CP/2002/7/Add.1, 3 f.).

As has been laid out in the introductory part, one difficulty is that there is no internationally accepted definition of "sustainable development" which goes beyond the description found in the Brundtland Report. Therefore, any analysis of the climate regime has to discuss the elements of sustainable development which have been identified in various academic writings and international instruments in order to render judgement on the contribution of the climate regime to sustainable development.

Even in this regard a scrutiny of the climate regime has to be a rough one, as the complexity of the rules elaborated under UNFCCC and the Kyoto Protocol reaches far beyond the limits of this article. As has been demonstrated above, the implementation of the climate regime affects all sectors of life, as a reduction or limitation of emissions may only be reached if measures are taken in all sectors that emit or which sequester CO_2. Therefore, only some of the main elements can be highlighted which have a bearing on the concept of sustainable development.

a) The precautionary approach and inter-generational equity

The principle of precautionary approach – as described in Principle 15 of the Rio Declaration – is one of the guiding principles contained in Article 3 UNFCCC. It stood at the very beginning of the negotiations, as scientific knowledge about the operation and function of the global climate was limited and the uncertainty in the prediction of environmental effects had to be taken into account. Thus, it has been a key element in the elaboration of the climate regime. Increasing scientific data and understanding of the world climate have reduced the significance of the precautionary approach for the ongoing process.

Equally, inter-generational equity stood at the beginning of the evolution of the climate regime, as it aims to use natural resources in a manner that future generations also benefit from them. This is clearly endorsed in the objective of UNFCCC (Article 2), although the climate regime that human efforts would only "prevent dangerous anthropogenic interference with the climate system", but could not stop natural changes.

b) The right to promote sustainable development

Article 3 UNFCCC underlines that each Party has a right to promote sustainable development – and should do so. It further states that "policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes taking into account that economic develop-

ment is essential for adopting measures to address climate change". Thus each Party has to set its own agenda towards sustainable development.

Article 2 of the Kyoto Protocol reaffirms this understanding as it only suggests certain policies and measures which are to be elaborated by Annex I Parties, but does not provide for mandatory policies and measures.[49]

The right to promote sustainable development as determined by the Party itself is also the basis for the mechanisms as set out in Articles 6 and 12. The Marrakesh Accords underline that projects undertaken need to be approved by the authorities of the Party where the project is located. It is up to them to decide whether a certain project may be undertaken on their territory and whether it conforms with their national sustainable development plans.[50]

Nevertheless, certain restrictions have been set in the rules for the operation of the mechanisms of Article 6 and 12. It was agreed that "Parties included in Annex I are to refrain from using emission reduction units generated from nuclear facilities to meet their commitments under Article 3, paragraph 1."[51] Furthermore, agreement has been reached that CDM projects of land-use, land-use change and forestry is limited to "afforestation and reforestation"[52] during the first commitment period.[53] Moreover, Annex I Parties may only use emission reductions resulting from such activities up to "one percent of base year emissions of that Party, times five".[54]

Although these restrictions have no impact on activities undertaken by Parties as they are not prohibitions, they express the understanding of the Parties

49 Article 2, paragraph 4 enables COP/MOP to coordinate any of the policies listed if it decides that this would be beneficial.

50 Cf. Decision 16/CP.7, Annex, paragraphs 31 and 33 (joint implementation); Decision 17/CP.7, Annex, paragraphs 28 and 29 (CDM).

51 See Decision 16/CP.7, preambular paragraph 4 (joint implementation) and Decision 17/CP.7, preambular paragraph 5 (CDM).

52 "Afforestation" has been defined as "the direct human-induced conversion of land that has not been forested for a period of at least 50 years to forested land through planting, seeding and/or the human-induced promotion of natural seed sources. "Reforestation" has been defined as "the direct human-induced conversion of non-forested land to forested land through planting, seeding and/or the human-induced promotion of natural seed sources, on land that was forested but that has been converted to non-forested land. For the first commitment period, reforestation activities will be limited to reforestation occurring on those lands that did not contain forest on 31 December 1989". (Cf. Decision 11/CP.7).

53 More detailed rules on the inclusion of afforestation and reforestation project activities under the CDM were discussed at COP9 and will be addressed at COP10.

54 Decision 17/CP.7, paragraph 7.

that certain activities are not to be regarded as promoting sustainable development. On the other hand, by putting particular emphasis on renewable energy projects and energy efficiency improvement projects under the CDM the international community has stated its priorities in regard to which projects need to be supported in particular.[55]

Although one can only speculate as to the reasons for focusing on certain activities and excluding others, one of the motives is for sure the understanding that not all activities support the aim of sustainable development.

c) Change of unsustainable patterns of production and consumption

The qualified emission limitation and reduction commitments by Annex I parties will only be achieved if considerable changes of the patterns of production and consumption are made, despite the fact that Annex I Parties may use the mechanisms to achieve their targets. As mechanisms are only to be used "supplemental" to domestic actions, the main efforts have to be undertaken at the domestic level.[56] Such "domestic action" shall be taken "in accordance with national circumstances and with a view to reducing emissions in a manner conducive to narrowing per capita differences between developed and developing country Parties, while working towards achievement of the ultimate objective of the Convention."[57]

As the national implementation plans adopted by Annex I Parties demonstrate, the commitments under the Kyoto Protocol may only be realized if fundamental changes in production and consumption patterns are achieved.[58] These changes have to include e.g. energy production, industrial activities, as well as transport and heating systems.

The obligation of Annex I Parties to report by 2005 that they have made "demonstrable progress in achieving their commitments" might be a first im-

55 Cf. Decision 17/CP.7, paragraph 6 and the ongoing work of the executive board of the CDM on establishing standards for projects (see http://unfccc.int/cdm).

56 Cf. the above-mentioned restrictions agreed on the use of the mechanisms. Moreover, the agreements reached in Bonn and Marrakesh limit the use of "domestic sinks" by Annex I Parties to a maximum value (see Appendix to Decision 11/CP.7).

57 Decision 15/CP.7, preambular paragraph 6 (Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol).

58 Cf. e.g. the Sixth Environment Action Programme of the European Community 2001 – 2010 (COM (2001) 31 final) which was adopted by Decision No. 1600/2002/EC of the European Parliament and of the Council (OJ L 242/1 of 10. 9. 2002). It includes as one of its priority areas action on climate change and envisages, *inter alia*, to integrate climate change objectives into various Community policies, in particular energy policy and transport policy, to enhance energy efficiency, to support renewable energy resources

portant impetus on the domestic level that will lead to changing existing patterns.[59] This report shall include, *inter alia*, a description of the domestic measures, the trends and projections of greenhouse gas emissions and an evaluation of the impacts of domestic measures.[60]

d) Common but differentiated responsibilities and capabilities

Global climate change is a "common concern of humankind", which needs to be addressed by all States. In doing so not only the varying contributions by different States to carbon dioxide equivalent emissions of greenhouse gas emissions, but also the different means and resources States command have to be taken into account. Therefore, the climate regime is built – as has been demonstrated above – on the principle of common but differentiated responsibilities by obliging those States who have a high per capita emission to reduce or limit their emissions.[61] These countries (Annex I parties) not only contribute a large share to the global emissions, but also have the technological and financial means to undertake policies and measures to reduce their emissions effectively. Such policies and measures should be implemented "in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade as well as social, environmental and economic impacts on other Parties, especially developing countries".[62] Thus, the climate regime not only emphasises the need to take measures for environmental protection, but underlines that these measures have to take into account the social and economic impacts on other countries.

Moreover, measures are envisaged in the areas of capacity-building and technology transfer to increase the developing countries capabilities to address climate issues and to promote sustainable development.[63] In this regard the role of the CDM has to be taken into account as Parties not included in Annex I will benefit from project activities.

and to promote energy-saving on both heating and cooling in buildings (cf. Article 5 of the Decision).

59 Article 3 paragraph 2. This report is to be submitted by 1 January 2006 to the Secretariat (Decision 22/CP.7 paragraph 4 and Decision 25/CP.8).

60 See Decision 13/CP.7, paragraph 4 and Decision 25/CP.8, paragraph 1.

61 Article 3 paragraph 1 and Annex B of the Kyoto Protocol.

62 Cf. Article 4 paragraphs 8 and 9 UNFCCC, Article 2 paragraph 3 and Article 3 paragraph 14 of the Kyoto Protocol. These provisions address the impacts of policies and measures undertaken by Annex I Parties on non-Annex I Parties (see e.g. Decision 5/CP.7).

63 Decision 2/CP.7.

Furthermore, financial resources are to be provided for developing countries to address climate issues: they range from adaptation measures, to deal with the negative impact of climate change, to measures such as energy efficiency, which have a positive impact on the global climate and support national policies towards sustainable development. The Global Environmental Facility (GEF) has been – so far – the main source under the climate regime to support projects in developing countries and countries in transition through its focal area of climate change.[64] Following the Bonn agreements two new funds have been established under UNFCCC:

- a "special climate change fund" shall provide funding in the following areas: adaptation; technology transfer; energy, transport, industry, agriculture, forestry and waste management; as well as activities to assist developing countries in diversifying their economies.
- a "least developed countries fund" to support a work programme for the least developed countries.[65]

Moreover, a "Kyoto Protocol adaptation fund" shall finance specific adaptation projects and programmes in developing country Parties.[66]

These three funds – which are to be financed on a voluntary basis by Annex I Parties[67] – will provide financial resources for activities to address the impact of climate change, thus contributing towards a more sustainable development in developing countries. Moreover, by providing financial resources e.g. for projects in the area of energy or agriculture the goal of sustainable development will be supported.

Thereby, the climate change regime follows the interpretation of the notion of "sustainable development" as elaborated within the United Nations system starting with UNGA Res. 44/228 which advocated "sustainable and environmentally sound development" for all countries. It stated that it "affirms that the promotion of economic growth in developing countries is essential to address problems of environmental degradation" and that it "affirms the importance

64 The operational Strategy of GEF is based on three operational programmes: removal of barriers to energy efficiency and energy conservation, reducing the long-term costs of low greenhouse gas-emitting energy technologies, and promoting environmentally sustainable transport.

65 Decision 7/CP7.

66 Decision 10/CP.7.

67 The European Community and its member States, Canada, Iceland, New Zealand, Norway and Switzerland issued a joint political declaration on their preparedness to collectively contribute _ 450 million/US-$ 410 million annually by 2005 to these newly established funds.

of a supportive economic environment that would result in sustained economic growth and development to all countries". Although this understanding has been criticized as changing the Brundtland report's concept that sustainable development was environmentally sound by definition, as it replaces in fact "sustainable development" by "sustainable growth", it has become the basic understanding of the international community.[68] This is also reaffirmed by Principle 12 of the Rio Declaration calling on States to co-operate "to promote a supportive and open economic system that would lead to economic growth and sustainable development in all countries" and the similar formulation contained in the Johannesburg Plan of Implementation.[69]

e) Public participation and access to information

Public participation under the climate regime has for a long time been seen primarily as the right of non-governmental organisations to participate in the negotiation process.[70] Thereby, transparency of the negotiations for the public was ensured. Although this public participation has been of utmost importance for the evolution of the climate regime, since the adoption of the Marrakesh Accords the principle of public participation and access to information has to be seen in a broader context.

Various provisions of the Marrakesh Accords provide for public participation and access to information. For example, in the context of joint implementation and CDM projects local stakeholders are to be given the opportunity to comment on planned projects. Under the compliance mechanism they may submit information to the compliance committee on a country's implementation activities.[71] Reports of the compliance committee as well as of other bodies established under UNFCCC and the Kyoto Protocol, such as the Article 6 Supervisory Committee and Executive Board of the CDM are to be made public. Furthermore, the public is given access to nearly all information collected by

68 On this issue see Malgosia Fitzmaurice, "International Protection of the Environment", *RdC* 293 (2001), 48 f.

69 See Plan of Implementation of the World Summit on Sustainable Development (A/CONF.199/20), paragraphs 47 ff.

70 Cf. the reports of the Conference of the Parties which list nearly 200 NGOs as participants.

71 Cf. Decision 24/CP7 on Procedures and mechanisms relating to compliance under the Kyoto Protocol. Part VII para. 4 of the Procedures states that "competent intergovernmental and non-governmental organizations may submit relevant factual and technical information to the relevant branch".

the Secretariat on the operation of the climate regime. Only under certain conditions may information be kept confidential.[72]

f) Environmental impact assessment

In the last years environmental impact assessments of projects have not only become a tool on the national level, but also on the international level.[73] Financial institutions such as the International Bank for Reconstruction and Development[74] and regional development banks have adopted policies which make the use of environmental impact assessments mandatory for projects which are supported by them. It is therefore not surprising that environmental impact assessments are part of the approval procedure set out for joint implementation and CDM projects.[75]

g) Other elements of sustainable development

By promoting certain elements of sustainable development – as pointed out above –, the climate regime will also have a positive impact on other elements, such as the sustainable utilization of natural resources or the eradication of poverty. By changing production and consumption patterns and by promoting alternative energy resources and energy efficiency, a more sustainable use of natural resources will be achieved. The additional financial resources provided under the climate regime from various sources will help to eradicate poverty.

Furthermore, the activities under the climate change regime will assist to integrate environmental protection and economic development – as envisaged in Principle 4 of the Rio Declaration – as both dimensions have to be taken into account in project activities.

72 See e.g. the provisions on the compliance procedure, the mechanisms and the guidelines for review under Article 8 of the Kyoto Protocol.

73 Cf. ECE Convention on Environmental Impact Assessment in a Transboundary Context 1991.

74 Cf. World Bank Operational Policies and Bank Procedures on Environmental Assessment (OP 4.01 and BP 4.01).

75 Cf. Decision 16/CP.7 (joint implementation) and Decision 17/CP.7 (CDM) which provide for an analysis of the environmental impacts of the project activity, including transboundary impacts.

5. Concluding Remarks

The climate regime has explored new roads in tools to be used to implement environmental commitments. By doing so it has also offered new means to further sustainable development, but has also raised concerns that these new means might have a negative impact on the environment and sustainable development.

In particular, the mechanisms have given rise to a lot of criticism. Thus, critics have argued that by allowing limitations and reductions of emissions abroad domestic action will not be taken or postponed and thereby changes of unsustainable patterns of consumption and use, in particular of natural resources, will not occur in Annex I countries. While joint implementation projects might have a positive effect on countries with economies in transition and CDM projects will benefit non-Annex I parties, the overall effect of the implementation of the Kyoto Protocol will be limited. Trading of emission reduction units between Annex I parties was much criticized for various reasons: trading would reduce incentives to reduce or limit emissions by domestic measures. The fear was, in particular, that "hot air" (i.e. reductions which have been already achieved in the past years due to economic changes in some countries with economies in transition) would be used by Annex I Parties to fulfil their commitments and thus the contributions towards sustainable development would be limited. As it has been demonstrated above, this criticism is only legitimate to a certain extent. By restricting the use of emissions reduction units resulting from the mechanisms, considerations concerning sustainable development have been included in the operation of the mechanisms. Moreover, the rules for joint implementation and CDM projects underline that they have to be supportive of sustainable development, as determined by the host Party.

By taking the lead in policies and measures to address climate change issues, the Kyoto Protocol has given life to the principle of common but differentiated responsibilities and capabilities. Furthermore, the agreements reached on financial resources, capacity building and technology transfer of the Kyoto Protocol have underlined that efforts are not to be limited to developed countries, but that efforts of developing countries have to be supported. These measures should lead to a more sustainable economy in developing countries.

Efforts to ensure transparency have been an important issue during the negotiations. The provisions of the climate change regime have achieved broad access to information and participation of the public. However, there has been some criticism that some of the established mechanisms under the climate

change regime are complicated and complex and, therefore, their operation will not be easily followed by the public.

In general, the climate regime is to be seen as an important instrument to further the goal of sustainable development. Although, as it has been demonstrated above, in certain areas there might be some conflict between the measures to be taken in the interest of climate change and those aiming at sustainable development, the climate change regime has, nonetheless, helped to clarify the concept of sustainable development further, by elaborating most elements of sustainable development.

Whether the rules set out will lead to a success of the climate change regime and a contribution to sustainable development depends on a number of factors:

- Will Annex I Parties be able to implement national measures and policies which will lead to a reduction or limitation of emissions?
- Will project activities chosen under the mechanisms support the sustainable development policies of developing countries and countries with economies in transition? Environmental impact assessments will play an important role in this regard, as well as taking into account the economic and social impacts of projects.
- The rather complicated institutional framework under the mechanisms has to prove its efficiency in promoting projects for sustainable development.
- Will the measures set under the climate change regime concerning financial resources, capacity building and technology transfer increase the ability of developing countries to use more environmentally sound technologies?

These questions may only be answered once the Kyoto Protocol has entered into force and has become operational at the global level. But the emphasis which has been given in the last years to certain issues – such as alternative energy sources and energy efficiency – is an encouraging step towards a more sustainable policy in key areas of climate policy.

As has been demonstrated above, some of the elements of sustainable development have received more attention than others. This is logical, since the climate regime is an evolutionary process and not all elements need to be – and can be – elaborated from the outset.

Moreover, it should not be forgotten that the Kyoto Protocol and the efforts undertaken till 2012 are only to be seen as a first step towards a sound global climate policy. Climate change is a new challenge for the world community to tackle and, therefore, new ways and means have to be explored. The commitments by Annex I Parties – following the principle of common but differentiated responsibilities – underline that they are taking the lead, but it will be necessary in the future to look for commitments of the whole world community in order

to successfully tackle climate change and thereby ensure sustainable development. The Montreal Protocol on Substances that Deplete the Ozone Layer is an example for the successful evolution of international rules to tackle a global problem in a "step-by-step" approach. However, climate change is a far more complex issue and to develop a comprehensive regime will take more time.

6

NATURAL RESOURCES AND SUSTAINABLE DEVELOPMENT: FROM "GOOD INTENTIONS" TO "GOOD CONSEQUENCES"

Thomas W. Wälde

1. Introduction

Sustainable development meaning "development that meets the needs of the present generation without compromising the needs of future generations" – must be one of the most successful, widely accepted and influential conceptual formulations of the last two decades. It has become a "mantra", i.e. an automatically recited reference, much in the form of the preambles of famous UN General Assembly resolutions, to claim legitimacy, modernity and moral goodness for views, arguments and positions in academic discourse, political statement and organisational self-praise. There is virtually no academic work in the field of the environment and of natural resources of recent times that does not emphatically rely on this concept as a foundational reference. Its beauty lies in the fact that it is the "principle for all seasons": it neither imposes insufferable deprivation of consumption on the present nor disregards the needs of the future. It encompasses humanity, but also nature. It appears to solve irresolvable contradictions. Everybody – from liberal advocates of the global economy to fundamental environmentalists – can fill the concept with his/her meaning.[1] This malleability of the concept explains why, different to other concepts advanced in the name of contemporary attitudes, there is so little opposition

1 For a critical analysis M. Pinto, 'The legal context: concepts, principles, standards and institutions', in Friedl Weiss et al. (eds.) *International Economic Law with A Human Face*, The Hague: Kluwer Law International, 1998, p. 13.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 119-150.*

to it. It has been suggested[2] that the principle may have become part of customary international law, though it is not clear if sustainable development is just a collective name for general and country-specific obligations under international environmental law or if it adds substantive value to it. One can end the reference to sustainable development simply by suggesting that its comprehensive acceptance indicates that in effect it means nothing, and serves rather as an incantation of contemporary political correctness, with no substantive content in an essentially hollow formula devoid of practical significance. But in this chapter I shall attempt to identify elements of real meaning for governance of the natural resources development, with a particular eye on the special situation of developing countries.

This chapter examines the relevance of the concept of sustainable development for natural resources, in particular non-renewable natural resources. Natural resources, and in particular non-renewable resources, seem to be particularly relevant to the principle of sustainable development as the environmental dimension of the principle must respond to the "taking" of a "resource" of "nature" for humanity's often transient and wasteful uses. The "non-renewability" of the resources adds a particularly high sensitivity. Our investigation should show whether such sensitivities have to do more with substance rather than with the association of non-renewability (and therefore possibly non-sustainability) of resource exploitation. This examination does not purport to be an exhaustive treatment of the concept of sustainable development in all of its meanings, configurations for use in legal and policy argument or applicability in multiple contexts. It rather intends to bring the generally lofty discussions of international environmental lawyers down to the ground of reality. My discussion will point towards effects and impact of various usages of this principle in the economy and governance of natural resources development. The particular context of my analysis is the situation of developing countries. Most natural resources industries have been migrating to developing countries, partly because reserves of natural resources in industrialised countries have become scarcer due to depletion and partly because resource exploitation is no longer a priority in the ranking of conflicting options for determining land-

2 For further discussion (including references in ICJ jurisprudence, e.g. Judge Weeramantry in the Gabcikovo-case), F. Weiss, 'The GATT 1994: environmental sustainability of trade or environmental protection protection sustainable by trade', in K. Ginther et al. (ed.), *Sustainable Development and Good Governance*, Dordrecht: Martinus Nijhoff, 1995, p. 382.

use policy. They are particularly important in the economies of most developing (and the largest post-Soviet transition countries) not only because of the forces of geology, but also because the very fact of underdevelopment means there are few other industries and economic activities available in which developing countries have a comparative advantage. Geology is one of the very few comparative advantages which the so endowed developing countries have not as yet lost – with cheap labour and lower regulatory standards becoming less and less significant for attracting investment and developing a meaningful economic activity.[3]

This chapter therefore does not engage in detailed surveying of the innumerable references to sustainable development in international treaties, in court judgments (essential or obiter dicta), and in the infinite number of instruments of greater or lesser authority on the level beneath formal international law.[4] Nor do I wish to make sense of and to advocate a systematic interpretation of the various aspects of sustainable development in international law. What is proposed instead is to identify some aspects and possible contours of the concept of sustainable development for natural resources as it could be an authoritative "topos" or argument in the international law debate. It will be based on an exploration of the implications of natural resource developments from the perspective of economic analysis and a better understanding of the characteristics and problems raised by and for major actors, namely multinational companies and non-governmental organisations (NGOs).

A prevailing view among public international (and in particular environmental) lawyers is that economic analysis is either irrelevant, or incorrect, confusing and, at any rate, misleading. The reasons for such disregarding of economic analysis is, first, a lack of education in basic economic analysis, and furthermore lack of awareness of methods of rational investigation of social and economic consequences of regulatory action. The close connection of international environmental law with traditional public international law – the law of diplomats and foreign services – suffers from the same deficiencies. International environmental lawyers, particularly those of the younger generation, are imbued with a strong sense of righteousness and high moral values. It is, therefore, rather

3 UN/UNCTAD, *World Investment Report 2001 "Promoting Linkages"*, United Nations: Geneva/New York, 2001, Sales No. E.01.II.D.12, ISBN 92-1-112523-5.

4 Harris, J., T. Wise, K. Gallagher and N. Goodwin (eds), *A Survey of Sustainable Development. Social and Economic Dimensions*, Washington: Island Press, 2001; Dominick McGoldrick, 'Sustainable Development and Human Rights', 45 *ICLQ* (1996), p. 796.

the "ethics of right sentiment" and consciousness than the "ethics of responsibility" for result and impact which controls the accepted discourse in this field. This chapter, however, takes the opposite approach. It assumes that legal rules do not exist for themselves or for self-referential discourse within a closed community but rather to help establish order in society. Any rational analysis in order to be relevant must look at the social, political and institutional context of rules as well as to their past, present and likely future impact. Any approach towards minimising environmental impact and social disruption that wishes to be more than rhetorical emphasis and preaching to the converted needs to appreciate how rules, systems of rules, regimes and institutions operate in reality.[5] While economics does not always provide in many cases an uncontested answer, and may also on occasion suffer from excessive attention to theoretical modelling separated from empirical testing, it is comparatively better at providing a method of rational argument about the consequences of law, existing or proposed, than the largely unsubstantiated allegations found often, if not pervasively, in the environmentalist literature, legal or otherwise. The facile dismissal of economic analysis by environmental lawyers and activists should therefore be seen rather as an indication of intellectual laziness and unwillingness to face the facts when they challenge dearly held assumptions.

This chapter, therefore, will try to identify some concepts and insights from economic literature on natural – in particularly mineral – resources and then work at making them intelligible and relevant to the legal discussion.[6] The aim is neither being exhaustive in research nor infinitely balanced in the selection and presentation, but rather to challenge the works in international environmental law which are very long on good intentions, but are short on references to the reality of actual or proposed rules of work. With a better idea of how to proceed in practice, it is much easier to argue rationally how rules and institutions should be structured to achieve what is intended to achieve – rather than constructing rules which produce the diametrically opposite of what they set out to do. Good intentions in rule-making have historically more often than not led to results opposite to those intended. In my view, many of the proposals made under the banner of "sustainable development" (and associates such as poverty eradication, elimination of child labour) may express the highest

5 An approach best illustrated by the traditions of the Scottish Enlightenment, see A. Herman, *The Scottish Enlightenment*, 2001 at 73 et seq., 361.

6 For a methodological background: T. Wälde, *Juristische Folgenorientierung*, Frankfurt: Athenaeum, 1979.

of human sentiments and values, but are likely to produce, if implemented as made and designed in a command-control approach, rather the opposite result of what was intended. The "New International Economic Order" of the 1970s – to which, in my mind much of the philosophy of international environmental law resembles – was based on the commendable ideas to make the world economy more equitable and to create domestic prosperity within the boundaries of national sovereignty. The result of the state-led and command-control-based philosophy underlying the NIEO was external and internal impoverishment in all countries that pursued the NIEO strategy.[7] Tanzania, the model country for the precursors of today's NGO movement, was the most aided country which fell into the deepest poverty trap in spite of all the aids and well-meaning advice it was receiving. These examples just illustrate that the way to hell is paved with good intentions and that loading rules with such intentions will often produce the opposite, something that Adam Smith[8] and experts on decision-making have long known.

2. The Forward Time Dimension, the Protestant Ethics and the Post-Industrial Society

Before delving into natural resource specifics, some observations on little or unexplored aspects of the concept of sustainable development should be made. While rhetoric about contemporary values is globalist, such values, as always, are rooted in particular cultural traditions. The main characteristic of the principle of sustainable development is the inclusion of time – forward time. While most cultures are oriented towards, sometimes almost solely, the present and traditional cultures often towards a partly real, partly imagined past, sustainable development puts the future on a completely equal footing with the present (and takes no account of the past). This "forward-time" aspect, looking rather

7 Thomas Wälde, 'A requiem for the "New International Economic Order"', in Gerhard Hafner et al. (eds), *Liber Amicorum Ignaz Seidl-Hohenveldern*, The Hague: Kluwer Law International, 1998, pp. 771-804; William Easterly, *The Elusive Quest for Growth, Economists' Adventures and Misadventures in the Tropics*, MIT Press, 2001, 335 pp.

8 See recent work on Adam Smith's approach to law and its effect: Jerry Muller, *Adam Smith in his time and ours*, Princeton, New Jersey: Princeton UP, 1993; Emma Rothschild, *Economic Sentiments, Adam Smith, Condorcet and the Enlightenment*, Harvard UP 2001; Adam Smith, *Wealth of Nations*, III.4. p. 400, Ed. R. Campbell/A. Skinner, Glasgow Edition, Oxford University Press, 1976; Helga Drummond, *The Art of Decision Making: Mirrors of Imagination, Masks of Fate*, John Wiley & Sons, New York, 2001.

to the future than consumption in the present, is a particular feature of the Protestant ethics. Consumption in the present is to be curtailed in order to accumulate for the future, and God will reward those who sacrifice current needs for future gratification.[9] "Sustainable development" hence is the secular version of Protestant ethics in that it expresses the same critical attitude towards the present and the satisfaction of current needs. The concept of "future generations" is equivalent to the "worker's heaven" or the building of a secular "Jerusalem" so prevalent in 19th century socialist romanticism.[10] Similar elements can be found in the emphasis on self-deprivation of Monastic life or during Communism – all justified by some greater happiness in the distant future.[11] The deprecation of the present and its chances for pleasure and happiness in favour of some distant future is a distinct feature of these beliefs. It is, therefore, not surprising that the concept of sustainable development found so much favour, with elements of *Ersatz*-Religion, in the Western capitalist spirit still rooted, though now secularised, in the Protestant ethic. The traditional values of Protestantism imbibed throughout the Western world, and probably present in strength in cultures influenced by other religions as well, emphasise frugality, i.e. abstinence, restraint from pleasure, horror of wastage and restriction of consumption to what is absolutely essential. These values are stark in contrast to the sybaritic culture of the contemporary society of mass consumption. They reject past cultural and philosophical preferences for enjoying the present rather than worrying about a future far beyond realistic sight and relation to the present. It is no wonder that the persistent need for an all-explaining religion revives in the form of present secular belief value systems deeply rooted in traditions formerly supported by religion. Sustainable development, I suggest, is so successful because it reflects and revives in existing secular format the "millenarian" aspects of the dominant tradition of the currently dominant societies in the world.

9 Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, 20th edn. 1890 trans. T. Parsons; see also on the cultural underpinning of the economic development notion: Francis Fukuyama, *Trust, the Social Virtues and the Creation of Prosperity*, Hamish Hamilton 1995; Wilhelm Roepke, 'Economic Order and International Law', *Recueil des Cours*, Vol 86 (II), 1954, p. 203.

10 Robert Skidelsky, *Interests and Obsessions*, London: Macmillan, 1994 on Beatrice Webb; also Corelli Barnett, *The Audit of War*, London:Macmillan 1986 – on the decline of Britain and the idea of a "New Jerusalem".

11 This is not to say that other religions, in particular Islam, do not also include such elements of sacrificing the present for satisfaction in a distant future.

But there is another aspect of sustainable development that has not received much attention either. Sustainable development, with its emphasis on conservation of natural resources, mirrors as well the nature of post-industrial societies. Applying Marxist terminology, it constitutes an appropriate ideological superstructure for a fundamentally changed economic basis. Post-industrial societies are characterised by a dramatically decreased need for the exploitation of raw materials. In post-industrial societies, economic growth is accompanied by an ever-decreasing material input. The value-added by modern economic activities – micro-chips, software, creative and entertainment industries and the ever growing service sector – require an ever smaller material input as compared, for example, with the heydays of the industrial revolution and the industrial societies. A railway engine which is heavy and requiring large inputs of metal represents the industrial age; a computer software may represent a much greater economic value, but with a negligible input of "hard" resources. Human ingenuity and creativity, embodied in intellectual property rights, substitute for the resource-heavy machines of our past. Sustainable development is a value system that is much more appropriate to these realities of the post-industrial age. It values less the material inputs than the modality and context of the production process and the role of human intelligence in it.

Finally, there is an inextricable link between the unequalled and pervasive prosperity – throughout all societies and classes of the Western world – and the general support for "sustainable development". The rich do not have to care for pressing needs of the present, but can afford to worry about preserving their wealth for the future. Prosperity triggers much greater "secondary" expectations once the "basic needs" are met without effort. The environmental quality of life is, therefore, the need of the rich societies, and the all-encompassing prosperity (which is so taken for granted that it is not properly understood and appreciated) provides the resources to satisfy such needs.

All these factors are, though, not present in underdeveloped countries – in a more positive way the "emerging economies", once called the "Third World".

3. Some Basic Truths about "Non-Renewable" Natural Resources: Is the End of Resources Availability near?

The qualification as "non-renewable" which attaches to resources such as oil & gas (which should be largely seen as equivalent), minerals and metals

suggests *prima facie* that no exploitation is "sustainable" – in terms of leaving enough to "future generations" if the resource extracted were truly "non-renewable" and disappeared upon extraction. But that would be an uninformed view. First, from a purely physical perspective, hard minerals tend not to disappear upon extraction, but enter into a chain of human consumption, with some increasing part into recycling, some part entering into lasting products and a decreasing part into currently no longer usable waste. Oil & gas, on the other hand, do disappear upon extraction and subsequent consumption; their extraction will tend to leave oil & gas behind in reservoirs, sometimes accessible to "secondary" and "tertiary" extraction, but with a substantial percentage remaining without prospect of extraction, at least under current technology and market prices.

From a purely physical view, extraction appears, therefore, not sustainable, if one assumes the freezing of current conditions: technology, needs, prices, cost and substitutes. For such reasons, there has been over the last 200 years, up to the present, a recurring view that humanity is close to the ultimate exhaustion of the mineral resources it requires to function.[12] Malthus was the first systematic propounder of the doomsday depletion prophecy; in his forecast, the growth of population would soon outgrow the availability of resources. Current economic analysis, on the other hand, indicates that a growing population will be met by growing availability of resources; indeed population growth seems to be a condition for economic growth.[13]

Stanley Jevons, a prominent 19th century English economist, predicted that coal, the feedstock for the industrial revolution, would soon run out. 150 years later, coal has not run out, but the world is full of coal reserves for which there is currently no more need. Serious economic dislocation has not occurred because of the abundance or scarcity of coal, but because the need for coal faded away. Today's environmental movement was more or less baptised by the then authoritative report of the "Club of Rome" in 1972. Its conclusion – that there was an inevitable "resource ceiling" to economic growth, forms the credo of the green movement even today. The "Club of Rome" predicted an end of copper

12 The following discussions is based on Marian Radetzki's much more extensive and lucid analysis: 'Is Resource Depletion a threat to human progress?', in *CEPMLP Internet Journal*, www.cepmlp.org/journal (2002); also published as: M. Radetzki, 'Is resource depletion a threat to human progress', *Lulea Economics Reprint Series*, 2002.

13 Easterly, 2001.

production by 2000 and an end to most other metals and minerals soon thereafter. But as of 2004, the world has not seen the attack of this "resource ceiling". Rather, the oil & gas and hard minerals industries have undergone a continuous period in terms of stagnating or declining prices, return on equity and other economic performance indicators over the last twenty years.[14] To the chagrin of the mostly public owners of large-scale metal deposits in remote areas or extractable only at high cost, there is neither a demand nor a price level justifying investment in such properties.

A review of the history of once strategic commodities – rubber in Brazilian Amazonia, silver in Bolivian Potosi, guano in the Chilean Atacama desert, jute industry in Dundee and Bangladesh – indicates that the geological deposits or natural resources were not fully depleted, but demand for them was rather superseded by more economic reserves, by substitutes in the form of other mineral resources or synthetic products, by change in societal needs and by constant technological innovation. Even in the face of doomsday prophesies regarding the depletion of oil reserves, the concern should rather be about abundant oil reserves becoming obsolete and the miracle cities of the Arabian Gulf becoming mirages of former wealth and glory than about petrol stations waiting forever for tank-wagons that never come. Sheikh Yamani is often cited in this context. He reportedly said: "The stone age ended – but not because of lack of stones" and presumably he meant the oil age will also end, but not because of lack of oil.

The Club of Rome, and current petroleum depletion alarmists,[15] have always seen the reserve-production ratio as an indicator of soon-to-occur depletion, with dramatic consequences for human life. In fact, in the case of most mines or oil & gas properties, proven reserves tend to be shown as depleting within a period of 8-12 years: If current production continues or grows in a predictable historic pattern, such extraction should have depleted the available proven reserves. It is only in rare cases, e.g. coal, or oil in Saudi Arabia or gas in countries with no meaningful current gas consumption, that proven reserves

14 See again Radetzki, 2002; Philip Crowson, 'Sustainability and the Economics of Mining', *CEPMLP Internet Journal*, www.cepmlp.org/journal 2002; see also 'Plenty of Gloom', *The Economist*, December 20, 1997, p. 21.

15 Campbell/Laherrere, 1998, 'The End of Cheap Oil', in *Scientific American*, Vol. 278, March 1998, p. 78. For a recent debate see Peter Davies v. Gavin Longmuir in *Ogel* 1 (2004) at www.gasandoil.com/ogel

exceed 15 or twenty years. Does this mean that in 20 years we will really be at the "end" – with the Club of Rome forecast just moved from 2000 to 2020? Countries with an unusually long forward reserves position have acted without commercial objectives in mind. Soviet geology, for example, identified reserves with scant regard to their economic viability; as a result, Soviet reserves may have looked as if they would last for a very long time, but they were mostly reserves that are not exploitable under the current economic conditions perhaps in 50 or 100 years. In other situations, e.g. Middle East reserves, exploration must have been comparatively easy, low-cost and low-risk. The purpose was probably not to identify reserves of oil in particular for development within a predictable future, but perhaps to reinforce the role of the Middle East in general and Saudi Arabia in particular as the world's most powerful producers, discouraging as much as possible competing exploration elsewhere.

However, the main factors predicting that a depletion of minerals necessary for the global economy is not in sight are: the combination of social, economic and technical change and the response of economies to price signals in a functioning market.[16] Humanity's economic endeavours are characterised by ingenuity, flexibility and responsiveness to incentives. There has been continuous technological change over the last 1000 years at least, and in terms of mining, this has led to the discovery of ever more remote and smaller deposits, to ever decreasing ore grades or complex oil & gas reservoirs, to ever greater rates of recovery on the supply side, but, equally on the demand side, to ever greater efficiency and intensity of use. If a particular metal seemed close to depletion, as reflected in higher prices, another usage with other material inputs was developed. Technological innovation and price signals have mutually reinforced each other. A good example is the cost for light units ("lumen") quoted by Radetzki (2002): From 1883 to 2000, the cost declined from 1000 to 1. Similar figures apply to virtually all other services with a material input, e.g. computing capacity, telecommunications, engine power, transportation and so on. There is no prospect in sight that this process would change, except if modern societies should move into some sort of static, frozen system, with change, adaptation, markets and price signals being destroyed. Individual minerals or energy resources may become at times scarcer – that will inevitably result in higher prices, search for substitutes or more efficient production or consumption methods. The problem, so far, has rather been sudden obsolescence

16 Most articulate on this: Marian Radetzki, *The Green Myth – economic growth and the quality of the environment*, Multi-science publishing 2001.

of demand for a particular mineral – with grave social and economic disruption for its producing country and community, rather than depletion. Scarcity has in effect only been a problem for successfully embargoed countries in times of war.

What does all this mean for the application of "sustainable development" to mineral resources? The first conclusion is that global depletion of non-renewable minerals is not a serious concern even under the perspective of the needs for future generations. Future generations are best cared for if the system for maintaining ingenuity, change and responsiveness to market signals is maintained. Future generations may or may not need the minerals currently being developed and consumed; if the past is any guide, it is likely that future generations' needs and the methods of satisfying them will be very different from today. But this does not mean that the principle of sustainable development is of no significance for the development of non-renewable natural resources. History and insight into current production relationships indicates the concern should be not really global depletion, but the dependency of individual communities, regions and countries on individual commodities. In other words: The problem is not that minerals may vanish, but that demand for them may vanish.

While the needs and the context of future generations are far away and not accessible to us except by speculation with a bias for very contemporary political interests, the needs and the problems of the present are much easier to understand rationally. It makes, therefore, much more sense to deal with the challenges of the present rather than engage in quite meaningless conjecture about future generations – as the past generations may have done best when worrying about their own situation rather than sacrificing the present for some unfathomable future. Natural resources, both renewable and non-renewable, present very real problems. The first is that commodity producers, mainly those in developing countries, are dependent on the export of their commodities and volatile world markets to a degree not understood in developed countries. Given that other comparative advantages – low labour cost, climate, transport distance, more favourable regulation and taxation – have either never existed or become less meaningful, geological endowment has now become the one major comparative advantage. It explains why natural resources figure so prominently in the economy of developing (and post-Soviet) countries' exports, foreign exchange earnings, tax receipts, employment. This dependence, e.g. of all OPEC countries on oil export, means that the economy, the state, the social and economic system, becomes dependent on the ups and downs of always volatile

commodity prices. This is not the fault of markets – which respond to demand/supply, but the impact of commodity dependence combined with weak governance structures. In an ideal system, governments would skim off surplus in the "fat" years, save it for the "lean" years, and invest into reasonable diversification. People and social systems would not become lazy as mineral rentiers, but develop skills, frugality and investment habits. The mineral rent would not be wasted on huge military expenditures, luxury expenditures by political, feudal, military, religious and administrative elites; capital would be available to develop productive middle and entrepreneurial classes. In reality, though, this does not happen in any OPEC country,[17] and probably not even in such developed countries such as Norway. The challenges of sustainable development would be to do away with the omnipresent pattern of waste, unequal wealth distribution and lack of entrepreneurial activity, to gain freedom from mineral-rent seeking and convert mineral rent into social and economic capital which sustains itself and is able to survive beyond the time when either the mineral resource is locally depleted or, perhaps more relevant, beyond the time when demand for it fades away. This, in my view, is therefore the true challenge of sustainable development: to conserve the resource in the ground not because otherwise future generations in need may not have access to it, but because current development, use and consumption create an unsustainable economy full of waste and suppression of innate human skills and resources. The true test of sustainability is if the resource extracted and therefore withdrawn from the "underground account" of the nation is converted into an equivalent or higher unit of social and economic capital.[18]

This conclusion which is rather focused on a prudent use of the resources in the present and near future than worrying about an eschatological future of generations to come – has quite definite implications for a sustainable policy towards natural resources here and now:

The first implication is for the governance system of natural resources. The current governance system is oriented mainly at maximising mineral rent for the landowner, usually the government. This paradigm has dominated applied

17 Jahangir Amuzegar, 'Opec as Omen', 77 *Foreign Affairs* (1998), p. 95.

18 R. Auty and Mikesell, 'Policies for Sustainable Development of Mineral Economies', Chapter 13 in *Sustainable Development in Mineral Economies*, Oxford/New York, Clarendon, 1998.

mineral economics and government policy.[19] As a result, sophisticated systems for capturing most of the mineral rent have developed, with national and in particular foreign investors as the prime purveyors. The utilisation of such income has largely been left to the political process in the producing countries. All the focus is on how to get money, but not how the money is spent. A survey of the development impact of commodities in virtually all oil and most other commodity-dependent exporters is dismal.[20] As a result, mineral rent is used by the governing elites for sustaining not their countries' economies, but themselves. Unproductive social consumption, luxury elite consumption and building up of great, and highly unequal wealth are the result. Military expenditures in resource-rich countries are, as a rule, far beyond average.[21] To the extent that the "resource curse"[22] prevails, it may in fact be better to produce less, or even not much bother about income, if all that mineral rent does is to create an unproductive rentier society which can not be sustained without the availability of such rent. A policy that does not sustain elites, but economies and societies, would have a more conservatory character, i.e. produce only to the extent that mineral rent can be absorbed in the domestic economy, with a surplus committed to export stabilisation funds and diversifying the economy. Very few countries, in particular Chile with its traditional dependence on copper, have been successful with such approaches; whether Norway, the European case for an oil-dependent country, will be managing to achieve greater independence is far from certain. A conservation policy may appeal on rational grounds, but such a policy does not have a great chance of practical success in most resource-rich countries as it is contrary to the short-term interest of ruling elites, but also that of the resource-dependent importing countries, in particular the US, the EU and now the most resource-hungry large countries in Asia. A bridge could

19 For the most recent survey of methods and contexts of extracting mineral rent: Bernard Mommer, *Global Oil and the Nation State*, Oxford, Oxford University Press, 2002.

20 See the books published by authors associated with the Oxford Institute of Energy Studies on Nigeria, Algeria, Venezuela and Indonesia. George Philipps, *The Political Economy of International Oil*, Edinburgh, University Press, 1994. The World Bank is currently carrying out research on oil income: http://www.worldbank.org/ogsimpact/mgroverview.htm; see also on the issues surrounding the transparency of petroleum revenue use is Global Witness (http://www.globalwitness.org/campaigns/oil/index.html

21 O. Noreng, 'Islam and Oil', *CEPMLP Internet Journal*, www.cepmlp.org/journal – 2002; idem, 'Islam and Oil', 1997(2). R.M. Auty, 'The Resilience of Latin American State Mining Firms', 1991; idem, 'Industrial Policy Reform in Large Newly Industrialising Countries: The Resource Curse Thesis', 1992; Adam Smith, referred to in George Phillip, op. cit. supra note 20.

22 'Ungenerous endowments', *The Economist,* December 23, 1995, 107-110.

be developed between Western environmentalists keen on higher energy prices and producer interests in higher prices for a more reduced output. In terms of international economic law, that would mean expanding the conservation exceptions in Art. XX (g) of the GATT and Art. 18 of the Energy Charter Treaty – against the interest of the two main consuming blocks arguing against export restrictions and raising competition law against producer production control. There are limits of external influence on the domestic power structure of commodity producers. But what can be done is to facilitate both conservation policies and economic diversification, mainly by integrating these countries into the major institutions – WTO, IMF, ECT, OECD, IEA, EU and regional economic integration institutions.[23] Support for and defence of the international economic institutions is probably the major contribution the Western countries can make towards sustainable economic development in commodity producing countries. The effort to undermine these institutions by unholy alliances of Western protectionism and ideological NGO campaigns steered from the North is one of the worst services for the goal of re-orienting resource-dependent countries towards sustainable economic development.

4. "Sustainable Development" as an Overall Description of Environmental "Good" Practices

The reference to "future generations" in "sustainable development" may not yield much direction for resource development policies. But the principle as currently interpreted entails a number of government and corporate policy prescriptions, including:[24]

23 This theme is developed in later writings of mine, e.g. a chapter on international economic organisations for the by Adrian Bradbrook, 2003, on renewable energy and sustainable development (or my comment on "OPEC" published in OGEL 2 at www.gasandoil.com/ogel.

24 D. Humphries, Presentation to CEPMLP Mining Seminar 2001; also check for D. Humphries "Mining as a Sustainable Economic Activity", on CEPMLP Internet Journal, vol. 6(11) at www.cepmlp.org/journal; Auty, R. and Mikesell, RF, Sustainable Development of Mineral Economies, Oxford: Clarendon University Press, 1999; J. Tilton, 'On borrowed time? Resources for the Future', Washington DC. For an up-to-date discussion of the concept, its background, history, implications (plus the conclusion that there is no definite meaning) see the Final Report (Chapter XI) of the MMSD-Global Mining Initiative report published in 2002. One should say that this is not a critical intellectual analysis, but rather a policy-paper aimed at a global, general, specific and all-encompassing and continuous process of infinite dynamic consensus and harmony – but it

- Application and early incorporation of environmental and social impact analysis (EIA) into project design; continuous monitoring and decommissioning obligations at the end of the useful life of a mineral or petroleum operation; this seems by now to be established "good", not even "best" practice. The problems are the partisan character of EIAs commissioned by the project developer and the fact that a properly executed EIA will identify environmental and related risks and mitigation measures and thereby create greater consciousness and transparency, but will not by itself provide an environmental cost- benefit balancing and valuation standard.[25]
- Procedures for consultation with "stake-holders" are now standard practice for development of natural resources projects, sometimes prescribed by law and sometimes by practical considerations.[26] The "MMSD" project that has been executed from 2000 to 2002 with the sponsorship of the World Business Council for Sustainable Development (WBCSD) and with the involvement of both mining companies and NGOs was premised on elaborate procedures for consultation with stakeholders on policy recommendations.[27] Consultation with "stake-holders" is meant to bring better information into the decision processes for natural resources projects, e.g. beneficial impacts for local people. It is also probably intended as something close to "democratic" participation in a governmental and commercial decision-making process. From a practical point of view, it should also help to identify serious opposition and help to resolve such challenges by both communications, negotiations with the prospective opposition and by modifying the project design so as to minimise serious opposition. Consultation, though, can easily become an empty ritual, with formalities replacing serious communication.[28] The notion of "stake-holder" involves considerable ambiguity as there tends to be a lack of formal rules on ownership

does include all the correct terms and attitudes. The MMSD final report is available at: http://www.lied.org/mmsd/finalreport/index.html

25 Rethinking Cost-Benefit Analysis MATTHEW D. ADLER, University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 72; Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection By Lisa Heinzerling and Frank Ackerman Georgetown Environmental Law and Policy Institute Georgetown University Law Center January/February 2002 at: http://www.globalpolicy.org/socecon/environmt/2002/CostBen2002.htm

26 Donald M. Zillman et al. (eds), *Human Rights in Natural Resource Exploitation: Public Participation in the Sustainable Development of Mining and Energy Resources*, 2002.

27 Website: www.iied.org/mmsd/

28 Helga Drummond, *The Art of Decision Making*, op. cit. supra note 8.

and on legal or political rights. This is particularly so for self-formed NGOs who may or may not represent and help "voiceless" local people. In practical terms, stakeholders tend to be those forces that have the resources, power and interest to make life difficult for the project developer. The more influential the stakeholders, the more problematic their competition with formally legitimised holders of democratic, political, property or legal rights, and also the more relevant the question about the transparency, legitimacy and accountability of influential stakeholder participants in relevant decision processes. It is generally ignored that the more stakeholders are involved in decision processes, the more such consultation turns into negotiation where everyone with power and influence will put forward its interest for consideration. This inevitably will drive up the cost of projects. The winners from such increase in costs are those with the power to obstruct, not necessarily those directly affected.

- Direction, by regulation, voluntary codes[29] or labelling,[30] incentives, emission trading, taxes or other means towards higher environmental standards incorporating "best practices", up-to-date technology and experience – can be done by "command-control" methods, mainly regulation, e.g. prescription of specific equipment or emission limits or by more market-oriented measures (labelling, incentives, permit trading, taxes). Environmentalists strive for ever-higher standards, but are concerned about competition in markets driving a "race to the bottom" rather preferring a "race to the top". Such a continuous upwards drive towards ever higher standards is not such an innocuous and universally "good" thing as it seems. Higher standards confer significant competitive advantages upon those companies with influence over standard setting and with strong exposure to "early-regulators".[31] It is, like so many Western environmentalist initiatives, anti-developmental, as producers in developing countries are least capable of influencing standard setting and of compliance with standards. The "race to the top" is beneficial for sophisticated companies from the North, while

29 Kernaghan Webb, *Government of Canada, Voluntary Codes, A Guide for their Development and Use*, March 1998.

30 Gary Gereffi, Ronie Garcia-Johnson, 'The NGO-Industrial Complex', at: http://www.foreignpolicy.com/issue_julyaug_2001/gereffiprint.html

31 Naomi Roht-Arriaza, 'Shifting the point of regulation: The international Organisation for standardisation and global lawmaking on trade and the Environment', in 22 *Ecology Law Quarterly* (1995), p. 480.

a "race to the bottom" based on standards commensurate with developing countries' capabilities rarely occurs.

- "Internalisation" of external cost, in particular environmental damage, based on earlier economic concepts; it means that if there are "costs", i.e. negative effects of actions, they should be allocated to the actor. Only if true costs and benefits are part of an actor's decision-process, will market-based competition help to encourage adaptation and innovation to reduce such costs and favour activities with less damage. Internalisation occurs by allocation of civil liability, by emission charges, taxes, by trade permits and incentives.[32] While this looks good in theory, there are serious problems in practice. The first is the valuation of external effects; there is a large judgmental element in any such valuation. The second is the allocation of external effects to a particular action or actor. As causality is not a simple act, but is based on more complex allocation of responsibility it comprises a broad subjective element.

All of these concepts form part of what is now considered proper environmental policy. They reflect both the cultural values and the objective economic basis of the Western, post-industrial society. They include both measures focused on the process and on the substance of decision-making for natural resources projects. Development of non-renewable (and other) natural resources takes place increasingly in developing countries. Depletion in developed countries, different land-use criteria and social and economic priorities push them away from developed countries; geology and also lack of practical alternatives pulls them into developing countries. The concept of "sustainable development", while developed in, by and for Western developed societies is, therefore, relevant very much, and perhaps predominantly, in developing countries. These countries had little, if any influence, on the formulation of the concept. They are, in economic parlance, rather "takers" of such contemporary policy signals than "senders" or in other words: They are mainly objects of policy concepts designed elsewhere. The appropriateness of the Western format of "sustainable development" for natural resources projects in the "South" will be discussed in the next section.

32 Rüdiger Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as viable Means?*, Berlin: Springer, 1996, p. 1.

5. Policy Implications for "Sustainable Development" of Natural Resources

The application of a more sober, economic-analysis based perspective has a considerable number of policy implications for sustainable development, in particular, for the thinking, interpretation and application of relevant international law rules as well as for the ideas and methods underlying them. The first principle is the "law of unintended consequences".[33] Sustainable development, with its intended betterment of humanity, is not achievable by good intentions, but by positively assessable results. The discussion of sustainable development – in particular by NGOs, well-meaning younger academics, in particular in international law – is impregnated by "good intentions". But good intentions seldom produce good results. More often, they produce the opposite of what is intended if they have any effect at all. Sustainable development is not helped by a sincere and heartfelt desire to help people in need, in particular in developing countries, not by specific moral commitment evidenced as in aid projects, moral exhortation, UN General Assembly resolutions or similar subsidiary instruments, but by a structure of incentives that is more likely than not, in an informed, rational economic and social analysis, to make people want to achieve such results.[34] There are reasons why in general people prefer to be guided by "good intentions" rather than "consequences" of an action: Good intentions are relatively easy to identify, in particular by believers themselves and within self-referencing, like-minded communities. Orientation at consequences involves considerable uncertainty; the mind and the relevant discourse need to operate with the considerable complexity of uncertainty, with ways to manage uncertainty, with the application of complex skills (not available to most university graduates) in forecasting the likelihood of future con-

33 Deepak Lal, 'Unintended Consequences: The Impact of Factor Endowments, Culture, and Politics on Long-Run Economic Performance', Ohlin Lectures; Shearmar, Jeremy, 'Adam Smith's Second Thoughts: Economic Liberalism and its Unintended Consequences', The Adam Smith Club Kirkaldy Paper No. 1, 1-13; p. 315, in: Adam Smith, Haakonssen, Knud (editor), Ashgate, 1998; M. Wolff in FT of 28/11/2002 commenting on 2002 Wendt-Lecture by Deepak Lal.

34 This should not require any specific justification or reference, but international public lawyers in particular have a tendency to take the proclaimed "moral value" in, for example, an authoritative resolution at face value rather than try – without being trained in systematic economic analysis – to find out what social action might produce the desired result. Generally: T. Wälde, *Juristische Folgenorientierung*, Frankfurt, 1979; M. Olson, Bill Easterly and Deepak Lal, op. cit. supra.

sequences and their scope and magnitude. Such skills tend to be available as a rule to specialised forecasters and economic analysts. Their performance is always open to doubt. Their forecasts – if formulated in a specific, verifiable way – often wrong. The skills required to make "regulatory impact assessment" are therefore as a rule suspect to those unfamiliar with the foundation and context of applying such skills and therefore easily dismissed. Operating purely by good intentions is, on the other hand, immeasurably simpler and more easily to communicate. Such approaches are superior by their much greater "economy of argument". But all of this does not distract from the basic fact that operation by good intentions is of little relevance for the "re-making the world" rather than for just interpreting it for moral purposes.

Western sympathisers – mainly NGOs and young lecturers – are greatly sympathetic to developing countries. Special sympathy for classic "Third World" positions – national sovereignty, restriction of free trade, unfettered rights to interfere into foreign (and national) private property and extensive bureaucratic regulation – is typically expressed.[35] But what is not recognised is that such positions are closely associated and presumably largely germane to poverty. A comparison between the EU – with its most extensive freedom of movement and protection of property – and developing countries is rarely undertaken. But with the EU, positions absolutely contrary to the still surviving NIEO positions now espoused by "civil society", have been visibly associated with prosperity, civilisation and very high environmental quality. It would have to be proved that such elements of essential good governance, mainly economic freedom and property protection, are less relevant to developing countries than they were for the EU. A review of countries – e.g. North Korea, Tanzania, even India – having pursued the inward-looking option versus countries that pursued the outward-looking option – the Asian city states, but also China – suggests, to the contrary, that the economic drivers are the same for developing as for developed countries. Property, contract and economic (and some argue political) freedom to participate freely in the global economy are closely associated with prosperity, while the opposite – i.e. the "sovereignty" elements – are associated rather with poverty and lack of growth. Sustainable development, with its combination of economic growth and economic quality, is not achievable in

35 E.g. representative for many: E. Nieuwenhuys/M. Brus (eds), *Multilateral Regulation of Foreign Investment*, The Hague: Kluwer Law International, 2001 (and in particular Nieuwenhuys therein). Critically T. Wälde, 1998, 'Requiem for the NIEO', in: Festschrift Ignaz Seidl-Hohenveldern, op. cit. note 7.

poverty. Poverty makes no funds available for environmental quality – they are used for immediate needs. Poverty is also not allowing the emergence of educated and more prosperous middle classes with their Western-derived higher demands for environmental quality. There are, if rarely made fully explicitly, elements of poverty-friendliness in some extreme environmentalist positions, i.e. those which oppose "nature" to "humanity" and give priority to "nature without humans" over a concept of nature which includes humans. Such thinking may be related to the 19th century notions of nature as a large pristine space empty of humans to be enjoyed by the select few able and willing to enjoy such pristine nature without leaving any traces of human contacts. There is probably a US tradition of pure and pristine wilderness to be enjoyed only by a select (and rich) elite of natural aristocrats – with little regard to humans, in particular local people. It has an element of considering humans in such pristine wilderness rather as invisibly caged denizens of a zoo than at human beings with the same aspirations and worthy of the same economic opportunities as nature lovers in the developed countries. But that is not the concept of sustainable "development" we are here looking at. An economic philosophy that tends – in economic theory and on practical evidence – to perpetuate poverty can therefore not contribute to sustainable development, nor is it going to be acceptable on a voluntary basis by the citizens of the poor countries. Sustainable development is, therefore, inevitably associated with the policies of economic liberalisation which have proven their success in both generating the necessary incentives for prosperity by investment and trade and their ability in generating both resources and expectations for enhanced environmental quality. Some guiding concepts can thus be identified:

Corporate profitability: Profit and efficiency are the pre-conditions for effective corporate action towards sustainable development. Impoverished companies struggle – as impoverished nations and people – for survival. They have no interest or incentive to invest into anything than very short-term, pure survival strategies. State companies, overloaded with social burdens, contradictory demands, political pressure and corruption, have traditionally been the worst environmental – as economic – performers. The largest environmental legacy damage is in almost all cases associated with state companies, in particular in command economies (e.g. Siberia, Caspian Sea; Lake Maracaibo in Venezuela). State companies in developing countries to this day are low-quality environmental performers, as their operational surplus is devoted to satisfying the strongest political pressure. This is usually corruption, patronage, support of political parties – and not environmental demands which in developing countries

usually play a secondary role. Multinational companies, on the other hand, can through operational efficiency usually generate greater resources and apply environmental skills more effectively. In addition, they are directly subject to environmental NGO pressure in their home states and indirectly to environmental reputation demands in their respective capital markets. A company that pursues the environmental component of sustainable development without sufficient attention to the "economic" element, in the form of profits, is unlikely to go on. It will have to stop its environmental support or go out of business or be taken over. There is not much to do about sustainable development or corporate responsibility with bankrupt and failing companies. To the contrary, it is likely that the most competent multinational companies will – as is evident already now, be able to successfully combine the environmental dimension (with a longer-term perspective, a need to infuse corporate decision-making with "internalisation" mechanisms) with technical and commercial competitive strength.

Resource Depletion: Quite different from the "depletion fundamentalists" mentioned above, depletion has to be seen in a flexible and dynamic, not in a static perspective. We do not know much better than people in previous generations what the needs of future generations will be. The depletion scare has been with humanity since the start of the industrial revolution.[36] What has happened is that specific resources in specific locations have been depleted, but there has not been any particular threat of scarcity in any important commodity – to the contrary, resources once considered vital and close to depletion in 1900 (e.g. salpeter in Chile, coal everywhere) have faced the opposite risk of lack of demand. The "Gastein valley" in Austria can serve as an example: Gold was mined there from the 13th century; depletion occurred at the end of the middle ages when ore grades declined, veins were too deep and the wood for smelting within economic transportation distance was used up. That was a clear locally focused, geologically, technically and economically based depletion with undoubted great adjustment pains. But the current needs in the valley are no longer gold mining, but tourism. Gold is still there. It could be mined again profitably with modern methods. But there is no interest: Local needs and expectations have changed and the depletion that occurred has no impact on "current" generations. Gold is at present available throughout the

36 Radetzki, 'Green Myth', op. cit. supra; M. Radetzki, 'Is resource depletion a threat to human progress?', *Lulea Economics Reprint Series*, 2002, also available from *Cepmlp Internet journal* at www.cepmlp.org/journal (2001/2002).

world in much larger quantities than the markets want – viz. the steep decline of gold prices from the 1970s to 2002. The conclusion to be drawn from such reasoning and example is that sustainable development means that depletion should produce value for society, best measured in the most objective efficiency measurements, e.g. commercial profits under normal taxation and under full internalisation of external costs (and benefits). The key is, therefore, a fully functioning system of mineral licensing, of mineral and environmental taxes (with perhaps a charge for depletion) and a system of governance which ensures that economic benefits of mining flow to those affected by mining. While one can argue for "mineral income stabilisation funds" for economies based and fully dependent on mining (e.g. Alaska, Norway, the OPEC countries), these are rather for stabilising the volatility of mineral (including petroleum) prices than to take care of generations far removed. To assess a depletion charge based on the hypothetical needs of generations far removed is bound to be speculative, based on untenable assessment of the shape of the future and never likely to reach such generations anyway.

Competitive and properly regulated and taxed markets: Sustainable development is most imperiled if exploitation of natural resources is inefficient – both commercially inefficient and environmentally efficient. This means a system of governance up to the modern (and always evolving) understanding of resource economics. Current understanding is that competitive markets will generate the most efficient results, but that environmental costs (and there is a lot of debate possible about that concept and scope of such costs) need to be internalised, either by taxes or by competitive licensing. The examples of non-sustainable resource development are to be found largely in badly governed communist countries, as well as in countries in transition and developing countries, with no respect for property (which makes the owner worry about the value of his/her resource), contract and external impact. There is also a distributional impact: Generation of profit – or, in a larger sense, value – that benefits only the rich is not politically effective as such regimes are undermined by the perception of a lack of justice.[37] This is why mineral-tax regimes have to look not only at maximising of fiscal income (as almost all mineral tax literature currently does), but also at how such income is used. Income that is wasted or enters into the feeding chains of corruption, cronyism and patronage is therefore not contributing to sustainable development, while income that is

37 Amy Chua, *World on Fire: How Exporting Free-Market Democracy Breeds Ethnic Hatred and Global Instability,* Heineman, 2003.

invested for the benefit of the local, regional and national people at large is much more useful. But one should also bear in mind that the dedication of mineral income only to the purpose of the dominant interests and ideologies of Western countries (e.g. only for environmental or human rights purposes in the Western NGO-paradigm) represents a distribution of income that is heavily skewed for the rich in the world and against the poor. It is not only about preferences for the developing country's wealthy, but also for the dominant ideologies and interests in the rich countries one should be concerned about.

All evidence suggests that market-compatible instruments are more efficient than command-control measures. Command-control measures introduce costs and restrictions regardless of their comparative benefit; they do not incorporate incentives – which are the great lever for human behaviour. Market-compatible interests will seek to get the greatest environmental benefit at the least cost; they will, therefore, make it possible to achieve much greater environmental benefit at given costs; such costs are often fixed by their political acceptability. Finally, market-conforming measures will be based upon incentives to create technological and organisational advances to achieve ever greater environmental benefit at given cost basis. Market-compatibility and sustainable development are, therefore, synonymous. The command-control approach comes easily to lawyers, and in particular lawyers from the administrative and international public law tradition where commands (often if not normally ineffectual)[38] are the familiar method and where the market is usually seen as a threatening, uncontrollable and mysterious dark force rather than what it is – the congregation of a multitude of stakeholders engaged in continuous debate. The usual attitude is to call for extensive regulation and then be quite content with the emergence of regulatory instruments which remain merely rhetorical[39] – unratified conventions, disregarded resolutions, litigation that only enriches the lawyers, ineffectual and in reality unenforceable prohibitions and even less respected general commands to do something. The secret of effectiveness, in international law as in national law, is "to go with the flow", to come up with

38 T. Wälde, 'Non-Conventional Views on Effectiveness', 4 *Austrian Review of International & European Law*, 1999, pp.164-204.

39 T. Wälde, 'Sustainable Development and the Energy Charter Treaty: between pseudo-action and the management of environmental investment risk', in F. Weiss et al., *International Economic Law with a Human Face*, The Hague: Kluwer Law International, 1998, p. 223.

rules that facilitate the provision of incentives and which articulate rules, conventions and values which the subjects of the rule already largely adhere to.

Reasonable and Differentiated Regulation: The usual mantra from the NGO-community and sympathisers is "re-regulation" after privatisation and alleged deregulation. Deregulation did not occur on a large scale. Privatisation – i.e. the transfer of public services to private ownership – largely led to a massive increase of regulation – regulatory rules, procedures and institutions. In the old way, public interests were supposed to be taken care of through the control conferred by public ownership. In the new way, the public interest is exercised by public regulators exercising a very close control over private operators. There are a number of myths where one needs to look behind the pretend-clothes of the new emperors: First, if markets and private operators do not achieve precisely what the public wants, or some part of the public want, re-regulation is not necessarily a viable alternative. Regulation brings about vices not that different from the heavy hand of state bureaucracy in the past: inflexibility, corruption arising out of the close public-private interface and lack of suitable incentives. The cost and inefficiencies of re-regulation will often outweigh minor grievances against operations of the markets. There are, though, proper criteria to assess the need for regulation: when the costs associated with market failure outweigh by a significant margin the costs and benefits of regulatory solutions (which often just indicate state failure). There is little doubt that environmental quality that is not achieved by incentives, emission charges and other internalisation methods should be a legitimate object of regulation – a regulation that is as "light" as possible and aims at nudging market actors towards the right behaviour rather than trying – often uselessly – to compel them. There are also public interests that constitute a "public good", i.e. a state of affairs that is valued by the political community that can not, or only at prohibitive cost, be provided by the market. Here again, one can not only focus on the failure of the markets, but needs to set this in the right balance against both the risks, costs and benefits of regulatory approaches. It is the "least-restrictive", proportionality and necessity tests we know from WTO and EU law[40] that should be the standard "chapeau" of any regulatory response.

Regulation is often meant to counteract an assumed "race to the bottom" where bad standards (like bad money) naturally drive out good standards, particularly

40 Usher, *General Principles of EU Law*, 1998.

so in developing countries. But factually, from an environmental point of view, economic liberalisation tends rather to lead to a race to the top, as multinational companies, with high levels of competence, exposure to home state NGO pressure and need for uniform operating guidelines, face state and national competitors without such environmental competence.[41] But again, while this is contrary to the simplistic assumptions held by so many green activists, it is not necessarily a good thing. Worldwide uniform environmental standards (but presumably also labour and social standards) help in global competition mostly those multinational companies which have had a hand in the formulation of the standards, are familiar and expert in managing compliance and have a familiar working relationship with NGOs. Such standards place the competitors from developing countries into an even weaker position of comparative advantage than the one they started out from in the first place. Contrary to critics of the "race to the bottom" and advocates of a "race to the top", developing countries do need to be protected from the imposition of uniform global rules that impair their comparative advantage. Anything else will just have the tendency to keep poor societies poor forever, and to cement the huge competitive advantages of the West with the help of the West's ideological auxiliaries in the contest for domination of global ideology. Environmental measures must, therefore, be differentiated so that developing countries can move forward while reaping the full benefits of modern technology and organisation, but without being tied to the standards prevailing in the West. In the absence of differentiation, uniform globalising regulation would simply tend to perpetuate poverty – contrary to the goal of sustainable development.

On the other hand, international regulation is an important pillar of a global economy oriented toward sustainable development. Without international regulation, many actions that can increase efficiency – and thereby save environmental costs and set free resources for environmental quality – would not take place, for example, liberalised trade where full comparative and competitive advantage (including environmental competence and efficiencies) can be exploited to their fullest. It is much better, for example, to process hazardous waste at the technically most advanced plant with least transport costs – rather than, for protectionist reasons, to send off such waste to domestic plants without such advantages.[42] International disciplines are, therefore, necessary which,

41 Edward Graham, *Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises*, Institute for International Economics, 2000.

42 This was the situation in the Myers v. Canada Nafta Ch XI case – www.naftaclaims.com

on the one hand, encourage prosperity-enhancing trade and investment[43] and, on the other hand, encourage transactions and institutions which promote environmental quality. The international economic organisations – WTO, World Bank, IMF, OECD, UN et.al.[44] – are the essential players in an effort to develop a sustainable global economy. No market economy can, in the long term, prosper without guarantees of security, order and a legal foundation. As national economies in the past, so does the emerging global economy require a platform of law, order and security to facilitate transactions, express public interests, internalise external negative impacts and articulate "public goods".

A Minimum of Efficiency and Pareto-Optimality

The typical state-centred approaches towards sustainable development are inextricably, though not always consciously, linked to bureaucratic solutions: The logic of the state-centred approach to regulation is command-control, i.e. prescriptive solutions. Whatever originally the sympathy, command-control prescriptive solutions lead to bureaucratically based systems to specify such rules and then enforce, control and monitor compliance. This approach is, as experience amply demonstrates, greatly weakened by the usual problems of command-control bureaucratic rule-enforcement: Rules are inflexible. There are different worlds between the primary noble purposes and the ultimate enforcement of specific rules at the "coalface" of reality. There are no incentives to improve environmental performance by developing better technology and organisational approaches,[45] but only incentives to minimise the cost of rule compliance, to forward such costs to other actors and to use influence over the setting of rules and their enforcement for competitive purposes against weaker – and typically developing country – competitors.[46] The usual situation that

43 T. Wälde/T Weiler, 'Iinvestment arbitration under the Energy Charter Treaty in the light of New Nafta Precedents', p. 159, in Gabrielle Kaufmann-Koehler/Blaise Stuckie, *Investment Treaties and Arbitration* , ASA Swiss Arbitration Association, Zurich, January 25, 2002 Conference.

44 T. Wälde, 'Comments on the Role of (Selected) International Agencies in the Formation of International Energy Law and Policy towards Sustainable Development', in A. Bradbrook and Ottinger (eds.), *Energy Law and Sustainable Development and Renewable Energy*, Gland IUCN, 2003.

45 D. Dudek/ R. Stewart/ J. Wiener, 'Environmental Policy for Eastern Europe: Technology-based versus market-based approaches', in 17 *Columbia J. Envir. L* (1992), pp. 1-52.

46 Naomi Roht-Arriaza, 'Shifting the Point of Regulation: The International Organization and Global Lawmaking on Trade and the Environment', 22 *Ecology LQ* 479 (1995).

evolves is the existence of highly rigid rules with very large non-compliance. This only obstructs sustainable development while only satisfying moral purposes of NGOs and public relations strategies of corporate and governmental actors on a very superficial level. The right solution must, therefore, be the opposite: To create a system whereby the natural self-interest, competitive ambition and energies of the relevant actors, are mobilised to find their own way of gradually developing environmental quality in their activities. That means that the principle of efficiency must be paramount for both the setting of environmental goals and for allowing relevant players to pursue such goals within a broad and flexible regulatory setting. Efficiency means that an action should not be undertaken if, all other factors being equal, another action would achieve the same objective at lesser cost. The further refinement of Pareto-optimality means that a solution is not efficient if without further distributional consequences at least one actor can be better off. There are many criticisms of the efficiency principle: that distributional consequences are overlooked, that valuation is difficult and subjective, that a preference is exercised towards outcomes and valuation criteria that are easily to quantify – as compared to values which are less tangible and have less an easily identifiable financial value.[47] But such criticism – valid as it is – is not a reason to jettison a systematic method of rational analysis as there is no persuasive alternative. Tolerating regulatory measures which clearly encourage conspicuous inefficiencies means that in the end less – always scarce – resources of a financial and political nature are available for environmental purposes. It means that total societal environmental performance is achieved at lower levels than would be possible in the alternative scenario of more resources liberated by more efficient (i.e. resource-saving) approaches. Visible inefficiencies in environmental regulation constitute waste of financial, social and environmental capital. At the same time, such inefficiencies will reduce the political acceptance of environmental measures. While it is perfectly legitimate to refine efficiency methodology to take into account the manifold implications, it is contrary to sustainable development and in the end undermining environmental values if proposed measures are not carefully assessed on efficiency – and realistic implementation – grounds. Efficiency should therefore constitute a key standard in any legal

47 Lisa Heinzerling and Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, Georgetown Environmental Law and Policy Institute, Georgetown University Law Center, January/February 2002 at: http://www.globalpolicy.org/socecon/envronmt/2002/CostBen2002.htm

interpretation project. Rules should be interpreted to favour any reading which promotes inefficiency; rules with a clear inefficient impact should be discarded.

Role of Multinational Companies

Multinational companies are currently the addressees of often contradictory demands: In an older perspective dating back to the "NIEO" era, they were expected to refrain from any interference in domestic politics. In a more contemporary view, they are expected to intervene in domestic politics of developing countries in favour of international principles (treaties; soft-law rules) which in general reflect the Western-based "civil-society" expectations. A conventional way of pretending to measure the "power" of MNCs over small countries is still in use: The comparison of corporate sales versus national GNP. This comparison has little if any sense in reality – except within the group of MNCs or nation states. Corporate sales in comparison to GNP does not indicate any particular power relationship, inferiority or superiority. MNCs can not, e.g., deploy budgets reflecting their "global sales" for political purposes as nation states can. Their sales and profits are market-driven; they are earned and spent under market conditions. No corporate CEO has any unfettered freedom to use the cash flowing into a company's network to spend for philanthropic purposes. If they do, usually for purposes of self-aggrandisement – e.g. the now fired and jailed CEO of Tyco Enterprises, they ruin the company and are quite properly sanctioned.

It is, therefore, necessary to appreciate the limits of what MNCs can do – and what "civil society" can reasonably ask them to do. A MNC that starts to pay more attention to a multitude of public purposes presented by "civil society" rather than its commercial core purpose will resemble the former state enterprises in socialist and communist countries. It will lose its efficiencies, be entangled in a net of patronage and politics. If it has to operate in a competitive financial market without protection, its shares will rapidly lose value, the company will be acquired or liquidated and its leaders and staff fired. In the same vein, one can not ask MNCs to take the place of failing or absent state agencies or development aid agencies. While there is a middle ground between proper state and proper commercial functions that can be shifted one way or the other by privatisation or nationalisation, state agencies are incompetent for core commercial functions and MNCs are incompetent for core governmental functions. It is true that large enterprises in formerly communist countries used to carry out many public welfare functions – they were in fact merged with

state agencies. This has also been the case of many state enterprises in developing countries. One needs to bear this function in mind when privatising enterprises in such a context and ensure that there is not suddenly a large gap not filled by the not-yet-existing or incompetently operating public agencies. But the idea inherent in the logic of most of current "civil society" demands that MNCs become the leaders of development aid and environmental policies in developing countries is unrealistic. They have no particular competence and would lose their commercial competence if they would take upon themselves such functions in an extensive way. The closest historical analogy to what "civil society" now often vociferously expects of MNCs were the large and powerful pre-colonial and colonial trading companies. These interfered heavily in domestic politics; they mixed commerce with politics and the exercise of military power. They were conquerors, colonisers, governments and traders.[48] But an expectation that Exxon and Shell should in effect revive in a modern, 21th century shape, the function of, say, the British East India Company once governing most of India, is politically unrealistic.

This is not to deny, however, that MNCs should pay attention to the results of their conduct in their social, economic and environmental context. Law in developing countries may be underdeveloped and ineffectively enforced; MNCs should not rely here on "compliance with domestic rules" as an excuse for failings to perform at least to the level of home state and – if existing – accepted international standards. Neither MNCs should exploit institutional weaknesses, but rather compensate for institutional weaknesses by making an extra effort to develop and apply modern environmental (and human rights, employment and related) standards. MNCs can be expected, within reasonable limits – which includes non-interference in domestic politics and financial resources, to support and facilitate positive trends in host state governance. But they can not be held responsible for weak governance and not be expected to remedy such weak governance when the domestic political process, the host state and development aid have failed. There is a limit to what MNCs can reasonably do, and be expected to do. It is only when such limits are accepted that one can come closer to reasonable expectations over the possible contribution of MNCs to sustainable development. But as large MNCs, in particular in the US, now tend to include representatives of public-interest groups, universities, think-tanks and politicians on their board of directors, so international agencies should have

48 John Keay, *The Honourable Company, A History of the English East India Company*, London: Harper Collins, 1991.

a formal involvement of those forces that count. Such integrative approach would also help to link NGO-political power with responsibility and nudge them towards developing not only negative, but also constructive approaches to the problems of the global economy.

6. Conclusion

This chapter was intended to raise some provocative questions about the formulation of policies for sustainable development and natural resources. The foremost conclusion is that sustainable development must be based on a dynamic, not static view of human needs for natural resources. Such needs have always, as history shows, changed and are likely to keep changing. There is, accordingly, no place for a static approach viewing human needs for natural resources as "frozen" for eternity. Sustainable development expresses the mindset of post-industrial society, and in particular its educated, suburban and younger middle-classes, continuing the Protestant traditions of frugality and prudence in an epoch of widespread prosperity. It projects this mindset – of prudent, frugal and not wasteful utilisation of natural resources – onto humanity as such. But one needs to bear in mind the highly different conditions in developing countries. While natural resources play no significant role any longer in post-industrial prosperity, they play and can play a large role in the development process, both as a base for learning industrial skills and modes of organisation and through the much greater materials-intensity required in the process of building up industrial infrastructure. A possible synthesis is to link exploitation and development of natural resources with modern concepts of good governance, of modernising the cultural, ethical and social aspect of resource development and of injecting environmental values (which after all bear witness to Protestant ethics' emphasis on frugality and avoidance of waste) into all phases and the design of the mineral development process.

Sustainable development, in my eyes, is closely linked to good governance, a both fashionable and perennial subject.[49] Resources – or rent derived from resource exploitation – which are exploited in situations of weak governance are likely to be wasted. Sustainable development, therefore, means modern forms

49 Note both the content and the pictorial cover of my book (edited with Ann and Robert Seidman, *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, The Hague: Kluwer, 1999.

of mineral licensing, mineral regulation and mineral taxation, but also institutional structures which are more likely to transform the revenues from mineral development into economic and social capital with a long-term societal rate of return.[50] This requires constant efforts to review current regulatory instruments and to adapt them to specific conditions in, mainly, developing countries.

Sustainable development also implies that efficiency and optimality are much more appreciated than they are now in the discourse dominated primarily by NGOs or very state-oriented and bureaucracy-trained public lawyers with little interest, familiarity or competence in the methods of economic analysis of law or understanding of the market (rather than the bureaucractic) mechanism. Inefficient rules are likely to result in wastage and lower environmental quality than can be achieved. They destroy both the resources and the political acceptance for costly environmental policies. Efficiency should therefore be a standard, principal guideline of designing, interpreting and applying rules in both national, international and voluntary regimes.

There will be no sustainable development without a proper functioning of the institutions and instruments of global commerce. This means strengthening – rather than undermining – the role of international organisations and developing disciplines on all relevant actors – national governments with their proclivity to yield to domestic protectionist and anxiety-based pressure, MNCs, NGOs who currently lack proper governance and external accountability and inter-

50 Bernard Mommer, *Global Oil and the Nation State*, Oxford University Press, 2002 discusses in great depth techniques and politics of selling national oil resources at the best price to the consumers, but virtually ignores (or suppresses) the question of what happens to tax revenues once obtained. We suggest that the real question is not how to extract as much money for the exploitation of resources, but rather of how to invest the mineral rent gained – without running the ever-present risk of any "rentier society", i.e. to become dependent on mineral rent and incapable of earning any income otherwise, the sorry state of oil-dependent economies everywhere – from Venezuela to Nigeria and all the Gulf states, Sarah Ahmad Khan, Nigeria, *The Political Economy of Oil*, Oxford: Oxford University Press 1994; George Philipps, *The Political Economy of International Oil*, Edinburgh University Press, 1994; Jahangir Amuzegar, 'Opec as Omen', 77 *Foreign Affairs* 95 (1998) and note the recent "resource curse" work of the World Bank; this work, naturally, will have to strike an uneasy balance between the Bank's major customers – resource producing developing and resource consuming developed countries on one hand, and the Bank's accommodation of the ideological pressures from Western NGOs. It remains to be seen if a World Bank analysis can circle this square without concluding nothing of any substance.

national agencies which tend to operate in an incestuous relationship between self-propelled international bureaucracies and their inter-governmental constituencies. I advocate an opening of the governing boards of international agencies in a much more formal sense than is done today towards NGOs and MNCs.

In all, one needs to pay much more attention to developing countries. These are currently overwhelmed by structural power superiority[51] from the West, exercised through an alliance of NGOs, MNCs, national agencies and international organisations. There are elements which remind us of 19th century missionary movements operating hand-in-glove with trading companies, there are expectations and demands towards MNCs which have shades of colour of the past colonial trading companies and there is a widespread cultural and ideological power imposing its values on the developing countries. Developing countries must be allowed to select a path which leads to the situation of the North. They must not be forced by Northern forces into zoo-like protection areas, reservations or protectorates. Much of today's NGO-initiated demands mean, if thought through to their logical conclusion, that developing countries should be corralled into something that seems akin to trusteeship, protectorates or structural re-colonisation. Developing countries can in the end only develop if their natural comparative advantages are not being continuously undermined by well-meaning environmental, human rights, social and labour policies imposed from the North for short-term interests in Northern countries.

The overall conclusion of this chapter is that it is the economic consequences which count for sustainable development, rather than good intentions.

51 Susan Strange, *The Retreat of the State: the Diffusion of Power in the World Economy*, Cambridge: Cambridge University Press, 1996.

PART II

SUSTAINABLE DEVELOPMENT: THE EVOLUTION OF PRACTICE

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INTRODUCTORY NOTE BY THE EDITORS TO PART II

The term "practice", as O'Connell reminds us, is used to indicate the aggregation of juridically significant acts or steps which are formative of law. Practice, therefore, is to be distinguished from the policy followed by a given state. Only when a tradition of acting is followed under the conviction that it must be followed and is, in fact, a tradition common to a large number of states, is it of significance in the evolution of international law, described as "the practice of nations".[1] Thus, it may be said that "practice" denotes the formative process, is evidence of the act of creation, while "custom" is the result of such practice. However, proving the existence of customary rules, the International Court of Justice (ICJ) stated, "…[it] must satisfy itself that the existence of the rule in the *opinio iuris* of States is confirmed by practice"[2]

Somewhat inconsistently, though, in view of Zemanek, the ICJ then "seemed to neglect that test in the reasoning of its judgment, relying almost exclusively on statements rather than on actions."[3]

1 D.P.O'Connell, *International Law*, London, Stevens & Sons, second edition, volume one, 1970, p.9.

2 *Obiter Dictum* in Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v.USA), Merits, ICJ Reports 1986, p.14, para.184, at p.98.

3 Karl Zemanek, 'What is "State Practice" and who Makes It?', in Ulrich Beyerlin, Michael Bothe, Rainer Hofmann, Ernst-Ulrich Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung, Völkerrecht-Europarecht-Staatsrecht, Festschrift für Rudolf Bernhardt*, Berlin, Springer Verlag, 1995, pp.289-306, at p.289.

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Regardless of whether such omission was deliberate or inadvertent, if it was one at all, it would seem incontrovertible that, for domestic or international policy reasons, states rely on many different novel forms of communication in addition to "real" acts, going beyond traditional diplomatic correspondence.

After the adoption of Agenda 21 at the 1992 Earth Summit it seemed that the world community lacked the resolve to translate lofty principles into practice, that it would be content to pay lip service to them, to repeat them ritualistically without acting upon them. While such inactivity provided at first ample ammunition to the detractors of the principles themselves and exposed their proponents to harsh criticism, even ridicule, practice began, nonetheless, to sprout in key policy areas. Furthermore, the eighth Millennium Development Goal seeks to establish a global partnership for sustainable development. The World Summit on Sustainable Development (Johannesburg 2002), on the other hand, focussed on implementation issues.

Part II of this book highlights both the growing diversity and expanding scope of pertinent practice on sustainable development in respect of all of its three dimensions – economic, environmental and social. But it also reflects the integrative nature of such practice. Hence trade issues appear as "trade and environment" issues while "foreign investment" may be subject to a socially responsible investment regime. Too frequently, relevant discourse concerned "economic" or "environmental" or "social" sustainability, as if each exists in isolation from the other two. The contributions in Part II show that the traditional mindset of narrow, sectoral compartmentalization, neglecting the interests of society at large, is waning.

Two chapters in Section A on *International Trade* deal with current – agriculture – and possibly future – competition – negotiations in the WTO; one deals with the difficulties facing China in the implementation of WTO law; one chapter considers the possibility of trade sanctions for breach of the United Nations Framework Convention on Climate Change and of its Kyoto Protocol; and one examines the role of "sustainability labeling" in sustainable development. *Surya Subedi*, discussing the most important item of the Doha agenda, the negotiations towards liberalization of trade in agriculture, argues that a middle course is called for in these negotiations, balancing the policies of the camps of liberalizers with those seeking to maintain protectionism, ostensibly to strengthen rules on food security, environmental protection and preservation of rural landscapes, food safety and quality and animal welfare.

Liu Sun tells the story of China's monumental problems in absorbing and implementing WTO law in its domestic legal system, while pointing out that through China's accession to the WTO, that organization has, at last, become a near universal organization. *Karl Meessen*, examines the issue of multilateral WTO-based competition rules which the Doha Ministerial Declaration of November 2001 had identified as an item for discussion rather than negotiations. *Erik Denters* analyses the legal consequences of the non-ratification of the Kyoto Protocol and takes the view that trade measures in the form of border taxes as well as claims for compensation may well be imposed on recalcitrant states. *Mar Campins-Eritja and Joyeeta Gupta* point out that while the international law on sustainable development embodies merely minimum common standards for international cooperation social actors demand more far-reaching instruments such as self-regulatory codes, labeling and product certification schemes. In their chapter they examine the very legitimacy of such unilaterally or privately developed schemes at the international level.

Section B on *Foreign Investment* brings together three chapters dealing with different, substantive and procedural aspects of foreign investment, namely with the social and development dimensions of investment and with pertinent international dispute settlement systems. *Paul de Waart* tests the rule of law in international trade law, applying the thinking of John Rawls and Immanuel Wallerstein on the international economic order, making a plea for a global market in the service of mankind based upon corporate social responsibility. *Eva Nieuwenhuys* asks what lessons may be drawn from the failure of OECD negotiations toward a Multilateral Agreement on Investment (MAI) for a future multilateral investment treaty and makes suggestions for the form and content of such a future regime. *Esther Kentin* takes a critical look at international investment arbitration under NAFTA and ICSID so as to assess the role of sustainable development in relevant arbitration awards, concluding that future awards should pay greater attention to issues of sustainable development, both procedural and substantive.

Section C on *Human Rights* contains three chapters, each of which dealing with a different, so-called third generation human rights.

Arjun Sengupta highlights difficulties relating to the implementation of the still somewhat controversial Right to Development, taking the view that this right should be understood as a right to a process of development, being more than the sum of rights – such as the rights to food, education and health care –

constitutive of the Right to Development. In order to improve the implementation of this right, he advocates the conclusion of "development compacts". *Sueli Giorgetta* examines the status of the Right to a Healthy Environment in the implementation of sustainable development, entailing both procedural and substantive aspects. The former, in her view, include the rights to information, participation in relevant decision-making and effective remedies, the latter the rights to life, dignity and non-discrimination. In a similar vein, *Antoinette Hildering* reviews the status of the emerging Right of Access to Freshwater Resources, implementation of which, as she points out, leaves much to be desired. She explores methods of international law to achieve a better implementation of the basic right of access to water, methods which require an integrative approach, combining human rights law and international water resources law.

Section D on *Natural Resources and Waste Management* groups together a cluster of chapters on various resources – agricultural heritage, high seas fisheries, wildlife – with a chapter on waste management. *Mary Footer*, writing on sustainability, common heritage and Inter-generational Equity in relation to agricultural heritage, provides an analysis of the "Seed Treaty", the FAO's International Treaty on Plant Genetic Resources, Food and Agriculture (ITPGRFA), which could embody the foundations for the establishment of an equitable food and agriculture system for future generations, while cautioning against the rash assumption that the Treaty can both provide a balanced solution to the sharing of ITPGRFA in accordance with the requirements – developmental and environmental – of sustainable development and help preserve agrobiodiversity and our agricultural heritage. *Rosemary Rayfuse* examines practice relating to the implementation of the principles of sustainable development in the context of high seas fisheries, noting that the decline of fish stocks justifies consternation at the apparent inability of the international community to meet the challenge of sustainable development and wondering whether the goal adopted by the Johannesburg Summit of the restoration of depleted high seas stocks by 2015 can be achieved and high seas fisheries continue sustainably thereafter. *Peter Stoett*, discusses institutional and normative considerations involved in debates about the international regulation of trade in wildlife with reference to CITES, suggesting that the need for habitat protection may be the only way to bridge the divide between antagonistic ideological positions because the dictates of environmental necessity and biodiversity outweigh those of cultural tradition and economic opportunity costs associated with the enforcement of trade bans/regulation.

Karin Arts and Joyeeta Gupta take the pulse of international law, particularly of its progressive development, regarding sustainable development in climate change and in the law governing hazardous waste, essentially the legal regimes established under the Kyoto Protocol and the Basel Convention respectively. While certain aspects of the emerging international law of sustainable development appear strengthened and clarified by these regimes (duty to co-operate, integration principle, principle of common but differentiated responsibilities), possibly leading to relevant state practice, others are new (sustained use and environmentally sound management of natural resources), somewhat confusing (sustainable development for the benefit of developing countries only possible through linkages with other regimes, e.g. technology transfer, capacity building, the precautionary principle subject to that of cost-effectiveness in the climate change convention), and yet others still controversial (e.g. the question of the hierarchy between the principles of cost-effectiveness and sustainable development).

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A

INTERNATIONAL TRADE

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7

MANAGING THE 'SECOND AGRICULTURAL REVOLUTION' THROUGH INTERNATIONAL LAW: LIBERALISATION OF TRADE IN AGRICULTURE AND SUSTAINABLE DEVELOPMENT

Surya P. Subedi

1. Introduction

Speaking at the World Food and Farming Congress in London in November 2002, the Director-General of the WTO, Supachai Panitchpakdi, remarked that "trade liberalization is probably the single most important contribution the multilateral trading system can make to help developing countries, including the poorest among them, to trade their way out of poverty."[1] An annual forecast in *The Economist,* "The World in 2003", agrees that "[i]tem one on the Doha agenda is agriculture."[2] Indeed, trade in agriculture constitutes the pivotal element of the on-going multilateral trade negotiations, billed as the 'Development Round', taking place under the auspices of the WTO and due to be concluded by 1 January 2005. Trade in agriculture may actually be a make-or-break issue for the WTO itself as this is the last remaining sector yet to have undergone any significant process of liberalization. In fact, liberalization of trade in this sector was one of the reasons why many developing countries joined the WTO, yet the pace of such liberalization has been slow, further damaging the respective economies of those countries that are heavily dependent

1 Supachai Panitchpakdi, "Agriculture and the Doha Development Agenda", Keynote address by the Director-General to the World Food and Farming Congress, 25 November 2002, London; http://www.wto.org/english/news_e/spsp_e/spsp06_e.htm; see also "WTO concern over progress in Doha talks", *Financial Times*, 26 November 2002, p. 11.

2 The Economist, *The World in 2003*, London, 2002, p. 128.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 161-184.*

on the export of agricultural products. Hence, the developing countries are pressing for a decisive move towards improving agricultural policies during this round of trade negotiations. Many developed countries are nevertheless resisting the pressure and continue to protect their own agricultural sectors from foreign competition, especially from developing countries. The EU was one of the strong advocates of the Development Round of the WTO, but the huge farm-subsidy provided by the EU to its farmers and its continued reluctance to phase this out seems to be threatening to derail the trade negotiations. The EU's policy on agriculture deals not only with subsidies but also with tariffs and quotas. Hence, the liberalization of trade in agriculture has been a contentious issue since the launch of the Uruguay Round and has now become perhaps the most prominent topic under consideration within the Doha Round.

The world is going through a process of huge transformation, offering unprecedented opportunities for development. It is constantly unfolding new chapters in the advancement of our civilization and future developments within the agricultural sector are likely to emerge as the most dramatic ones. Indeed, changes under way have already been dubbed the "second agricultural revolution".[3] The challenge for the international legal system is to manage this change in an equitable and sustainable manner. For instance, China, the most populous nation on earth, has embarked on a massive scale to produce genetically modified rice. According to a report, new technology is being developed to enable the production of varieties of rice, wheat and maize in arid environments. "Over 150m acres of transgenic crops will be grown in 2003, most of it soya, corn and cotton. And the market will grow: $2.9 billion-worth of the seed will be sold in 2003, rising to $3.8 billion in 2006. Farmers in the United States, sub-Saharan Africa and much of Asia are all happy planting these crops."[4] The EU is wavering, but is likely to give way to pressures to lift the ban on the import of genetically modified food or on its production within the EU for commercial purposes. Thus, an upheaval is taking place in the agricultural sector.

Countries with ambitious plans to take advantage of the 'second agricultural revolution' have proposed a harmonized reduction in tariffs and subsidies on agricultural products. For instance, the US, which has earmarked about $123 billion in farming subsidies recently, has stated that it is willing to reduce the

3 Ibid., p. 135.
4 Ibid.

amount by $100 billion, provided that other countries, especially the members of the EU, agree to cut their own subsidies to the same extent. The US has also proposed to cut the global average farm tariffs from 60% to 15% and the American average from 12% to 5%. The trade representative of the US, Zoellick, has stated that his country would be in favour of "agreeing on a date for the total elimination of agricultural tariffs and distorting subsidies."[5]

Thus, the challenges ahead for all countries, developed or developing, whether producing GM crops or not, are tremendous. In the history of international trade, it has been the developed States which have won the day and the Uruguay Round negotiation was no exception. Developing countries agreed to the Uruguay Round agreements under a package deal when the WTO Members agreed to initiate negotiations aimed at liberalizing trade in agriculture under the framework outlined in the Agreement on Agriculture. However, when the time came to work towards the phasing out of farming subsidies and lowering tariffs on agricultural commodities, which stand at the phenomenally high rate of about 60 per cent, and eliminating the quota system, the developed countries were displaying hesitation. In an effort to reduce pressure from developing countries, the EU has been trying to link the issue of farm subsidies to issues such as sustainable development, protection of the environment under international environmental agreements and food security under the WTO Agreement on Sanitary and Phytosanitary Measures.

The object of this Chapter is to examine the attempts at liberalization of trade in agriculture and its impact on the sustainable development[6] of agriculture in both developed and developing countries since agriculture plays, as stated in the Framework for Action on Agriculture prepared for the World Summit on Sustainable Development, Johannesburg, 2002, "a crucial role in sustainable

5 Robert Zoellick, "Unleashing the Trade Winds", *The Economist*, 7 December 2002, pp. 25-30, at 26.

6 See generally on the international law of sustainable development, Nico Schrijver, "On the Eve of Rio+10: Development – the Neglected Dimension in the International Law of Sustainable Development", Dies Natalis address delivered on 11 October 2001 at the Institute of Social Studies, The Hague, the Netherlands. See also the International Law Association New Delhi Declaration of Principles of International Law Relating to Sustainable Development (with Introductory Note by Nico Schrijver) in XLIX *Netherlands International Law Review* (2002), pp. 299-305.

development and in hunger and poverty reduction."[7] Indeed, not only the sustainability but also the survival of millions of communities across the whole developing world is dependent on agriculture as these countries are still heavily dependent on this sector for exports as well as for day-to-day survival. Perhaps, the notion of sustainable development is more relevant to agriculture than any other areas of human activity. It is this nexus that this chapter aims to examine in the context of WTO agenda on the liberalization of trade in agriculture.

2. Entry of Agriculture in the International Trade Agenda

When the process of liberalizing international trade began in the late 1940s with the conclusion of GATT 1947, the aim was to liberalize trade mainly on industrial goods that were then being produced by industrialized countries. Although the original GATT did apply to agricultural trade, it allowed GATT Contracting Parties to certain non-tariff measures such as import quotas as well as subsidies. For instance, GATT Article XI prohibits quantitative restrictions on trade, but allows certain exceptions relevant mainly to trade in agriculture.[8] Trebilcock and Howse summarise the situation in the following words:

> First of all, Article XI (2) (a) permits export 'prohibitions or restrictions' of a temporary nature in order to address critical food shortages in the exporting country. Second, XI (2) (b) permits 'import and export restrictions' necessary to the application of standards and regulations for the classification, grading or marketing commodities in international trade. Third, and most importantly, XI (2) (c) permits import restrictions on 'any agricultural or fisheries product' where necessary to enforce domestic restrictions on the marketing or production of a similar product or product substitute. Import restrictions are also permitted where necessary to remove a temporary surplus of a domestic like product or product substitute.[9]

Similarly, Article XVI of the GATT prohibits export subsidies with an exception for 'primary products'. Finally, Article XX (b) of the GATT permits derogation from the GATT obligations if the measures adopted are "necessary to protect

7 WEHAVE Working Group, "A Framework for Action on Agriculture" prepared for the World Summit on Sustainable Development, Johannesburg, 2002, p. 7.

8 GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva, 1994), pp. 500 ff.

9 Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London and New York: Routledge, 1995), p. 192.

human, animal or plant life or health". Consequently, trade in agriculture became highly distorted. This was because, dissimilarly to industrial products, countries could use export subsidies for agricultural products and impose tariffs and a quotas. Since agricultural goods were not included in the international trade liberalization agenda in the 1950s and 1960s, developing countries had little incentive to join the GATT. When the number of developing countries was small and their influence marginal, there was not much enthusiasm to reform the GATT system in order to include agriculture in the priority list. However, when the number of developing countries increased rapidly with the acceleration of the process of de-colonization in the aftermath of the establishment of the UN, it became necessary to develop the GATT system as a global system in order to embrace the trade of developing countries so that they too become integrated into the world trade system. The establishment of the UNCTAD in 1964 gave further impetus to the need to bring the developing countries within the GATT system. When attempts were made to encourage them to join the GATT system, the developing countries sought to introduce into the system not only the development agenda in order to achieve their aspirations for economic development but also the liberalization of trade in agriculture, which they made their priority. Consequently, when the Uruguay Round of multilateral trade negotiations was launched in 1986 the Punta del Este Declaration included the following objectives with regard to the regulation of trade in agriculture:

> Contracting Parties agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets. Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations, by:
>
> i) improving market access through, *inter alia*, the reduction of import barriers;
> ii) improving the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes;

iii) minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements.[10]

Thus, the objective of the Punta del Este Declaration was not to phase out subsidies on agricultural products overnight or an immediate liberalization of trade in agriculture. Rather, it was a modest beginning to addressing the issues surrounding trade in agriculture and to bring this within the rule-based system of the GATT. The main aim was to initiate negotiations with a view to achieving a gradual liberalization of trade in agriculture. The Punta del Este Declaration was significant in more than one way. First, it sought to bring within the ambit of the GATT a vast area of trade, i.e., trade in agriculture, hitherto not regulated by any specific multilateral international instrument. Second, it was seen as a major achievement for developing countries who had sought greater access for their agricultural products to the markets of the industrialized countries. Third, the developed countries had agreed to include agriculture in return for the agreement of developing countries to include trade in services. Fourth, following the adoption of the Declaration, the world trade agenda pursued under the auspices of the GATT began to be more relevant to developing countries, thus paving the way for a truly international system of trade regime with near universal participation.

3. The Agreement on Agriculture

After a lengthy period of negotiations and hard bargaining, the Uruguay Round of negotiations launched in 1986 came to a conclusion in December 1993. The negotiations were initially planned to be completed within four years, but went on for a further three, taking more than seven years in total to conclude. However, trade in agriculture was one of the items included in the agreement reached during the Mid-Term Review of the Uruguay Round according to which the long-term objective for trade in agriculture was "to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules

10 GATT: Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, 20 September 1986; 25 *ILM* 1623 (1986), at 1626.

and disciplines".[11] In addition to this long-term objective of a general character, the Mid-Term Review agreement also stated that "the above-mentioned long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets".[12] Accordingly, the Agreement on Agriculture finally concluded at the end of the Uruguay Round committed the Contracting Parties to "achieving specific binding commitments in each of the following areas: market access; domestic support; export competition; and to reaching an agreement on sanitary and phytosanitary issues".[13]

The Agreement on Agriculture has three main components: reductions in farm export subsidies, increases in import market access, and cuts in domestic producer subsidies.[14] The Agreement also seeks to place a particular emphasis on the obligations of developed countries *vis-à-vis* the developing countries in the following words:

> [D]eveloped country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops.[15]

The purport of these provisions is to stimulate the ability of developing countries to export their agricultural products to the developed countries and to phase out of the subsidies that the farmers enjoy in the developed countries. For this, a decision was taken to initiate a process of reform of trade in agriculture under the 1994 Agreement in Agriculture. However, a preambular paragraph to the

11 Preambular paragraph 2 of the 1994 WTO Agreement on Agriculture. See in GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva, 1994), pp. 39 ff.

12 Preambular paragraph 3 of the 1994 WTO Agreement on Agriculture.

13 Preambular paragraph 4 of the Agreement.

14 As summarized by Kym Anderson, "Agriculture, WTO, and the Next Round of Multilateral Trade Negotiations", a paper prepared for the World Bank/World Trade Organization joint Trade and Development Centre website and published on the Internet at http://www.itd.org/ (November 1998).

15 Preambular paragraph 5 to the Agreement on Agriculture.

Agreement also made it clear that the reform programme had to be reconciled with the need both to pay due attention to food security and to protect the environment. As will be examined later, it is this balancing act that is proving to be the biggest obstacle to achieving the main objective of the Agreement. This is because, after declaring that trade in agriculture would gradually be liberalized, the 1994 Agreement stated in Article 14 that "Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures"[16] establishing a link between the two agreements. In other words, national measures taken by individual States designed to ensure food security and the protection of the environment would not be overridden by the process of trade liberalization in agriculture under the Agreement on Agriculture.

The main obstacle towards the liberalization of trade in agriculture is the subsidy, both export and import, granted by States to protect their respective farming industries the main objective of the Agreement on Agriculture is to phase out such subsidies. While Article 6 regulates domestic subsidies, Article 9 deals with export subsidies. For instance, Article 9 seeks to phase out the following forms of export subsidies granted by States:

a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a co-operative or other association of such producers, or to a marketing board, contingent on export performance;
b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;
c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;
d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;

16 GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva, 1994), p. 53.

e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments;
f) subsidies on agricultural products contingent on their incorporation in exported products.[17]

Thus, the attempt was to phase out or prohibit every conceivable form of export subsidy to ensure a level playing field as regards the international trade of agricultural products.

The Agreement on Agriculture was to be implemented over a six-year period (a ten-year period for developing countries). The main areas covered by the Agreement on Agriculture are: market access, domestic support and export subsidies. The Agreement represented a significant breakthrough in terms of the reduction in export subsidies, domestic support and import barriers on agricultural products. It brought all agricultural products under multilateral disciplines. Prior to the conclusion of the Uruguay Round, some agricultural imports were restricted by quotas and other non-tariff measures; the new rule for market access is "tariffs only", meaning no other restrictions such as quotas could be applied to trade in agriculture. States were required to cut tariffs and the base level for tariff cuts was the bound rate before 1 January 1995. For unbound tariffs the base level for tariff cuts was the actual rate charged in September 1986 when the Uruguay Round began. Accordingly, developed countries were required to carry out average tariff cuts for all agricultural products by 36 per cent between 1995 and 2000 and minimum cut of 15 per cent per product during the same period.

The Agreement also requires States to cut back domestic support which has a direct effect on production and trade of agricultural products. Developed countries agreed to reduce such support by 20 per cent from the base level over a six-year period starting in 1995. The base level of support calculated for this purpose was the level of support existing in the base years 1986-88. However, domestic measures with minimal impact on trade, such as support for research, disease control, infrastructure and food security, could be applied freely. Taking averages for 1986-90 as the base level, the export subsidies were also required to be reduced by 36 per cent by the developed countries within a six-year

17 Ibid., p. 48.

period. The developed countries also agreed to reduce the quantities of subsidized exports by 21 per cent over the six-year period. However, the rate of tariff reductions and for the phasing out of subsidies applied to developing countries was lower and the period granted them to do so was longer; the least developed countries were exempted altogether from any such requirements. Article 15 of the Agreement recognizes the need for special and differential treatment of developing countries. It reads:

> In keeping with the recognition that differential and more favourable treatment for developing country Member is an integral part of the negotiation, special and differential treatment in respect of the commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments.[18]

This article also provides that while developing country Members would have the flexibility to implement reduction commitments over a period of up to ten years, least-developed country Members were not required to undertake any reduction commitments. To accelerate the process of liberalization of trade in agriculture and to review any progress made in the implementation of commitments already negotiated, the 1994 Agreement established a Committee on Agriculture. Article 20 committed the WTO Members to initiating, one year before the end of the implementation period, i.e., the six-year period commencing in the year 1995, the year in which the WTO agreements entered into force, negotiations for continuing the process of liberalization. States which were required both to phase out subsidies, both domestic and export, and to cut tariffs in the first phase at the rates outlined above were required to have their commitments implemented by the end of 2000. Accordingly, negotiations on agriculture had to begin in 2000, as they did, early in that year.

4. New Negotiations on Agriculture

As noted earlier, the objective of the 1994 Agreement on Agriculture was to initiate a process of liberalization of trade in agriculture in order to achieve the long-term objective outlined in the Agreement. It was "to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and

18 Ibid., p. 53.

protection in order to correct and prevent restrictions and distortions in world agricultural markets."[19] When the WTO trade ministers met in Doha in November 2001 for the Fourth Ministerial Conference they reconfirmed their commitment to this programme. Since negotiations on trade in agriculture had already begun in 2000 and a large number of negotiating proposals had already been submitted on behalf of a total of 126 Members, the Doha meeting sought to reconfirm and reiterate the commitments and to broaden the scope of the negotiations in the following words:

> Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.[20]

The Doha meeting also agreed that

> special and differential treatment for developing countries shall be an integral part of all elements of negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development.[21]

The Doha meeting set 31 March 2003 as the date by which modalities for the further commitments, including provisions for special and differential treatment, had to be established. Thus, for developing countries this was a crucial date in the negotiations. However, the deadline was missed and there remain, according to a WTO report, "wide gaps" in the positions among the WTO Members "regarding fundamental aspects of the further reform programme."[22] The report goes on to state that "while participants have stressed their commitment to the Doha mandate, including its timetable, there are still significant differences in the interpretation of the level of ambition that is implied in the wording of Paragraph 13 of the Ministerial Declaration." Given the failure of the WTO

19 Paragraph 13 of the Doha Ministerial Declaration, WTO doc. WT/MIN(01)/DEC/W/1 of 14 November 2001.

20 Ibid.

21 Ibid.

22 WTO Doc. TN/AG/6 of 18 December 2002, para 9.

Members to make more operational obligations on special and differential treatment in favour of developing countries by the December 2002 deadline,[23] it is doubtful whether the outstanding issues on agriculture would be resolved in time to meet the tight deadline of 31 March 2003.

5. The Issues at Stake in the Negotiations

Stating that "[n]o sector of world trade is more distorted than agriculture", an Oxfam report argues that "[r]eform of agricultural trade is a core requirement for making international trade work for the poor." Accordingly, it outlines the following as issues of particular concern: the scale and nature of rich countries' subsidies; the continued practice of export dumping; and the impact of dumping on developing countries.[24] Indeed, these and a few other issues are at the heart of negotiations during the Doha Round.

5.1 The Phasing out Farming Subsidies

As stated earlier, one of the major hurdles to the liberalization of trade in agriculture are the subsidies given by industrialized countries to their farmers. As summarized in an Oxfam report, the way the farming subsidies work is as follows: "Governments restrict imports and buy agricultural commodities at prices above world market levels, transferring income to their farmers. They then transfer the same commodities on to world markets, usually with the help of hefty export subsidies, pushing down world prices."[25] What is more, some of the richest countries such as the US provide 'emergency payments' to their farmers against adverse conditions on an institutionalized basis. Thus, by enabling the farmers from rich countries to dump their agricultural products on world markets at prices far removed from the cost of production the developed countries are creating a crisis in developing countries where local farmers

23 The WTO member governments have already failed to meet the targets set for December 2002 for agreement in negotiations on special and differential treatment for developing countries and access to essential medicines for poor countries lacking the capacity to manufacture such drugs themselves. See a press release (Press/329) of the WTO issued on 20 December 2002.

24 Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty* (Oxfam, Oxford, 2002), p. 111.

25 Ibid., p. 114.

cannot compete, in spite of their low cost of production, with foreign products. For instance, in the Philippines, "trade liberalization in the corn market in 1997 reduced import prices for US corn by one-third. At the time, US corn farmers were receiving $20,000 a year on average in subsidies".[26] Thus, under these circumstances, opening the market to US corn would pose a direct threat to the livelihood of the farmers in developing countries such as the Philippines.

Farming support given by the OECD countries amounted to US $311 billion in 2001. The new law enacted by the American Congress in 2002[27] commits the country to spending up to US $19 billion a year on commodity programmes over the next ten years.[28] Similarly, a deal struck between France, the biggest beneficiary of the EU's Common Agricultural Policy (CAP), and Germany in October 2002 on farm subsidies seeks to increase farm subsidies by one per cent per year until 2013, from its base in 2006.[29] Such measures are directly at odds with the objectives of the Development Round of trade negotiations aimed at achieving big cuts in domestic farm support and export subsidies. The British Prime Minister, Blair, who was opposed to the Franco-German deal, stated that while the world was heading in the direction of trade liberalization the deal was heading in another direction. He asserted that "the world is only going in one direction and that is of liberalization."[30] He added that: "The truth is that the CAP does damage to the developing world. Its maintenance in its present form is inconsistent with the commitment we have given to the developing world and we have got to make sure there is change."

Within the WTO trade negotiations, some States such as the US and those belonging to the Cairns Group of agricultural exporters have called for the elimination of export subsidies, big cuts in domestic farm support and a much lower tariff on commodity imports. Nevertheless, many States such as those within the EU, Japan, South Korea and Norway seem to favour limited subsidy cuts and greater emphasis on non-trade concerns such as the environment and

26 Ibid., p. 115.

27 "Bush returns to subsidies to support farmers", *Financial Times*, 14 May 2002, p. 10.

28 Martin Wolf, "Doha must weed out the world's farming subsidies", *Financial Times*, 6 November 2002, p. 23.

29 See "Schroder and Chirac in Farm Deal", *Financial Times* 25 Oct 2002, p. 1.

30 "Britain attacks France over EU subsidies", *The Times* (of London), 26 October 2002, p. 1.

animal welfare.[31] Nearly half the EU's total annual budget, which is about 100 billion Euros, is spent on supporting the farming industry. Along with the EU, there are a few other countries such as South Korea, Japan and Switzerland, which provide a very high level of farming subsidies. These are likely to join the EU in opposing big cuts in farming subsidy or substantial reduction in tariffs on agricultural products. Although the US has advocated liberalization of trade in the agricultural sector, it appears to be half-hearted in leading the camp advocating greater liberalization in this sector since the US itself is engaged in providing huge amount of subsidies to its own farmers.[32] What is more, the US also appears to be going its own way in expanding and liberalizing trade from multilateralism to bilateralism and regionalism. The US is busy concluding bilateral and regional free trade agreements rather than putting its faith in the WTO system to deliver the desired results.

In the terminology of the WTO, subsidies in general are identified by "boxes" which are given the colours of traffic lights: green (permitted), amber (slow down – i.e., be reduced) and red (forbidden). There are also two additional boxes known as the 'S&D' box (which includes exemptions for developing countries) and the 'blue box' (which is an exemption from the general rule that all subsidies linked to production must be reduced or kept within defined minimal *("de minimis*") levels.[33] The 'amber box' consists of all domestic support measures considered to distort production and trade. The Agreement on Agriculture requires a reduction in the total value of these 'amber' measures. The 'green box' contains subsidies that do not distort trade, or at most cause minimal distortion. One example is the subsidies given in respect of environmental protection and regional development programmes by the EU. While some States are asking to scrap the 'blue' and 'green' boxes, stating that the use of the measures included under these boxes are distorting trade, those countries such as those belonging to the EU which apply such measures have maintained that these measures are important tools for supporting and reforming agriculture and promoting environmental protection and regional development, which will

31 See a report by Frances Williams, "WTO farm deal may face delay", *Financial Times*, 20 December 2002, p. 7.

32 In addition to the huge farm subsidy approved by the American Congress in May 2002, the US Senate voted in September 2002 an additional US $6 billion in aid for farmers hurt by the drought in the US. "Senate passes $6bn in aid for farmers", *Financial Times*, 11 September 2002, p. 10.

33 "WTO Agriculture Negotiations: The Issues, and Where We Are Now", WTO, 1 March 2002.

promote sustainable development of agriculture. The problem arises when States make deceptive use of the measures under permissible boxes to distort trade. There is not much debate about the 'red box' since the Agreement on Agriculture makes it clear what types of measures are prohibited. The 'problem lies in the measures in the 'grey' areas under the 'blue', 'green' and 'amber' boxes. In fact, at the heart of the WTO negotiations are the measures of the 'amber box', which have to be reduced. States are attempting to protect the measures contained in the 'green' and 'blue' boxes when demonstrating their willingness to reduce measures included in the 'amber box'. For instance, the EU has said that it would be ready to negotiate additional reductions in 'amber' box support, provided the concepts of the 'blue' and 'green' boxes are maintained.[34]

5.2 Tariff Reductions

Another major obstacle in liberalizing trade in agriculture is the problem of market access resulting from the high rates of tariffs imposed on agricultural products imported from other countries. Average tariffs on agricultural products are 60 per cent. According to the Oxfam report "[t]hirty per cent of all peak tariffs applied by the EU protect the food industry. These tariffs range from 12 to 100 per cent, affecting sugar-based products, cereals, and canned fruit. The situation is similar in the USA, where the food industry accounts for one-sixth of all peak tariffs … Forty per cent of all Japanese peak tariffs protect the food industry".[35] That is why the on-going negotiations within the Doha Round have covered five issues in this area: tariffs, tariff quotas, tariff quota administration, special safeguard measures, importing state trading enterprises, and other market access issues. A WTO document providing an overview of the negotiations on agriculture sums up the issues relating to tariffs in the following words:

> The main outstanding issue in this area is the formula and quantitative targets for the further tariff reductions that are to be applied. A variety of proposals have been made in this regard. The two approaches commanding the widest support are (i) a harmonization formula for tariff reductions, and (ii) the Uruguay Round formula. As for the first approach, a Swiss formula with a coefficient of 25 has been proposed

34 Ibid., p. 20.

35 Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty* (Oxfam, Oxford, 2002), p. 103.

> to be implemented over 5 years, subject to special and differential treatment for developing countries (one version includes also a 50 per cent down-payment in the first year of implementation; another version includes, as a second step, the elimination of all tariffs by a date to be agreed). Proponents of the Uruguay Round formula have not yet submitted figures for the average minimum rates of reductions that they would like to see applied for developed and developing countries, respectively nor for the length of the implementation period.[36]

Among those late in submitting their negotiating proposal was the EU, within which there appear to be differences of opinion. For instance, while France, which is the biggest beneficiary of the CAP of the EU, seems to be opposed to any major reform of the CAP and greater liberalization of trade in agriculture, Britain seems to be at the forefront of the call for greater liberalization.

5.3 Trade in Agriculture and Food Safety or Food Security

As stated earlier, under Article 14 of the Agreement on Agriculture WTO Members have agreed to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). This agreement deals with sanitary (human and animal health) and phytosanitary (plant health) measures, meaning food safety and animal and plant health standards. The WTO itself does not set these standards; they are set by international organizations such as the WHO and FAO. As stated in a WTO report, the sanitary and phytosanitary measures can take many forms, such as requiring products to come from a disease-free area, inspection of products, specific treatment or processing of products, setting of allowable maximum levels of pesticide residues or permitted use of only certain additives in food.[37] The report goes on to outline the risks of such measures on trade in the following words:

> Sanitary and phytosanitary measures, by their very nature, may result in restrictions on trade. All governments accept the fact that some trade restrictions may be necessary to ensure food safety and animal and plant health protection. However, governments are sometimes pressured to go beyond what is needed for health protection and to use sanitary and phytosanitary restrictions to shield domestic producers from economic competition. Such pressure is likely to increase as other

36 WTO Doc. TN/AG/6 of 18 December 2002, para. 13.

37 World Trade Organization, "Understanding the WTO Agreement on Sanitary and Phytosanitary Measures", May 1998, p. 2.

> trade barriers are reduced as a result of the Uruguay Round agreements. A sanitary and phytosanitary restriction which is not actually required for health reasons can be a very effective protectionist device, and because of its technical complexity, a particularly deceptive and difficult barrier to challenge.[38]

This is because, the SPS Agreement allows the WTO Members to set their own food safety standards. Although the standards adopted must be based on science and should be applied only to the extent necessary to protect human, animal or plant life or health, the tendency to rely on limited scientific evidence or to use such evidence for the convenience of the government concerned has given rise to controversy. According to the Oxfam report, product standards applied by the developed countries "create problems for developing countries, because they often lack the capacity to comply. The legislation that governs standards can be complex and requires detailed legal and scientific knowledge to interpret it."[39] Furthermore, "[d]ue to differences in climate, existing pests or diseases, or food safety conditions, it is not always appropriate to impose the same sanitary and phytosanitary requirements on food, animal or plant products coming from different countries. Therefore, sanitary and phytosanitary measures sometimes vary, depending on the country of origin of the food, animal or plant product concerned."[40] This is where the problem lies, since the standards set by individual member States may be higher than those internationally agreed and may thus clash with the drive to liberalize trade in agriculture. Conversely, the drive to liberalize trade in agriculture may give way to an unsustainable pattern of food production and the marketing of unhealthy food worldwide to the advantage of big business. The SPS agreement seeks to strike a balance between the need to protect the consumers and animal and plant health against known dangers and potential hazards, on the one hand, and the need, on the other, to avoid using such food safety and health measures as protectionist measures in disguise.

Article 4 of the SPS agreement requires governments to recognize equivalent health and safety measures adopted by other governments. The SPS agreement includes provisions on control, inspection and approval procedures. The diffi-

38 *Ibid*.

39 Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty* (Oxfam, Oxford, 2002), p. 103.

40 World Trade Organization, "Understanding the WTO Agreement on Sanitary and Phytosanitary Measures", May 1998, p. 3.

culty here lies in the determination whether an exporting country's measures are equivalent to those used in the importing country. Developing countries have complained that the developed countries have used health and safety measures in such a way as to disadvantage the agricultural products coming from developing countries by applying standards higher than those accepted internationally. Indeed, the precautionary principle has already been discussed in the WTO Committee on Agriculture as well as in the *Hormones* case.[41] This 'safety first' approach designed to deal with scientific uncertainty is likely to be used by countries with high standards against products from countries where the food security and health safety standards are different or lower. At the heart of this debate at present seems to be the issue concerning the genetically modified food. The SPS Agreement requires governments to provide advance notice or new or changed sanitary and phytosanitary measures. Accordingly, various governments have notified the WTO SPS Committee of a large number of regulations related to the genetically modified crops. There does not seem, however, to be enough clarity in the WTO rules as applied to products of new technologies.[42] WTO Members are encouraged to use international standards and recommendations where they exist in setting their own standards, yet there are a number of 'grey areas' that have come under close scrutiny. Consequently, various environmental and other pressure groups have been calling for clarity in this area during the on-going round of trade negotiations.

5.4 Other 'non-trade' concerns and the liberalization of trade in agriculture

In addition to food security, there are other areas known as 'non-trade' concerns, including the environment, structural adjustment, rural development and poverty alleviation, which have to be taken into account in trade negotiations under Article 20 of the Agreement on Agriculture.[43] One of the most problematic areas facing the on-going trade negotiations within the Doha Round is the issue of these 'non-trade' areas, as these areas appear to mean all things to all States

41 *EC Measures Concerning Meat and Meat Products (Hormones) case*, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998.

42 World Trade Organization, "Sanitary and Phytosanitary (SPS) Measures: Food safety, etc.", Doha WTO Ministerial 2001: Briefing Notes, November 2001.

43 See Generally, Friedl Weiss, "The WTO and the Progressive Development of International Trade Law", XXIX *Netherlands Yearbook of International Law* (1998).

or different things to different States. In fact, the notion of the sustainable development of agriculture has been promoted as one of the legitimate 'non-trade' concerns to be taken into account in trade negotiations. The main issue here is whether 'trade distorting' subsidies, or subsidies other than those in the 'green box' are justifiable in achieving the objective of sustainable agricultural development. Since 'green box' subsidies exist to help the agricultural sector and are fully permitted under the WTO law as non-trade-distorting measures, many exporting developing States have challenged the idea that there is a need to legitimize other forms of subsidies designed to achieve the same 'green' objectives. These countries have opposed subsidies other than those allowed as 'green box' measures. Differences of opinion also exist with regard to a new proposal designed to compensate farmers, mainly in developed countries, for the extra costs they bear when they are required to maintain high standards of animal welfare.

6. Liberalization of Trade in Agriculture and the Sustainable Development of Agriculture

6.1 The objectives of the international community

The notion of sustainable development of agriculture[44] is based on the 1992 Rio Declaration on Environment and Development, Chapter 14 of Agenda 21 adopted by the UN General Assembly and the 1996 Rome Declaration on World Food Security[45] as well as the World Food Summit of 2002. The latter two international instruments provide an adequate basis for sustainable development of agriculture. What the international community needs to do is to give substance to the provisions contained in these instruments and then to implement them. As spelled out in these instruments, the objective of sustainable development of agriculture is, as outlined in a decision of the UN Commission on Sustainable Development, "to increase food production and enhance food security in an environmentally sound way so as to contribute to sustainable

44 See a summary of discussion on sustainable agriculture at the eighth session of the United Nations Commission on Sustainable Development (CSD) held in New York between 24 April and 5 may 2000 in 30(3) *Environmental Policy and Law* (2000), p. l06.

45 The Rome Declaration on World Food Security and the World Food Summit Plan of Action adopted by the World Food Summit, Rome, November 1996.

natural resource management."[46] The Commission stated in a decision taken at its Eighth session that "[a]ctivities regarding economic growth, trade and investment should be pursued in accordance with Agenda 21 and the Programme for the Further Implementation of Agenda 21, with the overarching objective of sustainable development."[47] It went on to acknowledge that "[t]rade and investment are important factors in economic growth and sustainable development … In consequence, there should be a balanced and integrated approach to trade and environmental policies in pursuit of sustainable development". Accordingly, the Commission included in the list of its priorities for future work an item entitled "Promoting sustainable development through trade and economic growth".[48]

6.2 Implementation of the policy

One of the challenges facing the international community today is to strike a balance between the liberalization of trade in agriculture and the sustainable development of agriculture.[49] As discussed in the preceding paragraphs, the main idea behind the liberalization of trade in agriculture is to reduce tariffs worldwide on agricultural products, to remove import controls and to phase out domestic support. The perceived wisdom implicit in this WTO agenda is that sustainable agricultural development could best be achieved through market-oriented approaches. Open markets would bring in the required investment in the agricultural sector and improve living conditions in both the developed and the developing countries. Liberalization of trade in agriculture would enhance food quality and quantity and contribute to the protection of natural resources. However, critics have argued that the lowering of tariffs and removal of import controls and domestic support would undermine local food production and farmers' livelihoods when these are faced with an onslaught of cheap subsidized imports. They have claimed that the idea of the liberalization of trade in agriculture is driven by a desire to serve a political or corporate agenda by privatiz-

46 Decisions of the 8th Session of the United Nations Commission on Sustainable Development (CSD) held in New York between 24 April and 5 may 2000. See in 30(3) *Environmental Policy and Law* (2000), p. l48.

47 Ibid., p. 153.

48 Ibid.

49 Heinrich Wohlmeyer and Theodor Quendler (ed.), *The World Trade Organization, Agriculture and Sustainable Development* (Sheffield: Greenleaf Publishing, 2002).

ing indigenous and public lands and allowing monopoly by powerful transnational corporations in the production and marketing of food products.

There are many countries around the globe which are unable to produce enough food to support their respective populations. The objective of the international community, as agreed at the World Food Summit, is by 2015 to halve the number of undernourished people living in poverty. The argument advanced by the developed countries is that this objective could be achieved by liberalizing trade in agriculture and by working in partnership with industry. The counter argument, however, is that unfettered liberalization of trade in agriculture would undermine the local capacity and self-sustainability by making communities dependent on foreign corporate giants for the supply of their basic essentials of life. Hence, there is a need to enhance the ability of developing countries to protect their farmers by increasing governmental funding. Critics have also pointed out that in the name of halving by 2015 the number of undernourished people living in poverty, the developed countries are encouraging their farming industry to produce lower quality and possibly unsafe genetically modified food for mass consumption. That is why there has been a call to increase governmental funding for the research and development of organic agriculture, rather than leaving this vital sector of human security to the elements of the market forces. The developing countries are aware of the risk arising from the practice of the US and the EU of using food aid as a useful market development tool through their disposing of surpluses by giving these to developing countries thereby creating food dependency. However, the developed countries see the technology to produce genetically modified food as constituting an answer to the impending food crisis in the developing world.

6.3 The challenge of balancing conflicting interests

The challenge facing the international community is the attempt on the part of certain developed countries to liberalize trade in agriculture in developing countries without giving up their own protectionist policy. The policy of the EU in this regard is an example. The idea of establishing a link between trade liberalization and sustainable development has been used by the EU to enhance its own agenda designed to protect its farming industry from competition from the products coming from the developing countries and the cheap genetically modified food from the US. The EU wishes to have its cake and eat it, too! The EU is supportive of the idea of trade liberalization in this sector by develop-

ing countries so that the latter's growing demand for food could be met by the supply of the food, whether genetically modified or otherwise, produced in northern countries. There is a certain element of hypocrisy on the part of the EU in this regard. On the one hand, the EU wishes to oppose the flooding of its market by cheap genetically modified food imported from the U.S., but it does not, on the other hand, oppose the US's attempt to flood the developing countries' market by the equally cheap genetically modified food.

The EU and the US are united in using the SPS Agreement to erect a number of environmental, health and food safety barriers against the products, whether organic or otherwise, coming from the developing countries. This is one reason why the developing countries have resisted the pressure from the EU to establish a link between trade and the environment. Conversely, the developing countries are, on the one hand, asking the developed countries to open up their markets for agricultural products from developing countries but are trying, on the other hand, to protect their own farming industry from foreign competition, claiming special and differential treatment under the WTO law. Every country is asking others to liberalize trade as far as possible without giving up its own protectionist measures; it thus remains to be seen who wins and who loses in the negotiations during the so-called 'Development Round'.

6.4 Trade and Environmental Standard-Setting

No state denies that there is a link between trade and environmental protection. Indeed, it is argued that the objectives of the WTO are compatible with Agenda 21. The WTO is not, however, an environmental protection agency. Nevertheless, many developed countries, especially the members of the EU, have been pushing the environmental agenda within the WTO and consequently, the Doha Declaration of the WTO decided to include the interrelationship between trade and the environment in the agenda of the on-going round of multilateral trade negotiations taking place under the auspices of the WTO. The developing countries have been wary of the idea of including environmental issues within the WTO agenda since they fear that they may not be able to participate fully or influence the standard-setting process in this regard. For instance, in the work programme of the WTO Committee on Trade and Environment, items such

as labelling[50] and certification schemes have figured prominently as tools for the promotion of sustainable consumption and promotion patterns.

Despite this, the developing countries fear that such measures could be used by the developed countries in an arbitrary and unjustifiably discriminatory manner or as a disguised form of restriction on trade, especially on the trade in agricultural goods imported from developing countries. This is because the developed countries have a tendency to take precautionary action to extremes. The developing countries also fear that by linking the liberalization of trade in agriculture to the concept of sustainable development, the EU may be attempting to pursue its trade agenda of protectionism, especially in the agricultural sector, by the back door. For instance, Thai business leaders recently accused the EU of imposing "arbitrary" food quality standards in order to protect the EU's domestic industries.[51] Many developing countries see the EU's attempt to introduce the environment into the agenda of the WTO as an attempt to impose EU standards on developing countries that do not yet have the technological ability to match them.

7. Conclusion

The Development Round of multilateral trade negotiations currently under way under the auspices of the WTO is facing conflicting and stark demands, each championed by one of the two camps of States: by those who wish to liberalize trade in agriculture and by those who wish to be able to continue to resort to protectionism. The agenda pursued by the liberal traders, as outlined by Anderson,[52] include making agriculture more market-oriented, phasing out farm export subsidies, strengthening disciplines on domestic subsidies, removing the 'blue box', tightening up of the 'green box' criteria, securing large reductions in bound tariffs, expanding tariff-rate quotas, the tightening up of the SPS/

50 See on eco-labelling, Surya P. Subedi, "International Aspects of Eco-labels" in Michael Bothe and Peter Sand (ed.), *Environmental Policy: From Regulation to Economic Instruments* (The Hague Academy of International Law/Martinus Nijhoff, The Hague, 2002), 191-218.

51 "Thais accuse EU of blocking trade", *Financial Times*, 3 December 2002, p. 10.

52 Kym Anderson, "Agriculture, WTO, and the Next Round of Multilateral Trade Negotiations", a paper prepared for the World Bank/World Trade Organization's joint Trade and Development Centre website and published on the Internet at http://www.itd.org/ (November 1998).

quarantine rules. The concurrent agenda pursued by the protectionist camp includes maintaining and strengthening rules on food security, environmental protection and preservation of rural landscapes, food safety and quality, animal welfare.

What is needed here is a middle approach that maintains a balance between the policies of these two camps and nudges the WTO towards the sustainable development of agriculture. It would not be the complete liberalization of trade in agriculture at the expense of the farmers from the developing countries as well the environment, nor would it be a back-door policy of protectionism, in the guise of environmental protection, the preservation of the rural landscapes, food security and food safety, against the products from developing countries, that is likely to achieve the sustainable development of agriculture. To achieve sustainable development, the developed countries should eliminate their subsidies and the developing countries should, as suggested by Oxfam, avoid making liberalization commitments that are inconsistent with policies of rural poverty reduction and national food security.[53] Although the US has submitted ambitious proposals to the WTO for the reform of the agricultural sector, it remains to be seen whether the US is serious in its approach and whether the EU and other countries such as Japan and Korea who also provide heavy subsidies to their farmers, are willing to go along with the US proposal. It also remains to be seen whether the developing countries are granted exemptions or concessions in this regard as part of the scheme to provide them special and differential treatment so that they can become sustainable communities at least with regard to the supply of food for their populations.

53 Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty* (Oxfam, Oxford, 2002), p. 117.

8

LESSONS FROM CHINA'S WTO ACCESSION NEGOTIATIONS: A LOOK AT LIKELY IMPLEMENTATION PROBLEMS AHEAD

Liu Sun

1. Introduction

As the world's largest developing country, as well as due to its special transitional economy structure and immature legal and administrative system, China has become the focus of attention by its WTO trading partners, who closely monitor how that Member implements WTO agreements.

But successfully joining the WTO does not mean that China has completed its economic and legal reforms or established a mature market economy and rule-based trading and administrative management system which is consistent with WTO rules. In fact, many problems still exist in Chinese systems of economic law. Scholars in western countries argue that China's complex and opaque system of bureaucrats, provincial governments' local protectionism, and problems associated with State-Owned Enterprises (SOEs), combined with its lack of the rule of law, may make China's implementation of WTO rules difficult.

In fact, China has neither established a WTO-compatible economic system nor a just, efficient, and transparent system of management for public administration or economic governance. Chinese State-Owned Enterprises (SOEs) still constitute an obstacle to free trade and free competition, either through state subsidies or through monopolistic practice. SOEs still can't make purchases and sales based solely on commercial considerations. The plague of local protectionism is destroying China's commitment to market access, national treatment, and uniform implementation of WTO agreements, thus blocking the

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 185-216.*

effective enforcement of judgments of the courts. Tariffs, layers of non-tariff barriers, restrictive ministry industrial plans, and a lack of protection of intellectual property are still present in China.

As a society that lacks the rule of law, China faces an onerous task in deepening its legal and legislative reforms and establishing rule-based legislation. As indicated by the Clinton administration during Sino-US bilateral negotiations: "Without legal changes, China … cannot implement its stated commitment to intellectual property rights, telecommunications, financial services, customs valuation, and sanitary and phytosanitary measures." In addition to legislative changes, China was asked to improve its judicial system and administration management as part of its legal reforms for the purpose of a smooth implementation of WTO rules.

For China, the task of reforms in its legal system is as difficult as in its economic system. As the thoughtful scholar Lubman, a specialist in Chinese legal reforms since China's open-door policy at the end of 1970, pointed out:

> "During China's lengthy WTO accession negotiations with the U.S. and other major WTO Members, including the European Union, the attention of the government involved was understandably focused on economic issues that have vexed foreign investors and exporters…the Working Party of Chinese WTO accession could perhaps have used the accession process more aggressively throughout the long negotiations to ask China to make more specific engagements to reform its administrative law and the judiciary, and to increase the efficiency of the legal institutions."[1]

When China began its campaign to join GATT in 1986, neither China nor its western trading partners imagined that this campaign would last for more than 15 years. But at the start of China's accession negotiations, both China and its trading partners realized the difficulty in integrating a large country that had a completely different political, economic, and legal system compared with the western world. China's GATT/WTO accession negotiations were constantly battered by political and diplomatic conflicts with western countries and their different economic and legal systems. An analysis of these conflicts and controversies may shed some light on a correct understanding of the difficulties of China's implementation of WTO agreements and the potential conflicts between China and its western trade partners after China's WTO accession. More im-

1 See Stanley Lubman, Bird in a Cage: Chinese Law Reform After Twenty Years, 20 J. Int'l L. Bus. 2000, p. 415.

portant is an analysis of the specific problems in China's current economic and legal systems which may constitute obstacles for China's implementation of WTO agreements.

By analyzing the difficulties encountered in China's accession negotiations and assessing the potential conflicts of China's economic and legal systems with WTO rules, this chapter is meant to provide some principal clues for anticipating the thistles and thorns along the road of China's implementation of WTO rules. Part II of this chapter offers a review of some characteristics of China's lengthy accession negotiation process, and analyzes some lessons from that process. Part III examines the conflicts of China's economic system with WTO rules, with particular focus on the problems of China's SOEs, along with local economic protectionism and its negative influence on China's implementation of WTO rules. Part IV discusses another major obstacle to China's smooth implementation of WTO rules: problems in the Chinese legal system. The conclusion will emphasize that although there exist many difficulties in China's smooth implementation of WTO rules, and although the country is not likely to make a rapid and smooth transition to a liberalized, rule-oriented economy, one should not lose patience and hope. WTO accession should and could be a great chance to quicken and deepen China's economic and legal reforms and integrate this special transition economy into a market-oriented and rule-based multilateral trading system, with the result benefiting both China and its trading partners.

2. Reasons for the Long Process of China's GATT/WTO Accession Negotiation: Some Lessons

The process of accession to membership in the WTO was complicated by China's economic and legal systems and continuing political and diplomatic conflicts with the West. It took China 16 years to became a Member of the WTO after officially applying to GATT,[2] the WTO's predecessor, in July 1986

2 Initially, the People's Republic of China (PRC) had little interest in and had no chance in Western economic institutions like GATT. After the Communist Party came to power in 1949, the country fell prey to Cold War Politics of isolationism. Both the international and domestic situations had limited any further expansion of economic relations with China. With its opening to the world in the 1970's, however, China became increasingly interested in western markets for its products, investment, and loans. In the mid-1980s, China's increasing success in exporting to western markets and expanding economic ties with the West drove it to seek GATT membership.

to resume its status as an original contracting party.[3] Why did it take 16 years for China to enter the most important international economic organization? What lessons can we learn from this process?

A. Politicization of the negotiation process

Since China launched its campaign to rejoin GATT 16 years ago, international politics surrounding the campaign has experienced dramatic change. China's accession has been so politicized that one may sometimes feel that this accession is a political incident!

Before 1989, China enjoyed a "honeymoon" in its relationship with the West, largely because China had embarked upon a course of economic reforms while most other socialist countries were still practicing central planning. Many western countries thought that the Chinese government would also proceed with political reforms. The persistence of the Cold war meant that the West had a strong interest in maintaining a strategic relationship with China in order to counter the Soviet Union and to create a model for other socialist countries.

But two events changed the situation completely. The 1989 Beijing Tiananmen event changed the western countries' image of the Chinese government. China was thought no longer a progressive country, but one ruled by a repressive regime. The collapse of the Soviet Union and the Eastern bloc further undermined the basis for a strategic relationship between China and the West.[4] The country became the only socialist power whose influence some western countries wanted to curb. From then on, negotiations over China's entry into the GATT/WTO became very difficult. The interest groups that opposed China's GATT/WTO accession usually utilized the friction between China and the West to strengthen their power and to ask for additional accession fees.

3 After the Second World War, the Republic of China (ROC) became an original member of the General Agreement on Trade and Tariffs (GATT). When the Communist Revolution succeeded in driving the ROC government from the mainland to the island of Taiwan, the ROC withdrew from GATT. Thus, the People's Republic of China asked to resume its status as an original contracting party in GATT in 1986.

4 One could imagine that without the Tiananmen Event and the collapse of the Soviet bloc, the West would have let China to join GATT out of political and strategic considerations. Lack of market mechanisms would probably not have been a major obstacle, as China could have joined GATT under the Eastern European models. It is difficult to assess whether this would have been desirable. In my opinion, an earlier accession could have accelerated Chinese reform or it could equally have reduced the incentive for further reform. On balance, it would have been more likely to lock in a semi-reformed trade regime, a bad outcome for GATT/WTO and China.

The tactics employed by these interest groups against imports from China included allegations of illegal transshipment and customs frauds associated with Chinese exports, poor working conditions, and human rights abuses. There have also been allegations of exports of products made by prisoners and the People's Liberation Army. This campaign has won support from human rights groups and has received great publicity. Linking trade issues with non-trade issues made China's accession negotiation unpredictable. The negotiation climate was always changing:

- before 1989, negotiations went smoothly;[5]
- 1989-1992, economic sanctions by the West; negotiations stopped;[6]
- 1992-1994, negotiations resumed and continued smoothly; the former Chinese leader Deng Xiaoping's reaffirmed China's commitment to continuing economic reforms;
- 1994-1995, US-China conflict on international intellectual property rights issues; negotiations moved slowly;
- 1996-1998, inspection by force of a Chinese cargo ship heading to the Middle East which was suspected by the US Central Intelligence Agency of carrying ingredients for chemical weapons and the Taiwan Strait Crisis; China's failed bid for the 2000 Olympics resulted, negotiations reached an impasse;
- 1999 the bombing of the Chinese Embassy in Belgrade, deteriorating Sino-US relationship; negotiations stopped. The meeting between Present Clinton and Jiang during the Auckland APEC Summit provided a timely opportunity to reverse the deterioration of the relationship. The Clinton administration thought China's accession to the WTO might be an appropriate focus in repairing the damaged relationship, but, under strong pressure from the business lobby, failed to sign an agreement with China in April 1999;
- after the 1999 agreement, negotiations between China and the West did not go very smoothly. There were always incidents which adversely affected

5 By the Spring of 1989, the GATT Working Party on China's Status as a Contracting Party had reached a relatively advanced stage of progress on most substantive issues. See Yuwen Li, Fade-away of Socialist Planned Economy: China's Participation in the WTO, International Economic Law with A Human Face, Friedl Weiss, Erik Denters & Paul de Warrt, eds., The Hague/Dordrecht/London: Kluwer Law International, 1998, p. 456.

6 In January 1990, the Taiwan authority applied for accession to GATT under Article XXXIII, not as a sovereign government but "on behalf of the Customs Territory of Taiwan, Penghu, Kinman, and Matsu", this claim further complicated China's membership in GATT. See Yuwen Li, supra note 5, p. 456.

the course of negotiations. For example, the failed WTO Seattle meeting had a negative impact on China's WTO entry. US labor and environmental groups were further angered by China's open opposition to the inclusion of labor standards and environmental issues in WTO talks. US congressional and popular support for China's WTO entry was severely undermined by allegations of Chinese campaign donations and espionage, including the alleged theft of US nuclear and satellite technologies.

A politicization of trade relationships will be bad not only for the West but also for China. It will cause rival enterprises in the west to lose the chance to enter China's market earlier and more quickly. More dangerously, it will strengthen the power of the conservative camp in China's leadership and slow down economic and political reforms.

Only in an open and interdependent world can China reform its economic and political systems more quickly and transparently. If China had not adopted the open-door policy in the late 1970's, if it had not asked for a review of GATT's position and accession to the WTO, the Chinese legal system would not have changed to the degree it has, and the Chinese government would not be supporting the idea of "socialist market economy"!

B. China's accession: a special case

Perhaps the most fundamental issue raised by China's accession concerns the readiness of the WTO to handle the unique challenges posed by China's legal and regulatory systems. The WTO has previously had difficulty handling similar challenges even in countries such as Japan that maintain a legal and regulatory system much more similar to the Western model.[7]

Negotiations of China's entry into the WTO were of a special kind, which tried to absorb the once largest central-planning economy in the world. The negotiations, based on the rule of a market economy, dealt with a country which did not have a tradition of the rule of law. Here was China, a country where little control was exercised over disorderly administrative authorities wielding law-making and law-interpreting power, trying to be absorbed into a world trade system which required just and transparent administration management. All of the above specifically made for a long negotiating process full of contradiction and adjustment. China's accession to the WTO was not only a challenge

7 See Greg Mastel, China and the World Trade Organization: Moving Forward without Sliding Backward, 31 Law & Pol'y Int'l Bus. 2000, p. 981.

for China itself, but also for all the other WTO Members. For China, to satisfy the requirements of the WTO and its Members, it has had to change its central planning economy system, establish a market-oriented economy system, and reform its legal system and administrative management. For the other WTO Members, trying to make special rules and find methods for establishing a normal relationship, within the WTO framework, with a new Member whose legal culture, economy, and political and administrative systems were quite different was a new type of challenge altogether.

During the negotiation process, the world economy was changing very quickly, and the global economic integration was developing with remarkable speed. In order for China to adapt to the requirements of economic integration, new multilateral trade rules appeared like bamboo after rain. When China asked for the resumption of its status in GATT, negotiations were limited to the field of tariffs and non-tariff barriers issues. But after the Uruguay round, the adjustment spectrum of the new multilateral trading system expanded from rules on trade of goods to rules on trade in services and intellectual property rights. Some GATT parties even wanted to integrate many other items in the negotiating agenda, such as labor standards, environmental protection, and competition policy. Because China failed to resume its status in GATT at the end of 1994, joining the WTO became more and more complicated than ever before.

C. Economic considerations

Although many interest groups in western countries supported China's accession to the WTO,[8] there were also many interest groups, both in China[9] and in its

8 There are many industries that can see the direct benefits from China's WTO accession, US hi-tech industries –for example, aircraft manufacturing-have been generally supportive of China's WTO entry. Many clever businessman in the field of capital-incentive and technology-incentive industries recognize the opportunities in China since it adopted the modern multilateral free trade principles: China has the world's largest population and hence potentially the largest market.

9 Not surprisingly, in China, opposition is strongest from sectors that have been most protected, namely, heavy industries (such as machinery, automobiles and chemicals industries) and services industries, including domestic distribution, banking, insurance and telecommunications. Lobbying for agricultural has been strong but driven mainly by agricultural bureaucrats and scientists. Many heavy industries are still dominated by State-Owned-Enterprises (SOEs) despite 20 years of economic reform. The wide expectation is that, if these industries are liberalized, SOEs will contract as a result of competition from foreign imports. Potential short-term unemployment in the SOEs sector has been a central concern of the Chinese government. Industrial interest groups have

western trading partners, that were opposed to China's WTO membership. From the beginning, China's application for GATT/WTO membership posed a dilemma. On the one hand, China had become one of the largest trading nations in the world with the fastest growing economy. This made one think that China is a natural candidate for the WTO and it was not in the interest of the WTO to exclude China from membership if it was to become a truly universal trade organization. On the other hand, the changing and developing nature of its economic, trade and political systems, and indeed its huge market and potential to become a more powerful trading nation, made some industrialized countries, especially the US, somewhat reluctant to grant China WTO membership.[10]

In the western countries, there was always a false suspicion that China would flood the world market with cheap goods. Some even were afraid of China's threat in the high-tech, capital-intensive and skill-intensive industries. Chinese-made garments, travel-bags, toys, footwear, and golf balls were everywhere. To many, the logical extension of this market penetration would be Chinese competition in many other industries. The likely truth was, however, that it would take China many years before the country could begin to export capital-intensive and skill-intensive goods at a level that would threaten the dominance of industrial countries in these industries.

Concerns by relevant interest groups in the West about China's strong competition capacity prompted these groups to increase lobbying pressure on their governments to demand a greater share in China's internal market in return for the opening of their markets to China.[11]

seized upon this, arguing that WTO accession will be detrimental to the national interest. It is fair to say that, over years, the Chinese political system has become more transparent. The conservative forces against reform have been substantively weakened, but the industrial lobby has become much more stronger. This is because, under the current economic system, the financial performance of enterprises does affect the welfare of the managers and the workers, unlike under the central planning where remuneration bore no relation to enterprise profitability. And the threat of massive unemployment as a result of SOEs restructuring makes Chinese politicians more sensitive to popular sentiment and the demands of industries and local governments.

10 See Yuwen Li, supra note 5, p. 474.

11 In the GATT/WTO negotiations, China's government had repeatedly made it clear that China would hold to the principles of balancing its rights and duties and to the principle of being treated as a developing country in resuming the GATT party status and seeking WTO membership, China refused to compromise its fundamental interests and will not accept unrealistic demands beyond China's economic ability or which harm China's normal economic growth and will also not accept discriminatory provisions. See Yuwen Li, supra note 5, p. 473.

The above mentioned lobbying pressure resulted in two characteristics of China's WTO accession negotiations:

First, the accession fee which western countries charged China usually exceeded the obligation required by GATT and the WTO. At times, with respect to certain legal issues, there were already clear rules stipulated in GATT or the WTO, but some of China's major trading partners asked that some special clauses be stipulated solely applying to China. This kind of special clauses naturally seems unfair and discriminatory to the Chinese.[12] For example, as part of the price to pay for admission, the U.S insisted that China accept a rather peculiar product-specific escape mechanism, adding a safeguard clause[13] which would permit other WTO Members to limit imports from China in order to prevent or remedy the so-called market disruption.[14] Although the Agreement on Safeguard under the WTO framework set built-in guarantees to prevent the abuse of this kind of import limitation power, the clause stipulated in China's

12 In the WTO negotiations, China reiterated its support for any effort to build up a fair, safe and non-discriminatory multilateral trade system.

13 According to the Agreement on Safeguards, the safeguard measures are those which gives members the right to adopt temporary measures aimed at protecting a specific domestic industry from an increase in imports of any product which is causing, or threatening to cause, serious injury to that industry (of like or directly competitive products, hence the product-specific characterization).

14 According to the safeguard clause in the Protocol of Accession of 11 November 2001:
1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic products of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution…Any such request shall be immediately to the Committee on Safeguards.
2. if … it is agreed that imports of Chinese origin are such a cause and that action is necessary, China shall take such action as to prevent or remedy the market disruption…
3. if consultation do not lead to an agreement between China and the WTO Member concerned … the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption …

WTO accession protocol has no limitation.[15] Many Chinese scholars argued that this constitutes discriminatory treatment of China.[16]

Second, for fear of China's strong competitive capacity (current and potential capacity in the future), some major trading partners did not want China to make use of the special treatment provisions stipulated in many WTO agreements which can only apply to developing countries.[17] They asked that China be classified as a developed country, this directly conflicted with the basic pre-

15 The Agreement on Safeguards' scope is limited to a situation of absolute increase in imports(Art. 8.3); the Agreement also has built-in guarantees(such as the discipline concerning the nature and type of measures to be taken, their maximum duration, the obligations concerning their gradual dismantling etc. Art.5, 7,11) which the special transitional safeguard for China does not posses. The United States and China finally agreed upon a special safeguard that allowed safeguard actions at a lower threshold and only against China for a period of twelve years.

16 One scholar pointed out that, in Chinese eyes the negative aspects of this clause were far more greater than those entailed in the products-specific one. The main requisite for other WTO member's activation of the possible suspension of concession and obligations was neither market disruption or serious damage of any kind but only the unilateral determination of a WTO Member concerning undefined developments in their trade in goods and services and the implementation of China's Accession Protocol. The scope of the clause was not restricted to one specific industry at a time ('the like or directly competitive products' qualification of the product-specific clause) but to the entire range of goods and services traded between China and WTO members. To some extent, China will have to be subjected to a sort of post-accession, non-application clause. Escape protection measures would have to shield from fair trade not only the domestic producers of the like or directly competitive products but a more general, unilaterally determined, group of goods, services and corresponding economic actors. See Fabio Spadi, Discriminatory Safeguards in the Light of the Admission of the People's Republic of China to the World Trade Organization, Journal of International Economic Law, 2002, p. 437.

17 Under Article XVIII and Part IV of the GATT, developing countries are entitled to preferential treatment: (a) The Generalized System of Preferences granted by industrialized countries gives superior non-reciprocal tariff benefits for imported goods from developing countries; (b) GATT allows for exceptions to the principle of prohibition of quantitative restrictions. If a high level demand for imports results in a decline of foreign exchange reserves, a developing country may take measures to restrict import quantity for balance-of-payment purposes; (c) Some flexible changes are allowed in the tariff reduction schedule of developing countries. Developing countries can impose temporary protective measures for the protection of infant industries; (d) Part IV of GATT requires developed countries first to reduce tariff or other barriers to trade and stipulates that they cannot expect reciprocity from developing countries. The newly agreed General Agreement on Trade in Service also explicitly declares the intent to increase participation of developing countries in service trade, strengthening their domestic service capacity, efficiency and competitiveness, improving their access to

requisites provided by China in the accession negotiations and constituted a persistent obstacle during the accession negotiations.

Because of its comparatively weak negotiating power and its aspiration to join the WTO as soon as possible, China accepted some rigid requirements demanded by its major trading partners, especially the United States, during bilateral negotiations. Many Chinese scholars argued that these concessions agreed to by China were too much for a developing country, and would affect the benefit to China arising from WTO accession. Examples can be seen in the US-China bilateral agreements: the accession agreement provided that the United States could maintain current antidumping methodology and countervailing duty law, which treat China as a non-market economy, for fifteen years after China's accession;[18] The United States will keep its bilateral textile agreement with China in effect until 2008[19] and can subject China's textile and clothing exports to a special safeguard provision beyond the Agreement on Textiles and Clothing.[20]

distribution cannels and the information network, and liberalizing market access in sectors and modes of supply of export interest to them.

18 Current US practice treats China as a non-market economy and looks to third countries for appropriate prices and costs. Some scholars criticize that the Sino-US agreement on US antidumping and countervailing practice against Chinese imports will subject Chinese exporters to continued discrimination, because this is consistent neither with the transition periods allowed market opening nor with the current status of marketisation of the Chinese economy. They pointed out that, in fact, to stipulate a provision discriminating against Chinese enterprises across the board does not accord with reality, China's most competitive exports are produced by the non-state sector, which is subject to limited government interference in terms of pricing and subsidies. On the other side, if China were to commit to accomplish market-access reform in five years in almost all industries, the current US antidumping and countervailing practice and discriminatory unilateral import restrictions should cease to be applicable at the end of the transition when the Chinese trade regime is deemed to have become consistent with WTO rules. See Yongzheng Yang, China's WTO Accession: The Economics and Politics, 34 Journal of World Trade, 2000, p. 82.

19 The United States will be able to use a safeguard provision drawn from the 1997 Sino-US Textile Agreement to restrict Chinese textile and clothing exports until 2008, four years after the Multifibre Agreement (MFA)quotas will have been phased out by all other WTO members.

20 These kinds of provisions are also criticized for their unjust and discriminatory characteristic: permitting the US to target Chinese exports unilaterally at standards lower than the WTO safeguard provisions is a blatant violation of the non-discrimination principle. It is widely acknowledged that most of China's textile and clothing exports are produced by the non-state sector, especially the so-called township and village enterprises and foreign invested firms from newly industrializing Asian economies. The US cannot justify

3. Likely Problems for China's WTO Compliance: SOEs and Local Economic Protectionism

A. State-owned enterprises and their conflicts with WTO rules

1. Concerns about Chinese State-owned enterprises

Some scholars have noted that China's single biggest economic problem, one looming as a major obstacle to WTO compliance, is its state-owned enterprises (SOEs). To some extent, the success of China's reformation of its SOEs is crucial to the implementation of its obligations under WTO agreements.

Under GATT, SOEs were required to make purchases or sales solely in accordance with commercial consideration, such as price, quality, availability, and marketability. In other words, SOEs were supposed to be on an equal footing with private business sectors in regard to commercial transactions and competition. The disciplines on SOEs were also mentioned in Sino-US negotiations. The Sino-US Agreement requires SOEs and State-Invested enterprises to undertake their business activities on a commercial basis, providing foreign enterprises with the opportunity to compete with domestic ones. The Chinese government has agreed not to interfere with the commercial decisions of SOEs and Stated-Invested enterprises except in a manner consistent with WTO rules and principles and will allow SOEs to make purchases and sales based solely on commercial considerations. Realistically, however, the situation is much more complex and controversial.

The reasons why China's western trading partners believe that Chinese SOEs constitute a major obstacle to China's WTO compliance are two-fold:

First, SOEs as the dominant part of the Chinese economy are still subsidized by the government or granted exclusive or special rights or privileges by the government. This results in an unjust market competition advantage in China's internal market and in foreign markets. In China, it is still very difficult at present to police or control any granting of exclusive or special privileges,[21] whether formal or in effect, to SOEs. Even today, for example, the Chinese government remains ready to pump money into failing SOEs. If an enterprise does not have enough money to cover its obligations, either the State pays or

its demand to subject China's textile and clothing exports to a special safeguard provision beyond the Agreement on Textiles and Clothing. See also Yongzheng Yang, supra note 18, p. 83.

21 For example, China's government still assumes the burden of subsidizing growing losses through fiscal subsidies and through so-called policy loans from state-owned banks.

the creditors are left without recourse, because in practice it is very difficult to attach the property of SOEs.

Second, the government still controls and interferes with SOEs in their day-to-day operations, making purchases and sales of SOEs based solely on commercial considerations very difficult. Although China has tried hard in recent years, through the Communist Party decisions[22] as well as the Company Law,[23] to separate the government administration from enterprise management and to make enterprises sensitive to market forces, such legislation and Party decisions and legislations are inadequate to preclude government interference in the day-to-day management of SOEs. Government interference is especially serious at the local level.[24] For example, in the field of foreign trade, SOEs that are granted foreign trade rights[25] still cannot slip government's leash, either because the Chinese government directly controls the enterprise through ownership or because of government's right to grant the Foreign Trade Right through a complex administrative licensing system. To some extent, this process of determining who gets a foreign trade license still seals off SOEs from international markets and competition insofar as the commercial decision-making

22 For example, according to the 1993 Communist Party Decision (Decision by the Central Committee of the Communist Party of China on a Few Issues in Establishing the Socialist Market Economic System, adopted on November 14, 1993), the state should change its role from administrative authority in charge of the enterprise to investor, or shareholder of the company; the state should be only entitled to normal shareholder rights and should not interfere directly in management; the enterprise should require the legal rights to dispose of the assets of the enterprise, which it must manage independently and assume sole responsibility for profits and losses.

23 The Company Law came into force on July 1, 1994.

24 As some scholars have pointed out, local governments tend to view successful enterprises as milk cows, and almost all types of local government agencies are seeking money from enterprises, See Donald C. Clarke, What's Law Got to Do with It? Legal Institutions and Economic Reforms in China, 10 UCLA Pac. Basin L. J. 1991, pp. 37-42; Local governments have significant power and local cadres are not interested in giving up their patronage over SOEs or the revenue they gain through taxes and bribes, See David Blumental, 'Reform' or 'Opening'? Reform of China's State-owned Enterprises and WTO Accession-The Dilemma of Applying GATT to Marketizing Economics, 16 UCLA Pac. Basin L. J. 1998, p. 234.

25 An important aspect of China's foreign trade system reform was the granting of Foreign Trade Rights to individual SOEs. These SOEs were traditionally separated from international markets, neither could they directly import what they needed for their production, nor could they export what they produced until 1984. Today, large and medium SOEs are qualified to apply for FTR. See Jan Hoogmartens, Can China's Socialist Market Survive WTO Accession? Politics, Market Economy and Rule of Law, Law and Business Review of the Americas, Winter/Spring 2001, p. 57.

is subordinate to administrative decision-making. This kind of governmental interference in SOEs regarding foreign trade rights has caused intensive concerns to China's trading partners, who are worried that the Chinese government might utilize state-trading enterprises[26] as substitutes for other measures covered in GATT, such as quantitative restrictions, tariffs, and subsidies.[27]

2. China's commitments on trade in services and the problem of state monopoly in the service sector

In the service sector, China has made comprehensive commitments to eliminate most foreign equity restrictions within reasonable transition periods, mostly within two to three years. These commitments cover banking,[28] insurance,[29] telecommunications,[30] distribution, securities, professional services, audiovisual, travel and tourism.

Without sufficient capital and modern management skills, and jeopardized by long-term monopoly, Chinese service sectors lack competitive capacity

26 According to the WTO Understanding on the Interpretation of Article VII, state trading enterprises are governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.

27 One of the major concerns of western countries of Chinese SOEs and its foreign trade system is that the Chinese government could act in indirect way to influence world trade in an uneconomic direction. They argued that, acting through SOEs, China could provide protection against imports or to advance exports, to the detriment of foreign producers. See Jan Hoogmartens, supra note 25, p. 55. The most prominent negative effects of uncontrolled state trading are violations of market access obligations and the use of proprietary direction to evade the elimination of quantitative measures. Governments might abuse ownership in enterprises to give directions that limit the amount of trade and therefore protect the domestic market without having to issue trade-distorting legislation. In doing so, governments create quantitative restrictions. See John H. Jackson, State Trading and Nonmarket Economies, 23 Int'l Law. 1989, p. 892.

28 China will allow 100 percent foreign ownership of banking entities beginning five years after accession. Foreign banks will be allowed to do local currency business with Chinese enterprises starting two years after accession, with Chinese individuals starting five years after accession.

29 China will allow foreign companies to own up to 50% in life insurance companies after accession, and branching or wholly foreign-owned subsidiaries for non-life insurance within two years. Furthermore, China will expand the scope of business for foreign investors to include group, health, and pension.

30 China will permit 49% foreign ownership of the telecommunication service after accession, and that percentage will increase to 50 % after two years, also, China will phase out all geographic restrictions within six years.

compared with western companies. If external competition becomes threatening after China's WTO accession, causing serious damage to important Chinese industries, China's commitment to the service sectors will be problematic.[31] The Chinese banking sector is a good example. The four pillar state banks in China have amassed huge debts and are technically insolvent. Many non-banking financial institutions in China have also developed financial difficulties. Recapitalization of state banks and other financial institutions in recent years has not resolved the fundamental problems in the Chinese financial sector. Apart from the poor management of these financial institutions, the poor financial performance of the SOEs has been at the root of the problems in the financial sector. Banks are forced by the government to finance losses suffered by the SOEs.[32] Having to finance SOEs regardless of their financial soundness makes the banks less accountable.[33]

Another potential problem may be China's comprehensive commitments in sectors such as banking, insurance and telecommunication, which are deeply influenced by state monopoly. Conflicts with the requirements of the General Agreement on Trade in Services may arise. Although Article VIII of GATS does not create an obligation to change either the pattern of the ownership or the market structure, promises to make such changes, however, have been central to China's accession negotiations. The country has committed itself to eliminating most foreign equity in all major service categories,[34] but negative influence by long-standing monopolized state-owned service providers on China's internal market competition will not disappear overnight. Whether China can provide a just competitive environment and implement its commitment to market access and national treatment in these sectors has become of a great concern to western countries.

31 Chinese SOEs in the service sectors are seriously worried about the problem of how to develop and promote the service industry under the WTO legal framework. They argued that if some problems appear in the banking and insurance system, the implement of GATS will be impossible.

32 Usually, for the reason of expecting that the government will bail them out if in trouble, SOEs in China do not have adequate incentives to improve their performance.

33 See Yongzheng Yang, supra note 18, pp. 80-81.

34 China's commitments in major services are accompanied by transition periods, but the five-year transition has certainly set a tight time frame for reforms in the service sectors, especially for the monopoly state-owned service providers. As some scholars have pointed out, past experience suggests that it needs extraordinary political will and management skills to accomplish such a task in such a short period of time.

3. *Difficulties of eliminating government protection of SOEs in the short run*

The enforcement of the above-mentioned rules will be very difficult. On the one hand, there are well-established close relationships between state enterprises and the government, along with the inertia of government officials toward market intervention. On the other hand, SOEs in China have become accustomed of relying heavily on governmental protection.

One must keep in mind that China is still a socialist country. An important role of Chinese SOEs in the country's economy is to make China's government believe that it is still on the route of socialism. No one dares to call for the abandoning of the socialist road, at least not at the present. That is why China calls its economy a "socialist market economy". SOEs still play the most important role in the Chinese economy: they employ 110 million workers - about two-thirds of the urban labor force - and they own two-thirds of the nation's entire stock of productive assets. The important issue is that the failure of SOEs[35] reforms may cause some seventy million Chinese to become unemployed and to lose their post-retirement pensions.

There will always exist significant political and economic pressure in China to retain some form of protection for SOEs after China's entry into the WTO. Government protection of SOEs in China may not necessarily involve direct subsidies, which the Chinese government has tried to eliminate in the past two decades.[36] Rather, it usually takes the form of favorable policy treatments, such as the non-uniform granting of quotas or licenses, the grants to certain monopolies in some business sectors within a certain geographical areas, the non-economic policy loans from state-owned financial institutions, etc. This may lead to serious unfair competition among foreign enterprises, SOEs and other non-SOEs enterprises, which is inconsistent with the principles of GATT/WTO and the market economy.

The Chinese government has tried various ways to reform SOEs in past decades without obvious effect. Continuing efforts include:

- improving the efficiency, competitive consciousness, and risk-taking ideas in most of SOEs by decentralizing the decision-making process;
- privatizing some SOEs by publicly issues of stocks and debts instruments;

35 More than forty-four percent of China's SOEs are losing money according to the World Bank, and SOEs in China face 200 billion US dollars in bad debts, which constitute more than twenty percent China's bank loans.

36 Subsidies still exist in China, either directly or by requiring banks to make compulsory loans which will not be repaid.

- encouraging the participating of foreign investment in most sectors;
- leasing or selling small-scale SOEs to private sectors.

Notwithstanding the Chinese government's well-intended efforts, the longterm problems might not be easily resolved. Moreover, the role of SOEs as service providers of certain social functions such as post-retirement pensions, education, and health care certainly exacerbate the difficulty and bitterness of the reform. In fact, SOEs themselves in China have been lamenting that they are not yet ready for the competitive environment of the WTO.

B. Local economic protectionism in conflict with WTO rules

1. Reasons and forms of local economic protectionism

Trade barriers among provinces or even towns have been a problem throughout China since its economic reform began and in many instances still persist today.[37] Although China is a unitary State, its various regions differ in terms of economic prosperity, degree of openness, tradition and governance structure. Even law enforcement varies from region to region, not only because of different local regulations and rules, but also because of discretionary application of the law from region to region.

Some scholars have argued that local protectionism was one of the negative outcomes of China's economic reform. A recent study examining China's ability to comply with WTO rules noted that

> "a major feature of economic reform has been the decentralization of authority to the provincial government level in a variety of areas, including enterprise ownership, taxation, foreign trade management, investment project approval, and credit allocation. But the provinces have vigorously used these policies to reinforce regional development and the protectionism that had already been in place."[38]

Local protectionism in China may now take various forms, including:

- at the legislative level, enacting local rules aimed at protecting local interests;

37 Daniel H. Rosen, Behind the Open Door: Foreign Enterprises in the Chinese Marketplace, 136 (1999).

38 Richard H. Holton & Xia Yuan Lin, China and the World Trade Organization: Can the Assimilation Problems Be Overcome?, Asian Survey, Aug. 1, 1998.

- at the judicial level, refusing to enforce other courts' judgments against local interests or distorting the law to render favorable judgments for local interests;
- at the administrative level, setting up physical check points blocking the inflow of goods from other localities. Occasionally, local governments impede the judicial course of local courts for the purpose protecting of local interests;
- other institutions, such as local banks, support local interests. For example, if an outside court demands a bank to freeze an account of a local enterprise, it is very likely that the bank will refuse to do so until a local court has authorized it to do so, also, usually, a secret contact between local courts and the debtor may make it possible for that party to shift funds and property because it was warned.[39]

2. Conflicts with WTO rules and the difficulties of eliminating local economic protectionism

Because of local protectionism, China is facing serious challenges in implementing WTO rules uniformly. According to the GATT (1994), each WTO Member "shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory". Art. X of the GATT also requires WTO Members to administer a uniform, reasonable, and impartial legal system. The understanding on the interpretation of this provision further strengthens the requirement for uniform administration by introducing the WTO Dispute Settlement Mechanism and even sanctions when the central government of a WTO Member fails to mend a breach by a regional or local government. To some western countries, China's extensive, deeply-rooted local protectionism amounts to a Chinese production subsidy.

With respect to concessions China has made to market accession and national treatment obligation under the General Agreement on Trade in Services, the popular phenomenon of local economic protectionism will render market accession in the internal market meaningless and make the national treatment of trade in services difficult. Local protectionism impedes the free movement of goods and services, which is a basic goal of the WTO. The modern multilateral trading system is based on a unified market and against an artificially divided market,[40] but in China, due to different local interests, many local governments in China employ various means to protect their locally-owned

39 See Hoogmartens, supra note 25, footnote 261.
40 See Yuwen Li, supra note 5, p. 463.

businesses from competing with other localities. Sometimes, the discrimination caused by local protectionism is so serious that domestic enterprises of one province may find it very difficult to enter the market of another province.

The cost of failure to prevent local protectionism may be very high since the WTO disciplines impose the responsibilities for local government action on central government. The WTO will penalize countries with systems that prevent the dismantling of internal protectionist barriers.[41] China's government has realized that the WTO Dispute Settlement Mechanism could result in sanctions even where it is a provincial or municipal government that is responsible for the breach of an obligation under WTO agreements.

As some western scholars have pointed out, the problem of Chinese protectionism does not ly fully in the control of China's national government. Beijing does not run all levels of government in China, and the national government faces an entrenched system oriented away from compliance with undertakings against local protectionism.[42] In the space of fifteen years or so, the Chinese political structure has been transformed from one that was once reputed for its high degree of centralization and effectiveness into one in which the center has difficulty coordinating its own agents' behavior. Because power and resources are dispersed, the exercise of central control now depends to a large extent upon the consent of the subnational units whose actions are slipping from control.[43]

Other aspects that prevent China's central government from confronting local protectionism include:

- the imbalance of regional development is becoming more and more serious. It is very difficult for less-developed regions to abandon local protection policy, because these regions can receive huge subsidies from the central government, but this kind of subsidies are strongly opposed by those developed regions. Furthermore, it has been shown that such subsidies are not useful in advancing the economies of less-developed regions, since they put these regions in a position where provisional government can "wait, rely upon, and request the money from the central government". Finally,

41 Charles Tiefer, Free Trade Agreement and the New Federalism, 7 Minn. J. Global Trade, 1998, p. 66.

42 Charles Tiefer, Sino 301: How Congress Can Effectively Review Relations with China After WTO Accession, 34 Cornell International Law Journal, 2001, p. 69.

43 See Wang Shaoguang, The Rise of the Regions: Fiscal Reform and the Decline of Central State Capacity in China, in the Waning of the Communist State: Economic Origins of Political Decline in China and Hungary, Andrew G. Walder, ed., 1995, p. 87, 109.

these regions will lose the inspiration to develop their economy by themselves.
- some economists support the argument that the best way to maintain regional political and economic balance is to give the local governments more power to stimulate their own regional economic development policies. But the problem is that the more is power given to local government, the more difficult it is for the central government to guarantee the uniform implementation of WTO rules in China;
- sometimes it is difficult to deal with the local protection problem because some consideration must be given to the basic policy of protecting the autonomy of minorities.

Although the central government has repeatedly demanded the removal of local protection, its orders are often ignored with impunity by local authorities. The extent to which sub-central government authorities refuse to obey central government rules in China, and the apparent impotence of the central government to change that behavior is not new to outsiders. The relative weakness of the central government is likely to reduce the effectiveness and meaningfulness of WTO commitments. Perhaps, a completely independent legal system would be the ideal solution to this problem. However, the establishment of such a system is impossible under China's current political structure.

4. Likely problems for China's WTO compliance: the rule of law

In that the WTO is the ultimate rule-based international institution, China's accession to the WTO will compel the Chinese government to make the country a more rule-based society than it has ever been. Although the tremendous efforts made since China's application to join GATT have improved the country's situation greatly, China is still exercising "rule by law" rather than the rule of law.[44] China's lack of the rule of law has created major skepticism within the international community regarding China's desire and capacity to implement obligations under WTO rules.

Although it is very difficult to define what is meant by a "lack of the rule of law", an analysis of deficiencies existing in China's legislative, judicial, and administrative systems may help us understand the difficulties faced in imple-

44 In "rule by law", law exists not to limit state power but to serve as a mechanism for state power. See James V. Feinerman, The Rule of Law with Chinese Socialist Characteristics, 96 Current History, 1997, pp. 278, 280.

menting WTO rules in China. China's legal system can be characterized as weak for the following reasons: (1) unpredictability of the legal system through the compartmentalization of law making; (2) legislative disorder; (3) vagueness and flexibility of laws; (4) numerous "policy laws"; (5) a lack of transparency due to uncontrolled administrative power and corruption in administrative management; (6) problems surrounding the judicial system due to a lack of judicial autonomy; (7) weak judicial enforcement; (8) lack of a strong judicial review system. These are just some of the outstanding problems that may make China's implementation of WTO rules problematic.

A. Problems in legislation

The thoughtful scholar Lubman pointed out that, the allocation of rule-making power by the agencies within the Chinese bureaucracy is a major structural problem in the organization of the Chinese state. This has enormous implications for the future of the rule of law in China.[45]

In China, laws and regulations are promulgated by a host of different ministries and governments at provincial and local levels, as well as by the National People's Congress, its Standing Committee, and the State Council.[46] As a result, laws and regulations are frequently at odds with each other, resulting in the compartmentalization of law making and legislative disorder.

45 See Stanley Lubman, supra note 1, p. 389.

46 In China, numerous sources of laws, regulations and rules are in a complicated hierarchy structure: the National People's Congress (NPC) as the highest authority has the power to enact and amend "basic laws"; the NPC Standing Committee as the permanent organ of the NPC exercises the legislative power when the NPC adjourns. It has the power to enact and amend " laws other than basic laws", supplement and amend to some extent laws made by the NPC; the State Council as the highest administrative organ of the State has the power to enact " administrative regulations " in accordance with the Constitution and laws, these administrative regulations are binding nationwide; the People's Congress at the provincial level and their standing committees have the power to enact "local regulations", "provided that they do not contravene the Constitution, laws and administrative regulations", these local regulations are binding only in the provinces; local governments of cities where the provincial governments are situated and of "large-sized cities" have the power to work out local rules, which are binding only in the localities concerned; the Constitution of China provides that, subject to their respective authority, ministries and ministerial-level commissions may enact "administrative rules" "in accordance with the laws and administrative regulations of the State Council". These administrative rules are binding nationwide on the matters concerned.

At the administrative legislation level, the State Council and its more than sixty departments (including ministries), commissions, administrative bodies and offices, possess the authority to issue regulations to implement specific legislation under a grant of power by the NPC Standing Committee. No procedural rules exist to govern enactment of these important rules, which may be issued or modified by any agency with exclusive jurisdiction over the subject matter of a rule. When agencies share jurisdiction, rules are issued either jointly or by one of them with the permission of the State Council. In practice, often the overlapping in jurisdiction results in overlapping legislations.[47]

To make matters worse, administrative agencies in China alone possess the power to interpret the rules they issue, and these agencies have wide discretion in the interpretation of those rules, as a major goal of Chinese legislative drafting is "flexibility". As a result, Chinese legislation at all levels is intentionally drafted in "broad, indeterminate language", which will allow administrators to vary the specific meaning of legislative language with circumstances.

Another problem in Chinese legislation is the existence of a large gray area of "policy laws"-policy statements, administrative regulations, meetings, notices, instructions, and speeches that are given legal effectiveness because they emanate from authoritative government. One characteristic of these "policy laws" is their "flexibility".[48] They usually do not set precise limits on legal and illegal behavior nor define the legal consequences of failure to comply .[49] The other characteristic of Chinese government policies is their more important status than that of law. As some scholars have pointed out, for the purpose of maintaining China's long-term peace and satisfying the need to attract foreign direct investment, political stability is given an a overwhelmingly important position. Law is thus secondary to policy.[50] However, the supremacy of government policy over law cannot guarantee a stable legislative environment able to deal with foreign trade issues involving investment, banking, finance,

47 See Stanley Lubman, supra note 1, p. 389.

48 In practice, officials can easily legalize their illegal profits by quoting and practicing flexibility in the productive process and silence their critics by also applying flexibility in politics, see Chih-Yu Shih, China's Socialist Law Under Reform: The Class Nature Reconsidered, 44 Am. J. Comp. L. 1996, p. 643.

49 See Stanley Lubman, supra note 1, pp. 391-92.

50 Usually, laws in China are drafted in such vague terms that their interpretation can change overnight to suit any sudden policy change.

tax, etc., as long as foreign investors and China's traders remain exposed to the legendary arbitrariness of Chinese policy makers.[51]

The implementation of such Chinese policies contributes to legal uncertainty and creates a legal system that is fluid and very changeable and hence unreliable. It allows the current regime to maintain the appearance of a viable legal system while retaining within its actual operation many facets of policy implementation, namely changeability and adaptation to local normative structures and conditions.[52]

B. Problems in the judicial system

It is crucial to keep an effective and impartial judicial system for the implementation of WTO rules in Member States, but the independence and professionalism of the Chinese judiciary and the enforceability of judgments still arouses skepticism.

In China, judicial autonomy is still constrained by many forces. For example, Chinese administrative agencies have the power to require the courts to enforce the rules issued by these agencies. This denies the courts the role that they otherwise might play in a system that seeks to maintain the rule of law. The courts are expected to apply the laws within whatever boundaries are set by government policies and must also respond to changing emphases.

The power of judges in China is also constrained by many factors. There is no judicial independence, wherein judges handling a given case would be free of interference from other judges. Chinese judges are not equal, they are placed into a hierarchical bureaucracy. Every judge is responsible to the head of a division he belongs to, and the division is responsible to the Judicial Committee which, according to Article 11 of the "Organizational Law of the People's Courts, is responsible for "summarizing judicial experience, discussing important and difficult cases, and handling other matters relevant to judicial work".[53] Administrative officials also interfere with judges' independence.

51 See Peter Howard Corne, Lateral Movements: Legal Flexibility and Foreign Investment Regulation in China, 27 Case W. Res. J. Int'l L. 1995, p. 247.

52 See Peter Howard Corne, supra note 51, p. 263.

53 In practice, judges ordinarily bear the sole responsibility for deciding cases only in very minor matters. The courts are subdivided into "departments" according to subject matter, and a judge may consult a department head, senior judges, the Chief Judge, or all of them when deciding a case. Cases deemed difficult or complicated will, as a matter of regular procedure, be decided by an "Adjudication Committee" of senior judges. See Stanley Lubman, supra note 1, p. 397.

Local judges are appointed by the local governments in the jurisdictions in which they serve, they usually face strong pressure from these "parent officers" (fumu guan). Local protectionism often creates pressures on judges to persuade complaining parties to withdraw suits and to issue judgments not in accordance with law and facts. Sometimes, judges who try to be impartial are punished with transfers.

Low professional qualifications and educational standards will create significant difficulties for Chinese judges to understand and apply WTO rules at the domestic level correctly and effectively. Most of China's judges owe their positions to transfers from the government and the military. Most of them lack university education, and very few have received formal legal instruction. Although the Chinese government has arranged many kinds of special training plans during the last decades, the overall educational level of judges remains low.[54] Furthermore, the sudden expansion of the legal profession as a result of economic development and economic reforms during recent years has created enormous temptations for judges to engage in a variety of corrupt practices.

Another phenomenon that causes the international community concern is the weak enforcement system in China. Under the current Chinese legal system, the implementation of law constitutes a major problem. Law enforcement depends to a large degree on bureaucracy and is often seriously obstructed by local protectionism. On the one hand, given the inconsistency between relevant laws and regulations deriving from different departments, these statutory provisions often leave room for discretionary application-either through honest misunderstanding or through selective application-or are ignored outright.[55] On the other hand, local protectionism constantly makes it difficult to enforce judgments of the courts when successful litigants must attempt to obtain payment in a place where defendants live or do business. Some scholars believe that the most important reason for judgments being unenforceable is local protectionism, a strong testament to the fragmentation of the Chinese legal system. Some observations by Jan Hoogmartens show that judges are extremely reluctant to enforce judgments against local enterprises, local citizens, or authorities since local governments, on which the court depends, are themselves dependent on local enterprises and banks for income and employment. They are all part of the same bureaucratic family, and every member must respect

54 See Donald C. Clarke, supra note 24, pp. 21-22.

55 See Qingjiang Kong, Enforcement of WTO Agreement in China: Illusion or Reality? 35 Journal of World Trade, No. 6, 2001, p. 1191.

its local relatives.[56] Lubman has also stated that the strongest and most insidious type of extra-judicial influence on the outcome of non-criminal disputes is interference by local officials in pending litigation and in the enforcement of judgments.

C. Problems in administrative management

China's administrative management often suffers from a lack of transparency.[57] One obvious example is its various kinds of administrative screening systems of economic transactions. For example, China has so far maintained its practice of case-by-case foreign investment screening. Under this practice, any proposed foreign investment or participation project is subject to state examination and approval. Investment screening involves multi-level governments and multi-agencies: the department responsible for the administration of the industry to which the proposed investment belongs; the department of foreign trade and economic co-operation; the economic planning department; the department for industry and commerce; and the departments for environmental protection, fire-fighting, etc. All are involved in the screening process. Many of these agencies have the power to veto or defer the proposed investment. The investment screening involves both procedural and substantive requirements, but these requirements are usually not designed consistently and clearly. Authorities base

56 See Jan Hoogmartens, supra note 25, p. 81.

57 Article X of GATT stipulates:" Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them." The same Article also provides that each contracting party must "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings". Indeed, transparency, stability, predictability and non-retroactivity are important principles in any international trade order. See Yuwen Li, supra note 5, pp. 462-463. The WTO system assumes that a lack of transparency in rules and regulations affecting imports could have the same effect as quantitative restrictions (GATT 1994, Article XI) and thus requires that members' laws, regulations, administrative and legislative processes be transparent (GATT1994, Article X). It has been popularly accepted that a comprehensive legal framework, coupled with adequate prior notice of proposed changes to laws and regulations and an opportunity to comment on the changes, will greatly enhances business conditions, promote commerce and reduce the opportunities of corruption.

their examining of a proposed investment project on varied, often vaguely worded, and sometimes contradictory substantive requirements as well as procedural requirements.[58]

Another problem in administrative management is the lack of effective judicial review of administrative acts that affect international trade. This is in conflict with certain corresponding requirements stipulated in a number of WTO agreements. For example, the General Agreements on Trade in Services asks that Members shall maintain or institute as soon as practicable judicial, arbitral, or administrative tribunals or procedures which provide, at the request of an affected supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.[59] However, in China, the deficiencies of administrative law, both at the substantive and procedural levels, block the justified and appropriate remedies to arbitrary administrative actions.

From the perspective of substantive law, although the administrative law of China gives affected persons or organizations the right to sue, in Chinese courts, agencies that have acted unlawfully. Furthermore, an Administrative Compensation Law has defined the situations in which governmental agencies may be liable for injurious consequences of their acts. The jurisdiction of the courts, the extent to which they may vindicate rights, and the power to restrain arbitrariness all remain very limited.[60] The actions of administrative agencies in applying rules in specific situations may be reviewed only if the agency has violated a law. However, this is difficult to prove when the rule in question, like most Chinese laws and administrative rules, has been very generally and broadly framed and has given an agency broad –and unreviewable-discretion.[61]

From the perspective of procedural law, the Administrative Procedural Law provides that no organ or individual can challenge before the court any administrative rules, orders and acts of a binding nature. Other laws provide that certain administrative acts shall be decided in the end by the relevant administrative organs. The Administrative Procedural Law further strengthens the regime by providing that courts shall not accept any suits against "specific

58 See Qingjiang Kong, Foreign Direct Investment Regime in China, 57 Heidelberg Journal of International Law, 4 (1997), p. 881.

59 Art. VI: 2 (a) of GATS. Similar requirements are also stipulated in the Agreement on Trade-Related Intellectual Property Rights, which states that members accord to parties an opportunity for review by a judicial authority of final administrative decisions.

60 See Peter Howard Corne, Foreign Investment in China: The Administrative Legal System, 1997, p. 246-248.

61 See Stanley Lubman, supra note 1, pp. 393.

administrative acts that shall, as provided by law, be finally decided by an administrative organ".[62] These contents stipulated in the Administrative Procedural Law limit the right of foreign and domestic investors and trade businessmen to challenge administrative agencies' actions. One the other hand, in practice, an injured party's frustration is more likely to arise from other deficiencies in the Chinese legal system, such as insufficiently developed procedural law and the general inefficacy of the courts.[63]

5. Prospects and Conclusion

China's WTO Accession Protocol falls far short of converting China into a textbook example of a free market economy. The true value of the concessions made in the accession protocol will only be know once China implements the agreements.

It is fair to argue that China's accession to the WTO is evidence of a China's formal commitment to further pro-market reforms. In return, China's WTO accession will deepen and entrench this country's domestic legal and economic reforms and strengthen those in China's leadership who want their country to move further and faster toward economic freedom. Chinese domestic reform after WTO accession, coupled with Bejing's growing dependence on foreign markets and resources of capital, may make China a more responsible international citizen.

At the moment, Chinese society is in the midst of dramatic, ongoing change. Although nobody can predict the future evolution of relations between China's state and its society-and the extent to which their mutual relations will shape and be shaped by law-China's accession to the WTO will truly mark another important stage in the continuing journey by symbolizing its deepening involvement in the international community in a manner that will involve Chinese legal institutions with other nations and their citizens more than ever before.[64] There is no doubt that international norms, like those created in the WTO framework, have played a tremendously important role in guiding the remodeling of the legal and economic system in China. Furthermore, a successful integration of

62 Art. 12 (4) of the Administrative Procedural Law.

63 See David L. Weller, The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action, 98 Colum. L. Rev. 1998, p. 1262.

64 See Stanley Lubman, supra note 1, p. 423.

China will certainly strengthen the WTO's mandate.[65] As advocates of China's WTO membership often point out, if China could be made to live by the terms of the WTO, it would become a much more reliable economic partner. The multilateral nature of the WTO may also make it possible to bring multilateral pressure to bear against China, instead of pursuing all matters through US-China confrontations.[66]

China's WTO accession will play an important role in its post-accession domestic reform for the following reasons:

First, the WTO is the most important international economic organization. China needs this organization's help to exert its economic influence as the largest developing country. WTO rules and policy will hopefully be respected by China. As a Chinese scholar argued:

> "The WTO succeeded the club-like atmosphere of GATT … A pragmatic China knows that if it wants to protects its interests as a club member and play a role in that club, it will have to treat its obligations under WTO agreements sincerely and reform its domestic structure."[67]

Second, the modern multilateral trading system embodied in the WTO is based on the rule of law. Through the WTO and pressure from its major Members, the rule of law will be strengthened in China. The disorderly trade management system, weak legal redress and law enforcement, and the lack of transparency of legislation and administrative management in China are all inconsistent with the spirit of the rule of law imbedded in WTO rules and hence need elimination. There is no way for China to escape after WTO accession.

Third, market economy is the soul of WTO rules. There is no longer space and time for China to postpone its market-oriented economic reforms. Government protection of SOEs, as well as of agriculture and state monopolies in the service sector are facing more and more challenges from China's WTO partners. Government meddling, which makes market participants unable to decide their produce and sales on a commercial consideration, must be eliminated. Otherwise, China will face more and more challenges under the WTO Dispute Settlement System, which will push China into a sea of lawsuits.

Fourth, WTO agreements are international treaties that China must implement and for which China assumes international responsibility. In general, the

65 See Jan Hoogmartens, supra note 25, p. 82.
66 See Greg Mastel, supra note7, p. 993.
67 See Qingjiang Kong, supra note 55, p. 1214.

Chinese attitude towards international law can be fairly described in this way: While emphasizing the principle of absolute sovereignty, it accepts the existence of generally recognized international law and its universal applicability. In respect to treaties, China acknowledges the doctrine of *pacta sunt servanda*. WTO agreements are treaties that China accepts voluntarily. The specific obligations under different multilateral trade agreements within the WTO legal framework and principles such as transparency, market access, most-favored nation treatment, and national treatment will be respected by China.

Fifth, since the Uruguay Round, the multilateral trading system under the WTO has become to be an effective and enforceable legal system, especially strengthened by its dispute settlement mechanism and trade policy review mechanism.

On the one hand, no WTO Member can hinder the establishment of a WTO dispute settlement panel nor ignore its decisions. The possibility of cross-sector retaliation under the dispute settlement mechanism as well as the strong pressure from WTO Members make it very difficult for any WTO Member to ignore the decisions made by a WTO panel or the appellate body. As Samuel Berger pointed out:

> "China's entry into the WTO-into the world economy-will enmesh China in an international system that will hold it to rules and laws universally applied. In fact, for the first time, some of China's important decisions will be subject to the review of an international body, with binding settlement procedures to resolve disputes.[68]"

On the other hand, the trade policy review mechanism also plays an important role in keeping WTO Members on the free-trade track. The WTO's periodic reviews of Members have proved to be useful progress reports on changes in trade policy in the United States, the European Union, Japan, and other WTO Members. In the case of China, these reviews, or something similar, could even be more critical. A WTO-based process that would regularly review China's progress in implementing its commitments under the WTO during a transitional period could provide a useful benchmark of that progress. These reviews could regularly focus attention on the issue of China's implementation efforts. In doing so, they would put pressure on China to make further progress. Given the potential difficulties that WTO dispute settlement procedures are likely to have

68 See Samuel Berger, U.S. Policy in East Asia: Trade Relations With China, Remarks at the East Asian Institute, Columbia University, May 2, 2000.

in considering problems in connection with China, these reviews could prove to be a valuable supplement.[69]

When we discuss the problems of China, we should look at both sides of the coin.

On the one hand, China has indeed made great progress in its economic and legal reforms in recent years with the purpose of establishing a market-oriented economy. These kinds of reforms are deepening and are occurring faster. China is now examining and reviewing more than 2000 laws, regulations, and rules at both the central and local level. Laws, regulations, and rules that are inconsistent with WTO agreements are being amended or repealed. Some of the amendments were made even before China joined the WTO. One obvious example is the amendment of three basic foreign investment laws in China (the Wholly Foreign-Owned Enterprise Law of the PRC, the Equity Joint Venture Enterprise Law of the PRC, and the Cooperative Joint Venture Law of the PRC). In these three new laws, measures that were inconsistent with the Agreement on Trade-Related Investment Measures (TRIMs Agreement)[70] or that applied discriminatory investment standards were amended or deleted.[71]

69 See Greg Mastel, supra note 7, p. 994.

70 The TRIMs Agreement prohibits the use of all investment measures regarded as having a distorting and adverse effect on trade in goods. In China, before the amendment of its foreign investment law, these kinds of measures include: (1)measures requiring foreign-invested enterprises to give preference to domestic supply instead of international supply when purchasing raw materials, fuel, and other materials; (2)measures requiring a wholly foreign-owned enterprise to utilize advanced technology and to export the majority of its annual production; (3) measures requiring auto-balance in foreign currency; (4)measures controlling the production and operation activities of foreign-invested enterprises.

71 For example, the new Wholly Foreign-Owned Enterprise Law of the PRC has been amended as follows: (1) Before the amendments, this law stipulated that enterprises "must benefit the development of China's national economy and utilize advanced technology and equipment or export all or the majority of their products." This provision has been amended to read as that enterprise "must benefit the development of China's national economy. The State encourages the founding of Wholly Foreign-Owned enterprises whose products are export-oriented or involved in the high-tech field." (2) the provision concerning the control of production and operational plans by relevant administrations have been deleted; (3) regarding the procurement of raw materials, the new Wholly Foreign-Owned Enterprise Law states that "on the basis of fairness and reasonableness, the raw materials, fuel and other materials required by a wholly foreign-owned enterprise which come within its authorized business scope may be purchased within China or on the international market." Before the law was amended, this provision stated that the raw materials shall be procured in the domestic market if the conditions are the same. (4) the provisions regarding the balance in foreign currency have been deleted.

China also has sincerely tried its best to solve some serious problems in its foreign economic relations with some major trading partners. One remarkable example is Chinese quick and significant improvements in intellectual property protection. Before the US-China intellectual property agreements in 1992 and 1995, China was one of the world's largest IP pirates. Since then, it has improved its legal framework and virtually shut down the illegal production and export of pirated music, video CDs and CD-ROMs. Enforcement of IP rights has become part of China's nationwide anti-crime campaign, and the Chinese police and court system have become actively involved in combating IP piracy. China will continue to further revise its IP laws. This kind of legal reform is not only been undertaken as part of Sino-US bilateral agreements, but is also intended to bring Chinese law into conformity with the TRIPs Agreement. The successful implementation of the two Sino-US IP agreements can perhaps be used to shed light on the question of whether China will comply with WTO rules after its accession.[72]

On the other hand, the reality in China is much more complicated. There still remain many political, economic, cultural, and legal problems waiting to be resolved.

The long negotiation process of China's WTO accession and the complicated political, economic, and legal issues involved in the negotiation process tell us that anyone who wishes China to become a constructive member of the world's multilateral trading system must be patient. All problems that may impede China's WTO compliance can only be solved step by step.

China is a country that lacks a tradition of the rule of law. It is now in a special period of change, from a centrally-planned to a market economy. Everything in China is changing, and every change needs time. We should admit that it took western countries quite a long time to establish a mature market economy, we also must recognize that the establishment of the rule of law in western countries also took several hundred years, and there are still many problems in the application of the rule of law in the West. Thus, we should not lose patience with China. Lubman once cautioned that:

> "There are some who undoubtedly believe that the U.S. and the West in general use the rule of law cynically, not only to aim a sugar-coated bullet at China, but because history suggests that it has been used hypocritically … Americans, including policy-makers, often fail to recall that the rule of law emerged in the West only

72 See Qingjiang Kong, supra note 55, p. 1186.

after centuries of slow evolution of political philosophies that prize legality over the alternatives, and that the concept of the rule of law is itself contested."[73]

73 See Stanley Lubman, supra note 1, pp. 410-411.

9

COMPETITION IN THE DOHA ROUND OF WTO NEGOTIATIONS

Karl M. Meessen

1. Coercing a Spontaneous Process?

Competition was an item earmarked for the second phase of the Doha Round of WTO negotiations.[1] It no longer is. But it may become one again. The European Union, which was the main promoter of the issue, now has second thoughts, albeit for tactical reasons only. After the Cancún debacle, it first agreed to unbundle the four so-called Singapore subjects and then declared itself ready to drop competition policy for the time being, that is, to take it up again should circumstances permit.[2] At this point of a trade policy lull, it may be appropriate to look at the merits of the issue from a legal perspective. After all, it were legal academics that made it an issue to begin with.[3]

1 WTO Ministerial Conference, Fourth Session, Ministerial Declaration of 14 November 2001, para. 23, WTO Doc. WT/MIN(01)/DEC/W/1.

2 For the clearest statement yet see the letter written on behalf of the European Commission by trade commissioner Lamy and agriculture commissioner Fischler to the "Ministers responsible for trade in all WTO countries" on 9 May 2004, http://trade-info.cec.eu.int/doclib/docs/2004/may/tradoc_117097.pdf; see also Commission statement of 31 March 2004, http://trade-info.cec.eu.int/doclib/docs/2004/april/tradoc_116808.pdf; for the policy context see Bhagwati, 'Don't Cry for Cancún', 83/1 *For. Aff.* 52 (2004).

3 For the legal theory background see Meessen, 'Das Für und Wider eines Weltkartellrechts', 50 *Wirtschaft und Wettbewerb* 5 (2000) with further references.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 217-229.*

The problem of competition and trade lacks the emotional dimension of trading tuna and shrimp harvested without due care for dolphins and turtles. But the subject has a history as old as the GATT itself. Mention of the subject was already made in the Havana Charter.[4] The Charter and the ambitious project of an "International Trade Organization" had to give way to a more modest but increasingly successful set of obligations to dismantle government imposed trade barriers under the GATT. In 1994, the GATT was incorporated into, and supplemented by, the Marrakesh Agreement. The numerous multilateral and plurilateral agreements annexed to it include but scant elements of competition law. Efforts had, however, been made to outlaw restrictive business practices by instruments of international law outside the GATT. Yet they did not proceed very far either. A UN Convention drafted in 1954 has not even been signed, let alone ratified, by a single state. The UNCTAD's Restrictive Business Practices Code of 1980, though it received the unanimous support of the member states of the United Nations by way of a General Assembly resolution at the time, came to be ignored ever since.[5]

The dismal account of treaty law is in contrast to a most stupendous success story of up to 90 states unilaterally adopting competition laws. Impressed by United States economic performance, with a little help of United States occupying forces, Germany was the first country to emulate United States antitrust laws by enacting a differently structured but equally strict "Statute Against Restrictive Practices" in 1957. Also in 1957, the European Economic Community, which originally comprised only Germany, France, Italy, and the Benelux states, followed the same course of action and expanded the regulatory approach of the Coal and Steel Community of 1951 to feature general provisions of competition law as a supplement to the gradual abolition of all trade barriers among the member states of the EEC within a period of twelve years. The competition law of the EEC Treaty was supplemented by additional legislation in one or other member state and above all extended to cover a community successively enlarged to nine, ten, twelve, fifteen and today twenty five member states.

Already by the late 1970s, it was common ground that the economic growth rates in industrialized states grouped in the Organization of Economic Coopera-

4 For a recent account of the history see K. Kennedy, *Competition and the World Trade Organization: The Limits of Multilateralism*, London: Sweet & Maxwell 2001, p. 122 et seq.

5 For the text see Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 19 *Int'l Leg. Mat.* 813 (1980).

tion were not unrelated to the establishment and sustenance of free market economies in those states. It took the example of the newly industrialized countries in East Asia and their astounding economic development throughout the 1980s and 1990s to advertise the competition law based model of market economy to states outside the OECD, and it took the fall of the Berlin Wall to make that recipe available to former socialist states eager to dump their notoriously low performing command economies.

The growth rates witnessed in some of the states of the Second and Third world are telling enough. The attractiveness of competition law as a supplement to the dismantling of government imposed trade barriers is beyond doubt. The only open question, therefore, is whether, given the spontaneous proliferation of competition laws, that process should in the future be based upon mandatory rules of international law, which would be incorporated either into multilateral agreements binding upon all WTO members or at least into plurilateral agreements binding upon those states that are persuaded to accept them.

So far, convergence has worked by itself. To make it an obligation, therefore, requires some good reason. Several reasons have indeed been advanced for the proposition to include obligations of competition law into the framework of the WTO agreements. They have to be examined one by one. It will be done in the following section. An attempt at reconciling efficiency oriented competition law with a developmental perspective will be made in the final section of this chapter.

2. Trade Related Problems of Competition Law

The technique of expanding the realm of GATT and WTO law to other fields of law was to discover their trade-relatedness. That is how trade-related investment measures (TRIMs) and intellectual Property rights (TRIPs) came to be integrated into the Marrakesh Agreement. An agreement on trade-related antitrust measures (TRAMs) is an obvious candidate to follow suit, not only because the American term "antitrust," by contrast to the British English term "competition," assures the pronouncability of the acronym. In fact, already Adam Smith explained the merits of the market by reference to both crossborder trade and internal deregulation. Trade law expands the geographic market by pulling down government made fences, and competition law protects the market

against private restraints. As part of market law,[6] they both have a common objective but the operative rules have different addressees, to wit governments in one case and business enterprises in the other. The significance of the linkage has to be assessed in a problem-by-problem analysis.

2.1 Market Access

On dismantling government imposed trade barriers, business practices should not be allowed to deny market access. The United States raised charges of that kind against Japan on several occasions. The most recent and best known instance was the Kodak/Fuji Case submitted to a WTO Panel.[7] In its report of 1998, the panel held that none of the alleged elements of government involvement stood up to scrutiny: the schemes of distribution set up by Fuji, which may have prevented Kodak from increasing its market share in Japan, could not be imputed to the Japanese government.

Exploring the competition law track, the United States firm Sabre complained that the leeway given in Europe to its competitor Amadeus prevented it from extending its computerized airline reservation system to European countries.[8] That case was handled by a rare Transatlantic referral under the positive comity provisions of the EC-US agreement on the enforcement of competition law. The European authorities mooted Sabre's complaint by looking after possible monopolistic conduct on the part of Amadeus.

The scarcity of the case law and the vagueness of the charges raised – a fact confirmed by the silent death of the Japan-US Strategic Impediments Initiative[9] – seem to indicate that the problem is less significant in practice

6 For an extensive discussion see Meessen, *Economic Law in Globalizing Markets*, The Hague: Kluwer 2004, ch.V, at p. 99 et seq.

7 Japan – Measures Affecting Consumer Photographic Film and Paper, WTO Panel Report of 31 March 1998, WT/DS44/R.

8 For a case study see Rill, Wilson & Bauers, 'The Amadeus Global Travel Distribution Case', in: S. Evenett, A. Lehmann & B. Steil (eds.), *Antitrust Goes Global, What Future for Transatlantic Cooperation?*, Washington DC: Brookings 2000, p. 194.

9 Saxonhouse, 'A Short Summary of the Long History of Unfair Trade Allegations against Japan', in: J. Bhagwati & R. Hudec (eds.), *Fair Trade and Harmonization*, vol. 1, Cambridge, Mass., 1997, p. 471, 491 et seq.; for a cautious review by a government installed committee see International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Final Report of 28 February 2000, at p. 211 et seq.

than theoretical analysis might suggest. Apparently, existing instruments allow to cope with particular cases:

(1) If internal rules on competition law are designed, or applied, in such a way as to allow domestic companies to keep foreign competitors at bay, the application of the GATT may well have to be considered along the lines of the Kodak/Fuji-Case. In EC case law, a "Buy Irish" campaign was imputed to the Irish government and therefore held to trigger the application of Article 28 (ex Article 30) of the EC Treaty.[10]

(2) In the Sabre versus Amadeus type of situation, the state, from whose market the competing firm alleges to be precluded, may enforce its competition law rules on monopolistic conduct or its rules prohibiting the abuse of a dominant position. In the absence of such provisions or in the event of their non-implementation, the state whose company is denied market access has jurisdiction to apply its own competition law on foreign conduct of that kind.

Theoretically, some cases escape either approach: if there is no government involvement warranting the application of the GATT and if, at the same time, the conduct is not covered by the competition law of the home state of the would-be market entrant. That gap can, however, be closed.

It actually seems within the logic of market integration to set up rules of competition law by way of treaty law and to add rules on business practices to those of trade law on government imposed barriers. It is the EC model of promoting market integration not only through the abolition of tariffs and non-tariff barriers but also by prohibiting anticompetitive conduct on the part of business.

Proceeding in that way would fill the gap but would also have more far-reaching effects. For reasons of equal treatment, it would not be permissible to enact rules of competition law that are applicable only to market access cases. They have to cover purely domestic cases as well. The interstate clause of United States antitrust law and the member state trade clause of Articles 81 and 82 of the EC Treaty practically prohibit every infringement of competition law save for minor matters of local importance. If the WTO agreements were supplemented by rules of competition law in order to guarantee market access, those rules would therefore have an impact exceeding their purported objective.

Only the trade law approach could be confined to the problem of market access. Existing rules of trade law just need to be extended to business practices

10 Commission v. Ireland, Judgment of 24 November 1982, Case 249/81, E.C.R. 4005 (1982).

indirectly allowed by government deference. Within the broad limits defined by international law, target states would remain free to add remedies under their own competition law so as to cover foreign conduct they consider harmful to domestic competitors.

2.2 Antidumping

Protectionism has many lives. Once tariffs were abolished, non-tariff barriers abounded. The more progress was made in eliminating non-tariff barriers, the more frequent use was made of antidumping duties. More often than not the imposition of antidumping duties is not warranted at all but it is not challenged either because dumpers and competitors reach amicable arrangements at the expense of their customers. That is the stage reached today. Competition law, so the argument goes, can help to phase out antidumping duties by serving as a substitute remedy to the more serious situations of dumping.[11]

Eliminating antidumping would eliminate a bone of contention from the process of trade liberalization. Developing countries in particular have reason to complain about the indiscriminate application of that relic of protectionism. The question, however, again is whether treaty obligations of competition law are a necessary or indeed fitting instrument to comfort target states of dumping over the possible loss of their preferred measure of retaliation. There are two reasons that preclude an affirmative response:

(1) The competition law approach to dumping cases actually has not much comfort to offer. It would suppose to consider dumping a case of predatory pricing. The theory is that, during a first phase of dumping, the predator puts all competitors out of business and then, during a second phase, not only recovers the losses made during the first phase but proceeds to draw a monopolistic rent for an indefinite period of time. In today's open markets, would-be predators can never be really sure that there are no competitors from other regions of the world to enter the market and make life difficult to them once they start collecting monopolistic rents. In other words, it has rarely been possible to prove predatory pricing in the past and is likely to become virtually impossible to do so in the future.[12]

11 Matsushita, 'Reflections on Competition Policy Law in the Framework of the WTO', *Ann. Proc. Fordham Corp. L. Inst*. 31, 47 et seq. (1998).

12 See e.g. Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

(2) Most states, which notoriously suffer from genuine or perceived dumping, have prohibitory rules of competition law in place already and, if they have no such laws, they are free to adopt them on their own and hence need no urging by way of obligations of treaty law.

2.3 Export Cartels

The effects principle of international law permits states to apply their domestic competition law to foreign conduct by foreign companies if that conduct has direct, substantial and foreseeable domestic effects. Anticompetitive effects on any other territory are considered irrelevant, which allows domestic companies to engage in all sorts of restrictive practices that have an impact only on foreign export markets.

The exemption of export cartels from the general prohibition of cartels but translates the effects doctrine into an operative rule. Yet it also reveals a mercantilist rationale: principles meticulously observed with regard to domestic transactions are lightly abandoned if they harm just foreign customers. They may even be actively promoted to boost the profits of domestic exporters.

Under the soft law of the Restrictive Business Practices Code of 1980, all the member states of the United Nations actually pledged to apply their domestic law to such restrictive practices as "adversely affect international trade, and particularly the trade and the development of the developing countries."[13] Only Germany of all U.N. member states rescinded the exemption of export cartels. The change, however, did not make much difference since the application of domestic law continued to be confined to conduct with domestic effects, and it has now become obsolete as a result of Regulation 1/03 obliging member states to comply with EC law in all restrictive agreements and concerted practices cases.[14]

It is on that note that a "Development Round" of WTO trade negotiations could now wish to proceed and eventually demand expanding domestic jurisdiction to be expanded by substituting "effects on global trade" for "domestic effects."[15] In other words, the question is whether the members of the WTO

13 Section E.4 of the Code (note 5).

14 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1/1 (2003).

15 For an early proposal of that kind see Drexl, 'Trade-Related Restraints of Competition', in: R. Zäch (ed.), *Toward WTO Competition Rules, Bern: Staempfli* 1999, p. 225, 246.

should assume an obligation of international treaty law to apply their national competition laws to all "trade-related" restrictive business practices under a principle of universality. The problem, however, is less pressing than it seems.

In most cases, the trading takes place between states with competition laws in place at both ends. Thus, with regard to the trade among the 90 or so states that already have competition laws, every export cartel as seen from the exporting state is a cartel perfectly within the jurisdiction of the importing state under the effects doctrine according to its traditional meaning. United States, Canadian and Finish woodpulp producers in a well known EC case had nothing much to fear from their home states. The European Commission, however, was right to initiate proceedings against those alleged export cartels, or concerted practices, targeting the European market.[16]

Whenever an export cartel relates to states that do not, or not yet, have a competition law, to enact one should be the remedy of first choice. States that feel bothered by foreign export cartels can fend them off under their own laws. That point is valid also with regard to developing countries:

(1) The alternative of charging the home states of the members of the cartel with the prosecution is not likely to be effective. Implementation would cost them money, and might be *contre-cœur*.

(2) The home state of the members of an export cartel may even take the obligation too seriously and enforce its law on behalf of the foreign target state irrespective of its attitude in the particular case. Especially developing states might end up seeing incoming trade discouraged and, therefore, resent the loss of enforcement control.

To be sure, those developing states that wish to enact competition laws but lack the necessary expertise of making such laws and the administrative resources of enforcing them face a real problem. Relying for the necessary law-making and enforcement on the home states of an export cartel, however, is not the answer. Those governments might disagree among themselves, and none of them can be trusted to take up cases, and tailor remedies, so as to match the needs and policies of the respective target state.

Instead, legislative and administrative support may readily be provided by the OECD, the UNCTAD or friendly governments within the International Competition Network. Even setting up a supranational body seems preferable to abandoning all control in favor of a worldwide bureaucracy. Furthermore,

16 Åhlström v. Commission, Judgment of 27 September 1988, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, ECR 5193, 5254 (1988) – Woodpulp; quashed on the merits, Judgment of 31 March 1993, E.C.R. I-1307 (1993).

calculating overpayments for imported products on the basis of cartels that were actually uncovered under the present enforcement system hardly suggests to change that very system by resorting to WTO law-making.[17]

2.4 Conflicts of Jurisdiction

The discussion about export cartels was based on the assumption that there are cases of restrictive business practices that remain unchallenged by any enforcement authority. The more common complaint is that, given the transnationality of business conduct, two or more states take up one and the same matter and do not always reach matching conclusions. Business may indeed be exposed to multiple demands and even be confronted with conflicting orders. Global business needs global law, seems the obvious response.[18]

Except for mergers of a Community-wide dimension, not even supranational EC law eliminated the applicability of member state law,[19] and a recent bill to amend the German statute tries hard to exploit the room left for independent law-making on member state level.[20] Those who call for a global competition law usually hasten to add that they see dim prospects for its adoption in the near future.

Global uniformity of competition law, if combined with centralized adjudication, would indeed eliminate the risk of conflicts of jurisdiction, which, however, is neither feasible nor desirable. The real question is whether steps short of global uniformity, such as stating principles or *per se* rules on hard core cartels, would help solving or avoiding conflicts of jurisdiction. The answer may surprise. It is: no. A rapprochement of competition laws and policies does not preclude intense rows in particular cases.

In the past, conflicts of jurisdiction in the field of competition law have only occurred between states that basically subscribed to the same policy and operated fully-fledged competition laws. No instance of a confrontation between a First World capitalist state and a Second World socialist state or a Third

17 But see Evenett, 'Can Developing Economies Benefit from WTO Negotiations on Binding Disciplines for Hard Core Cartels?', 59 *Aussenwirtschaft* 215 (2003).

18 Cf. e.g. Fox, 'Toward World Antitrust and Market Access', 91 *Am. J. Int'l L. 1* (1997); Amato, 'International Antitrust: What Future?', 24 (4) *World Comp.* 451 (2001).

19 See supra note 14.

20 Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbschränkungen, Entwurf der Bundesregierung vom 26. Mai 2004, BR Drs. 441/04.

World developing state has ever been reported. Apparently, states hesitated to press their point where a reconciliation of positions seemed beyond reach. During the last two decades, most politicized conflicts occurred between the United States and the European Union whose policies and legal approaches are known to be quite close to each other. Enforcement authorities applying similar rules to different territories, however, are bound to reach different conclusions from time to time.[21]

As long as complete harmonization is unrealistic, business will have to observe different laws and mind the nuances. Arguably, even complete harmonization, if not accompanied by a centralization of decision-making, will not prevent agencies from construing identical laws differently whenever national interests are at stake. Cross-border business will, therefore, continue to involve higher transaction costs than domestic business. That regrettable fact, however, does not apply only to competition law but to tax law, environmental law, corporation law, and many other fields of law as well. This is not to say that costs of that kind cannot be diminished. In fact, multiple filings for exemptions of cartels or for clearances of mergers are conceivable, and the elaboration of drafts agreements to that effect is under way. Yet, that is a technical issue best left to the OECD or regional organizations.

2.5 Dispute Settlement

The merits of WTO dispute settlement, of course, are also offered to cross-border controversies over competition law.[22] While the adjudication of domestic competition law cases is in reasonably good shape, crossborder controversies sometimes degenerate into flurries of anti-suit injunctions and the like for want of an international arbiter. Nevertheless, the alternative of submitting such conflicts to WTO procedures has more cons than pros.

The usual WTO setting is that a member sees its trade interests impaired by certain measures, rule based or not, taken by another member and then files an application with a WTO panel to state the violation. By way of a second

21 Cadot, Grether & Cottier, 'Trade and Competition Policy', 34 (3) *J. World Trade* 1, 18 (2000).

22 Giardina & Beviglia Zampetti, 'Settling Competition–Related Disputes, The Arbitration Alternative in the WTO Framework', 31/6 *J. World Trade* 5 (1997).

application, it might have to file for an authorization to retaliate.[23] If all or some of the WTO members pledged to enact competition laws and if then one of those members failed to live up to its obligations, the case would indeed have to be handled in the traditional WTO manner. Most competition law cases, however, have a completely different setting.

Business enterprises ask for the judicial review of orders rendered by enforcement agencies or are involved in private litigation. In those cases, it would be for state-to-state arbitration to deal with the jurisdictional issue as a preliminary question. Proposals of that kind have been made many years ago.[24] They continue to be worth considering though not in the context of the WTO. There would be a role for WTO panels, however, in those cases where the applicable competition law falls short of GATT obligations since, unless those rules are made directly applicable, any failure to observe them would have to be ignored before national courts. Only afterwards could such shortcomings be taken up as an impairment case. As a result, the final character of national adjudication would then be likely to suffer.

There is another countervailing consideration: whatever is decided by a WTO panel is subject to the tit-for-tat system of trade law enforcement. A failure of State A to implement treaty obligations of competition law could be answered by State B through withholding trade benefits, and vice versa. Trade law obligations may be rendered unenforceable as a result of confirmed violations of treaty law obligations of competition law. WTO members would offer core elements of their economic law-making to constant scrutiny and schoolmastering. That prospect is less than encouraging, and sheds a dubious light on sanguine expectations as to the submission of competition law disputes to WTO dispute settlement.[25]

3. Competition of Competition Laws

Sustainable development is development that sustains and promotes itself. There is no better way of achieving developmental self-sustainability than by allowing

23 For a recent survey see D. Palmeter & P. Mavroidis, *Dispute Settlement in the World Trade Organization*, The Hague: Kluwer 1999.

24 Meessen, 'Antitrust Jurisdiction Under Customary International Law', 78 *Am. J. Int'l L.* 783, 809 et seq. (1984); reprinted in: Reisman (ed.), *Jurisdiction in International Law,* Brookfield: Ashgate 1999, p. 395; see also Meessen, 'Does International Law Matter?', 98 *Proc.Am.Soc.Int'l L.* forthcoming (2004).

25 Cf. also Tarullo, 'Norms and Institutions in Global Competition Policy', 94 *Am. J. Int'l L.* 478, 504 (2000); Kennedy (note 4), at p. 331.

market forces to reduce and eliminate inefficiencies. Governments lack the information and the sense of responsibility that every player in the market has when calculating the own chances and risks involved in day-to-day business operations. Hayek's famous tenet of competition as a "process of discovery"[26] should be heeded in particular by developing states, that is, by those states that can least afford losing the confidence of the international trade and investment community.

To adopt a competition law is not enough to produce sustainable development. Germany made that experience. Even before reunification with communist East Germany was formally consummated, the two former states agreed on extending the applicability of West German competition law to East Germany. In addition, however, private owners had to be put in control of the "means of production," which were all owned or controlled by the East German government. Decentralized private ownership was not enough either. Doing business through contract-making had to be reinvented after nearly 60 years of totalitarianism. East Germans had to learn how to operate in horizontal relationships rather than in the vertical structures of setting up a five-year plan and executing it to the letter. To avoid alienation, the living standard of the East German population had to be raised faster than their productivity so as to match West German standards, which may have delayed the necessary repair work regarding the run-down infrastructure in East Germany.

Competition laws, in other words, may not be adopted without regard to the legal and social environment and also to the mentality of the people operating under them. Competition laws have to be tailored to the particular needs, and political aspirations, of the particular people at a particular time. Furthermore, competition laws have to be internalized, or they would remain a dead letter. The resulting "competition culture" is most effective if it is made part of a national culture.[27] Competition policy, therefore, must be pursued at the national level, at least for the time being.[28]

26 F. Hayek, *Der Wettbewerb als Entdeckungsverfahren,* Kiel: Institut für Weltwirtschaft 1968.

27 Friedl Weiss, 'From World Trade Law to World Competition Law', 23 *Fordham Int'l L. J.* S250 (2000).

28 Chadha, Hoekman, Martin, Oyejide, Pangestu, Tussie & Zarrouk, Developing Countries and the Next Round of WTO Negotiations, in: Hoekman & Martin (eds.), *Developing Countries and the WTO: A Pro-active Agenda,* Oxford: Blackwell 2001, p. 1, 5.

If the more specific points discussed in the foregoing section did not precisely commend to squeeze competition policy into the Doha Development Agenda, one should draw comfort from the fact that internationally imposed rules of competition law are just second-best as compared with spontaneously adopted laws. Besides, there are two more points militating against making competition policy a WTO subject:

First of all, in the worldwide competition of systems, the fine-tuning of competition legislation to the particular needs of the particular state is an important parameter of the competition between governments for job-creating investment. That competition is another process of discovery. It would be contrary to the very idea of competition to stifle it by rigid rules of international treaty law. Even industrialized states with sophisticated systems of competition law have something to learn from the successes and failures of fellow states with regard to the making and enforcement of their respective competition laws. The open-ended competition of competition laws[29] has rendered a great service to competition law and sustainable development. It should be allowed to continue to do so.

The final point is whether the WTO should really be burdened with another function that requires regular arm-twisting so as to involve states outside the group of states committed already. To perform missionary work upon the faithful is a strange proposition to begin with, but not to make proselytes and to schoolmaster old and new believers would detract the WTO's attention from its real objective, which is to complete the dismantling of government imposed trade barriers in services, agriculture, and public procurement. Other urgent problems of trade law are not in short supply. Competition as an element of sustainable development and the WTO as an agent of trade liberalization therefore will be served best if, for the foreseeable future, competition and trade continue to be treated as an item for academic discussion rather than for political deal-making. By way of exception, some fine-tuning of GATT- and GATS-disciplines may prove necessary to preclude any discrimination through government tolerated restrictive business practices.

29 For the term and the concept see Meessen, Competition of Competition Laws, 10 *Nw. J. Int'l L. & Bus.* 17 (1989).

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10

FREE RIDERS, CLAIMS AND COUNTERMEASURES IN COMBATING CLIMATE CHANGE

Erik Denters

1. Introduction

This chapter explores legal consequences of free riding in the combat against climate change and the responsibilities of states that fail to ratify the United Nations Framework Convention on Climate Change (hereinafter UNFCCC) and the Kyoto Protocol. In addition, it considers the feasibility of imposing trade measures by industrialized parties to the Kyoto Protocol against industrialized non-parties. In particular it will discuss whether trade measures, because of non-ratification, meet the requirements of both Article III and Article XX of GATT. In the final analysis it is argued that the United States as a non-party to the Kyoto Protocol will be susceptible for claims and countermeasures.

In a letter of March 13, 2001, the then newly-elected government of the US clarified its views on the UNFCCC and of its Kyoto Protocol.[1] The letter expressed the US opposition to the Kyoto Protocol 'because it exempts 80 percent of the world, including major population centers such as China and

1 The objective of the UN Framework Convention on Climate Change is 'to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'. Under the Kyoto Protocol parties agreed on targets and methods to reach this objective. Under Art. 25 the Kyoto Protocol will come into force 90 days after being ratified by 55 governments, including developed countries, representing at least 55% of total emissions. For the text of the UNFCCC, the Kyoto Protocol and the latest record on ratifications see www.unfccc.int.

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India, from compliance, and would cause serious harm to the US economy'.[2] The 80 percent that was mentioned in the letter referred to the ratio in population, not to emissions of greenhouse gases[3] (hereinafter GHGs). By vote of the US Senate the protocol was also discarded because it was considered 'unfair and ineffective'. The 'ineffectiveness' argument hinted at scientific uncertainty surrounding the Kyoto Protocol.[4] In this respect the Senate relied on academic circles in the United States expressing considerable doubt that man-made GHG emissions themselves would cause climate change.[5] Both in political and academic circles there appears to be a fundamental dispute concerning the validity

2 The letter appeared under www.whitehouse.gov/news/releases/2001/03/20010314.html (9 Nov. 2001). In a resolution of 05/04/2001 the European Parliament called the new US stance 'appalling and provocative'. The argument brought forward by the US appears to ignore that states have responsibility to solve international problems even when international efforts may harm the national economy. In the same vein Colombia could argue that the 'war' against the cocaine industry must come to an end because so many Colombians are economically dependent on the growing of coca plants. However, under Articles 55 and 56 of the UN Charter the US is obliged to seek international cooperation to solve international economic problems. It may not refrain from cooperation because domestic economic costs are high. On the duty to co-operate for international development see Nico Schrijver, *Sovereignty over Natural Resources,* Cambridge University Press, 1997. 319ff.

3 'Make no mistake', the US share of world carbon dioxide (CO_2) emission from fuel combustion is 24 percent. China, with a 4 times larger population 13 percent. India produces 4 percent. Per capita in metric tons: US 19.7, China 2,7 India 1.1. Source: UNEP and UNFCCC, *Climate Change Information Kit*, available as http://www.unfccc.int/resource/iuckit/cckit2001en.pdf. The argument that Kyoto is unfair because major developing countries do not have substantial obligations is disputable. It gives developing countries merely a grace period until 2012 when Kyoto expires. After that new commitments must be negotiated. GHGs consists of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride. Excessive emissions of GHGs are considered to be a major cause of climate change.

4 'Senate Advises Against Emissions Treaty that Lets Developing Nations Pollute'. *Washington Post* of July 26, 1997.

5 Bruce Yandle and Stuart Buck, 'Bootleggers, Baptists, and the Global Warming Debate', *Harvard Environmental Law Review,* 2002, 177ff. 'Global Warming is a Myth', *The Wall Street Journal*, 4 December 1997. See also the Petition Project at http://www.oism.org/pproject/ the Frederick Seitz, Past President, National Academy of Sciences, US. Also The Heartland Institute at www.heartland.org strongly challenges the perceived dangers of global warming.

of scientific evidence that the emission targets agreed upon in the Kyoto Protocol would make a substantial difference.[6]

The validity of scientific evidence, however, is not the point to be discussed here. What is important is that the international community of States has agreed on an instrument that addresses climate change. This does not necessarily imply that the Kyoto-process is the only avenue towards combating climate change. The issue to be stressed is that international lawyers should not challenge the raison d'être of the UNFCCC and of the Kyoto Protocol. For law the authoritativeness of the evidence is decisive, not the value of the science of climate change itself. Other principles of international environmental law such as the precautionary approach[7] may give further guidance to legal argument.

The authoritativeness of evidence is addressed in both the UNFCCC and the Kyoto Protocol by accepting a right to challenge the conventional wisdoms of climate change science. Such wisdoms are usually publicized by the Intergovernmental Panel on Climate Change[8] (hereinafter IPCC). Thus, the UNFCCC does not stipulate that the IPCC should be the only source of academic research. Other relevant scientific bodies may be consulted.[9] Moreover,

6 Serious doubts can be raised on the independence of research in various critical US publications on the UNFCCC and Kyoto Protocol. This point is also raised by Media Transparency, a US based NGO. E.g. one of the authors of the Harvard Environmental Law Review publication (Bruce Yandle in note 5) is senior associate at the Political Economy Research Center (PERC). PERC does not publish on its website the donations it receives, but Media Transparent does. PERC received substantial donations inter alia from the Sarah Scaife Foundation (financed by the Mellon industrial, oil and banking fortune) and John M. Olin Foundation, Inc. (New York-based, which grew out of a family manufacturing business of chemicals and munitions). It is unlikely that under such circumstances authors would fundamentally disagree with the ideas of the energy industry on climate change.

7 For a study on state practice and precautionary principle see Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law,* The Hague: Kluwer Law International, 2002. Tim O'Riordan, James Cameron & Andrew Jordan (eds.), *Reinterpreting the precautionary principle*, London: Cameron May, 2001.

8 The Intergovernmental Panel on Climate Change (IPCC) is an independent body founded under the auspices of the World Meteorological Organization (WMO) and UNEP. It assesses the scientific literature and provides vital scientific information to the climate change process. The current structure of the IPCC consists of three Working Groups: Working Group I addresses the science of climate change; Working Group II deals with impacts, vulnerability and adaptation; and Working Group III with mitigation.

9 Art. 21 UNFCCC.

the scientific presumptions accepted in the UNFCCC and Kyoto Protocol may be challenged. The Kyoto Protocol even requires that:[10]

> 'The Conference of the Parties serving as the meeting of the Parties to this Protocol shall periodically review this Protocol in the light of the best available scientific information and assessments on climate change and its impacts, as well as relevant technical, social and economic information (...)'

Accordingly, there are opportunities to challenge the conventional wisdoms of climate change science and to seek the 'best available scientific information'. It is of vital importance that the parties are willing to consider a wide array of sources of scientific evidence.

The US position against the Kyoto Protocol created an entirely new situation for parties that *did* ratify the Protocol. A practical consequence is that the objective of globally stabilizing GHG emissions may not be reached. This issue is beyond the scope of the present contribution. More relevant here are the consequences that affect the legal position of parties. Firstly, the failure of the US to accept the obligations of the Kyoto Protocol may result in future legal actions against the US. By not ratifying the Kyoto Protocol the US fails to join the international consensus on measures against climate change. A legal consequence of such failure might be that, within the framework of state responsibility, the US may be open to claims for the compensation of damages. Indeed, it is well established that an international court or tribunal which has jurisdiction with respect to a claim of state responsibility has, inclusive of this jurisdiction, the power to award compensation for damages suffered.[11]

Secondly, the US as a 'free rider'[12] will gain a competitive advantage, as it may not have to face the costs that burden other industrialized parties to the Kyoto Protocol. Increased expenses of industrial production will affect competition between states when these costs are borne unevenly by the major GHG

10 Cf. Art. 4 para. 2(c) and (d) UNFCCC and Art. 9 Kyoto Protocol.

11 Cf. ILC Commentary on Art. 36 of the Articles on State Responsibility. Reproduced in James Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries,* Cambridge University Press, 2002, 218-230.

12 Free-riding in international relations may be politically objectionable but is not necessarily unlawful. In the end a sovereign state is not bound by a rule of international law when it explicitly rejects the rule (unless such rule is a peremptory norm of international law). It may reject a rule by not ratifying a treaty or behave as a 'persistent objector'. For a discussion on free riding in international law see Jonathan I. Charney, 'Universal International Law', 87 AJIL (1993) 529.

producing states. Thus, the environmental costs of steel produced in a party to the Kyoto Protocol will be higher than steel produced in a non-party. Industrialized parties to the Kyoto Protocol[13] may argue that environmental free-riding should not result in competitive advantage. Whereas the US may benefit domestically from its free-riding, there is no reason why it should also have an *international* competitive advantage. In the context of the WTO, industrialized parties to the Kyoto Protocol may want to impose measures to offset competitive disadvantages. For that reason industrial lobbies have pressed the European Commission to water down rules for trading credits for the right to emit GHGs because EU-legislation[14] could put European business at a disadvantage *vis-à-vis* their US competitors.[15]

2. The context: costs and benefits of the Kyoto Protocol

The UNFCCC is a unique treaty in the sense that it addresses the emission of a substance that is inherent to economic life in all States, regardless of their level of development. As a multitude of economic activities produce GHGs, there is no particular group of producers or consumers that can be addressed. Virtually all individuals, corporate entities and other organizations use fossil fuels because of transport, heating, lighting or other activities. In this sense the UNFCCC is fundamentally different from the Vienna Convention for the Protection of the Ozone Layer and subsequent Protocols which sought to reduce emissions of CFCs. In contrast with GHG producers, the number of CFC producers is limited and easily identified. Second, the UNFCCC is currently

13 That is Parties mentioned in Annex I of the UNFCCC.

14 See doc. COM(2001) 581 final 2001/0245 (COD) of the Commission: 'Proposal for a Directive of the European Parliament and of the Council for the establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC'. The Commission made this proposal after business organisations and NGOs had given the opportunity to comment on the Commission's Green Paper on Greenhouse Gas Emissions trading within the European Union; Brussels, 8.3.2000 COM(2000) 87 final. Documents appear at http://europa.eu.int/comm/environment/docum/0087_en.htm.

15 This point was addressed in a resolution of the Parliament in EP Doc. B5-0473/2001 of 5 July 2001. 'Considers that, within supranational structures (in particular the World Trade Organisation), the European Union should launch initiatives which are designed to prevent countries which do not ratify the Kyoto Protocol from obtaining unfair competitive advantages, particularly where energy products are concerned'.

the most significant document for the promotion of sustainable development:[16] it attempts to balance developmental and environmental objectives and promotes intergenerational equity.[17]

The Kyoto Protocol implements the UNFCCC and creates performance criteria in terms of GHG emissions. Annex I parties to the Kyoto Protocol will have three market-based international mechanisms available to them to meet emission targets.[18] Parties may trade in emissions, 'implement jointly' or use the 'clean development mechanism'.[19] Using one of these mechanisms will create costs for the Annex 1 parties. Thereby, the Kyoto Protocol becomes a document that will have considerable consequences for economic performance in industrialized states. GHG which could previously be emitted freely is now subject to limitations under the Kyoto Protocol. As explained in the statement of the US administration, the economic costs involved in implementing the Kyoto Protocol appeared to be a major impediment for US ratification. A 1997 study of the Wharton Economic Forecasting Associates found that for the US:[20]

> 'under the Kyoto Protocol's carbon reduction regime, real GDP would be 3.2% below the baseline 2010 estimate, and 2.0% below the 2020 estimate. These reductions amount to a huge economic impact. The lost GDP, just in the year 2010, is equal to 300 billion 1992 dollars, approximately equal to total public and private expenditures on elementary and secondary education.
> (…)
> On a per household basis, the cost of signing the Kyoto Protocol results in an average real GDP loss in 2010 of $2,728 per household. While all consumers would feel the impact, lower income families would feel the impact of lost income and sharply higher prices for basic necessities.'

16 Common but differentiated responsibilities, the precautionary approach and other principles pertaining to sustainable development are also incorporated in the Convention.

17 For a general survey on the law of air and atmosphere see David Hunter etc. (eds.), *International Environmental Law and Policy,* Foundation Press, 1998, 503-676.

18 Apart from domestic action that shall constitute 'a significant element of the effort made by each party included in Annex I'. See decision -/CP.7 on Mechanisms of the Marrakesh Accords available at www.unfccc.int (March 2003).

19 For an explanation see UNEP and UNFCCC, Climate Change Information Kit, available as http://www.unfccc.de/resource/iuckit/cckit2001en.pdf. Also: http://unfccc.int/issues/mechanisms.html.

20 Global Warming: The High Cost of the Kyoto Protocol National and State Impacts, 1998, p.37. Available at http://geosci.uchicago.edu/~archer/PS134/ntl98a.pdf. Committee on Science of the US House of Representatives, *What Does the Kyoto Protocol Mean for US Energy Markets and the US Economy?*

In contrast to the anticipated short-term costs of implementation there may be long-term benefits. The overriding benefit will, of course, be a lesser distortion of the earth climate; this will benefit 'humankind' and may save future generations from ecological disaster.[21] Apart from protecting the interests of humankind, a specified group of states may have to face some astounding consequences of climate change. These consequences, not addressed by the US administration, may be felt particularly in geographically vulnerable states such as small island states and states that are barely above sea level.[22] Estimates reveal that some island states like the Maldives will disappear within 50 years.[23] The World Resources Institute argues that the real costs and benefits are difficult to calculate. Indeed, what are the benefits of avoiding 'coastal inundation from rising sea levels, disruption of rainfall and therefore water use patterns, agricultural effects due to heat stress, and ecosystem damage such as loss of biodiversity and habitat'.[24] What is the benefit expressed in monetary terms of saving a species, water resource or nation-state?

21 Humankind is mentioned in the Preamble of the UNFCCC as a legal entity that derives rights from the treaty. For a comment on the decline of the notion of (hu)mankind see N.J. Schrijver 'De teloorgang van het Gemeenschappelijk Erfgoed der Mensheid' [The withering away of the common heritage of mankind], 48 *Ars Aequi* (1999) 405-412.

22 The Alliance of Small Island States (AOSIS) is an ad hoc coalition of low-lying and island countries. These countries are particularly vulnerable to sea-level rise and share common positions on climate change. The 42 members and observers are American Samoa, Antigua and Barbuda, Bahamas, Barbados, Belize, Cape Verde, Comoros, Cook Islands, Cuba, Cyprus, Dominica, Federated States of Micronesia, Fiji, Grenada, Guam, Guinea-Bissau, Guyana, Jamaica, Kiribati, Maldives, Malta, Marshall Islands, Mauritius, Nauru, Netherlands Antilles, Niue, Palau, Papua New Guinea, Samoa, Sao Tome and Principe, Seychelles, Singapore, Solomon Islands, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Tonga, Trinidad and Tobago, Tuvalu, US Virgin Islands, and Vanuatu. AOSIS was established as a negotiating group for the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change in 1991. AOSIS is guided by the following principles: the principle of preventive action; the precautionary principle;· the polluter pays principle and State responsibility; duty to cooperate; equity; the principle of common but differentiated responsibility; and commitment to binding energy conservation and the development of renewal energy sources. http://www.sidsnet.org/aosis/background.html (September 2002).

23 The long-term costs have been extensively described by the Intergovernmental Panel on Climate Change. Reports of the IPCC are published at www.ipcc.ch. (October 2002)

24 World Resources Institute, in: David Hunter etc. (eds.), *International Environmental Law and Policy,* New York: Foundation Press, 1998, 629. Also available at http://www.wri.org/wr-96-97/ac_txt6.html (October 2002)

3. The UNFCCC as an expression of consent

A decision not to take part in the UNFCCC may have considerable legal consequences for the future. In the framework of state responsibility a State may be held accountable for acts which are a violation of international obligations and can be attributed to that State. The first question to be discussed therefore is whether under customary international law an obligation exists to take action against climate change. Are states obliged to reduce the emission of GHGs that cause climate change?

A principle of international law is the obligation not to cause environmental damage to the environment of other States or areas beyond the limits of national jurisdiction. This principle of law was confirmed in arbitral decisions, and adopted in the Stockholm and Rio Declarations of 1972 and 1992. In the Trail Smelter Arbitration[25] it was argued that the harm would be a case of serious consequence and the injury is established by clear and convincing evidence. Violations of this rule could give rise to claims for compensation of damage suffered by the injured states.[26] More recently, the ICJ confirmed this rule: 'the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now a part of the corpus of international law relating to the environment'.[27] It is important to note that activities themselves may be perfectly legal under international law; the extraterritorial consequences constitute the illegality if these affect the enjoyment of sovereign rights of third states.

The question may be raised how the Trail Smelter principle could affect the legal position of industrialized countries that make disproportionate use of fossil fuels and thereby create conditions that would cause *serious* damage to

25 American-Canadian Joint Commission, Arbitral Tribunal, 1938 and 1941, United Nations *Reports of International Arbitral Awards,* vol.3, 1905.

26 The PCIJ set the international standard in the Chorzów Case: 'Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value, which a restitution in kind would bear; (...) such are the principles which should serve to determine the amount of compensation due for an act contrary to international law'. Factory at Chorzów, Merits, 1928, P.C.I.J. Series A. No. 17, p. 47. This principle is incorporated in the Articles on State Responsibility as codified by the ILC. For a comment see Crawford, op. cit. note 11, 218-219.

27 'Legality of the Threat or Use of Nuclear Weapons', ICJ Report 1996, 26. See on the duty to compensate for the damage caused by an international wrongful act: Art. 36 of the ILC Articles on State Responsibility.

vulnerable states. *Prima facie* such behaviour constitutes a violation and gives rise to responsibility but, of course, this merits further research. If the causal relation between injury and excessive use of fossil fuel could be revealed by clear and convincing evidence, an obligation may arise to compensate for the ensuing damage.[28]

Whatever finding follows from the considerations above, for the determination of responsibility a dividing line may be drawn between parties and non-parties to the Kyoto Protocol. In this context the Kyoto Protocol as a legal instrument becomes relevant. The Protocol is nothing less than an expression of agreement that parties find specified levels of GHG emissions acceptable. Parties apparently agree that the balance found in the Kyoto Protocol is compatible with the principle of sustainable development. By constituting a consensus the Kyoto Protocol will shield industrialized parties from future claims for compensation. Accordingly, the Kyoto Protocol can be considered a 'valid consent by a State to the commission of a given act by another State'.[29] Such 'consent' precludes wrongfulness and thereby international responsibility.[30] Non-parties to the Kyoto Protocol are not part of this consensus and therefore not protected against future claims. In that sense the Kyoto Protocol-process is a trade off: industrialized states commit themselves to reduce GHG-emissions and apply *inter alia* market based international mechanisms for sharing the burden. The ensuing stabilisation of greenhouse gas concentrations will be beneficial for 'mankind' and geographically vulnerable parties. In a sense, therefore, ratification of the Kyoto Protocol also implies a waiver of claims by affected parties. The logic of the state responsibility implies that 'consent' waives claims. It is therefore not surprising that some parties to the Kyoto Protocol have made a reservation stating that: 'The Government (...) declares its understanding that signature and subsequent ratification of the Kyoto Protocol shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of the climate change and that no provision in the Protocol can be interpreted as derogating from principles of general international law'.[31] Although poorly drafted,[32] the re-

28 Gabcikovo-Nagymaros Project case, ICJ Reports, 1997, 81 para. 152

29 Art. 20 of the ILC Articles on State Responsibility.

30 For ILC comment on consent as codified in the Articles on State Responsibility see op. cit. note 11, 163.

31 Reservation made by the Cook Islands, Nauru and Kiribati. For the text see www.unfccc.int.

32 It would have been better if the reservation had stipulated that ratification should not imply 'consent' in the sense of Art. 20 of the ILC Articles on State Responsibility.

servation may preserve claims for compensation by parties to the Kyoto Protocol.

A tentative conclusion to be drawn, therefore, is that legal claims for damages against non-Kyoto parties are likely to be more successful than claims against Kyoto parties. Whether such claims succeed will depend on the ability of claimants to demonstrate the causal link – by 'clear and convincing evidence' – between excessive production of GHGs and the injury. In the end this will depend on the scientific knowledge available. Although there continues to be uncertainty in scientific climate change models, scientists may be able to produce conclusive evidence in the near future.

A sceptical view may be that legitimate claims are not always enforceable. In the real world claims against powerful non-parties (such as the US) may be merely 'academic'. This argument bluntly implies that international power politics will prevail over the international rule of law. This point has some weight but the political implications of lawful claims should not be underestimated. International leadership comes with moral authority. Ultimately, the US should also realize that desired international cooperation (on climate change but also on the fight against international terrorism, drug trafficking) may benefit all, even the powerful.

4. The interface between trade measures and environmental rules

A second consequence of non-ratification relates to trade measures of parties to the Kyoto Protocol to safeguard international competitiveness. Simply put: industrial entities operating in Kyoto Protocol parties will demand trade related measures to offset competitive disadvantages because of their higher costs of production. Such measures fall *prima facie* within the jurisdiction of the WTO and must be considered in the light of the GATT and relevant case law.[33] While there is no fully crystallized interpretation, the current WTO practice appears to discern three modalities of measures for environmental reasons.[34]

33 A vast amount of literature has been published on the relationship between trade law and environmental law. A search for 'WTO and Environment' in the Peace Palace electronic library produces over 800 publications. Some recent general overviews are: Edith Brown Weiss, John Jackson, Reconciling Environment and Trade, Ardsley: Transnational Publishers, 2001. P.K. Rao, *The World Trade Organisation and the Environment*, Basingstoke: MacMillan Press, 2000.

34 Bernard Jansen and Maurits Lugard, 'Some Considerations on Trade Barriers Erected for non-economic reasons and WTO Obligations', 2 JIEL (1999) no.3, 530-536.

First, *unilateral measures strictly applied within a state's jurisdiction*. These measures may obstruct trade because the result may be that products cannot be imported. Examples are asbestos, hormone-treated meat, pesticides and other dangerous chemicals. These restrictions are lawful under GATT as long as they equally apply to domestic like products and do not violate the non-discrimination clause of Article III of GATT.

A second category is *unilateral measures with the objective to influence environmental policies extraterritorially*. These measures may be directed to protect the global commons or particular species such as dolphins or turtles. In this case trade restrictions are used as *reprisals* in order to force third states to change their policy towards a desired behaviour.[35] In case a third state is unwilling to adapt its policy, restrictions on the import of a product may be considered. The Appellate Body in 'Import Prohibition of Certain Shrimp and Shrimp Products'[36] (hereinafter: Shrimps Case), to be discussed below, appeared to accept unilateral restrictions, albeit under strict conditions only.

A third category is *measures legitimised by international law*; these may have effects both territorially and extraterritorially. Examples are the Montreal Protocol on Substances that Deplete the Ozone Layer[37] or CITES[38] that explicitly authorizes restrictions in trade in endangered species. The Appellate Body in the Shrimps Case hinted that internationally negotiated agreements are *prima facie* acceptable justifications for measures under GATT. However, restrictions based on international law may be complicated by the fact that not all states are party to a multilateral environmental agreement (hereinafter MEA). Some states may have opted out of a MEA because they believe the environment does not need protection or because they consider the economic costs too high. The Kyoto Protocol fits under this category. Major conflicts between the trading nations may come to the surface and put a strain on trade liberalisation between parties and non-parties to the Kyoto Protocol. Kyoto Protocol parties may feel compelled to 'measures relating to the conservation

35 Reprisals or countermeasures 'involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an international wrongful act of the State against which they are taken'. Cf. Crawford, op. cit. note 11, 282. Indeed, the law of reprisals may offer some scope for trade measures if it can be shown that there is a legal obligation to protect endangered species such as dolphins and turtles.

36 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WTO doc. WT/DS58/AB/R of 12 October 1998.

37 September 16, 1987, 26 ILM 1550.

38 March 3, 1973, 993 UNTS 342.

of exhaustible natural resources'.[39] Such measures may include border tax adjustment to offset the competitive disadvantages of domestic producers. The implementation of such adjustments is technically complicated and may easily give rise to disputes.

5. Trade and environment provisions in the WTO and under the UNFCCC

Since the landmark-decision of the Appellate Body in the Shrimps Case the concept of sustainable development has been given substance in the WTO. The Appellate Body, when considering the balance between primary WTO objectives and environmental concerns, has found that incorporation of 'sustainable development' in WTO's preamble gives 'colour, texture and shading'[40] to interpretations of the GATT. Thereby, Article XX, the relevant key provision of GATT, is amplified in a way that makes GATT 'a little greener'. Until the Shrimps Case a consistent pattern of dispute settlement findings against unilateral trade related environmental measures existed because these measures were not 'necessary' for achieving environmental objectives.[41] Other arguments were also brought forward. Measures were: discriminatory *vis-à-vis* domestic like products, not made effective in conjunction with restrictions on domestic production, not primarily aimed at conservation or ignoring alternatives to conservation. The Shrimps Case has also spurred renewed discussions within the policy-making bodies of the WTO. Indeed it has been suggested that negotiated compromise should be preferred to confrontational litigation.[42]

The discussion on the relationship between trade and environment focuses on the reach of Article XX of the GATT which allows for the adoption or trade measures for environmental reasons without clearly stating which kind of

39 Art. XX(g) GATT

40 Para. 153.

41 E.U. Petersmann, The GATT/WTO Dispute Settlement System. International Law, International Organisation and Dispute Settlement, London and Boston: Kluwer Law International, 1997. Chapter 3. Update in: Richard L. Revezs, Philippe Sands and Richard B. Stewart, *Environmental Law, The Economy and Sustainable Development*, Cambridge University Press, 2000, 127ff.

42 Sylvia Ostry, WTO Secretariat, *Trade, Development and the Environment,* Dordrecht: Kluwer Law International, 2000, 46.

measures could be acceptable. *Prima facie,* measures may range from outright quantitative restrictions to import charges.[43]

Article XX GATT uses the following wording when it allows for exceptions for GATT's general rules:

> 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, *or a disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures (…)
> (b) necessary to protect human, animal of plant life or health
> (…)
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.' (emphasis added)

Whereas the WTO allows for trade measures for the promotion of sustainable development, the UNFCCC also refers to trade restrictions by inclusion of a provision parallel to Article XX GATT. Part of the wording of Article 3 paragraph 5 of the UNFCCC was clearly borrowed from Article XX GATT:

> 'The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of *arbitrary or unjustifiable discrimination or a disguised restriction on international trade*.' (emphasis added)

The introductory paragraph of Article XX, or its *chapeau*, has two dimensions. First, application of the exceptions may cut deep in the GATT's general rules because of its firm language: '*nothing* in this Agreement shall be construed to prevent the adoption (…)'. Certainly this language is stronger than e.g. 'this Agreement shall not be construed to prevent the adoption (...)'. Second, the Appellate Body held in the Shrimps Case that the paragraphs of Article XX

43 In general, however, quantitative controls would fail the proportionality test and frustrate the object and purpose of the WTO. From an economic perspective quantitative restrictions are less attractive than other tools available under GATT such as taxes, subsidies or tariffs. GATT secretariat, Taxes and Charges for Environmental Purposes, 1997 (doc. 97-1913). Available under http://docsonline.wto.org (21 October 2002).

include *limited and conditional* exceptions from the substantive obligations contained in the other provisions of the GATT 1994. This view is also supported by the *travaux preparatoires*.[44] The Appellate Body concludes:

> 'Thus, the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947.'

The identical wording of the quoted provisions suggests that the drafters of the UNFCCC had already in mind the relationship between the WTO and the UNFCCC.[45] The provisions are mutually supportive and create a specific rule that can be applied to questions on trade and environment. It seems reasonable to make an interpretation of the wording of the chapeau of Article XX GATT and Article 3 paragraph 5 UNFCCC in an analogous manner. In the Shrimps Case the Appellate Body interpreted the chapeau of Articles XX in a way that can also be used for the interpretation of Article 3 paragraph 5 UNFCCC.

The Appellate Body expressed the following views. Generally, the prohibition of *arbitrary or unjustifiable discrimination or a disguised restriction on international trade* reflects an obligation that must be applied in good faith and creates a balance between the rights of a WTO-member and its obligations under the GATT. A *justifiable discrimination* must meet two requirements at least. First, the Appellate Body rejects a straightforward extraterritorial application of domestic environmental law. This does not mean that all unilaterally required measures must be considered unjustifiable. The Appellate Body considers unilateral actions 'unjustifiable discrimination' if such measures require that all exporting states adopt essentially the same policy as the state imposing the measure. What appears to be required is a sufficient degree of flexibility when imposing measures upon third state. An inquiry into the appropriateness of the measures is therefore necessary, taking into account the conditions in the exporting countries. States should also be given an adequate opportunity to respond to environmental concerns. These elements, inquiry and flexibility,

44 Shrimp case para. 157.

45 The same wording can also be found in Principle 12 of the Rio Declaration.

should enable WTO-members to adapt to the measures 'taking into consideration different conditions which may occur in their territories'.[46]

A second element that made measures unjustifiable is the absence of 'across the board negotiations with the objective of concluding bilateral or multilateral agreements'. The Appellate Body indicates that at least a serious attempt must be made. A serious effort could be adequate even if an agreement may not be reached. Accordingly, before imposing trade measures, states should make an extra effort by having prior recourse to diplomacy as an instrument of environmental protection policy. If properly understood, States that were given the opportunity to negotiate an agreement but decided to opt out, are left in a weaker legal position when confronted with unilateral acts for the conservation of exhaustible natural resources.

On the question of *arbitrary discrimination* the Appellate Body refers to procedural requirements in case of unilateral measures. In the Shrimp case the Appellate Body argued that when the US took its measures 'there was no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it'.[47] Moreover, countries that were affected by the measures were not or poorly informed. The procedure applied by the US was short of 'basic fairness and due process'.[48] It this respect the Appellate Body also referred to Article X of GATT 1994 on Publication and Administration of Trade Regulations.

Taking into consideration the findings of the Appellate Body, some interesting conclusions can be drawn concerning the Kyoto Protocol. First, trade measures against a non-party to the Kyoto Protocol party cannot be taken without applying a sufficient degree of flexibility. Thus, if a State decides not to ratify the Protocol because it has chosen another way to reduce GHG-emissions, e.g. through domestic legislation, then this must be considered carefully. What counts is the result, not the method by which the result is achieved. As a consequence, domestic US measures that are equivalent to its original commitments under the Kyoto Protocol, shall not give rise to trade measures. Second, the extensive negotiations preceding the Kyoto Protocol gave

46 Shrimps case, para. 73. This finding has alarmed particularly developing WTO members. They fear an increased resort to unilateral measures and have urged for negotiated clarifications in the WTO Committee on Trade and Environment. Cf. Sabrina Shaw and Risa Schwartz, 'Trade and Environment in the WTO – State of Play', 36 *Journal of World Trade* 1, 2002, 129-154.

47 Ibid.

48 Ibid. para. 74.

ample opportunity to the US to opt in to the Kyoto Protocol. A 'serious attempt' was made to conclude the Kyoto Protocol and an agreement was even reached. In the end the US decided to opt out. Without any doubt the requirements that the Appellate Body mentioned in the Shrimps Case have been met. Third, when trade measures are considered against non-parties to the Kyoto Protocol, due care must be given to the consultation process prior to the imposition of such measures.

6. Responses under the WTO – Subsidies and Taxes

Measures may be considered to offset competitive disadvantages as a result of the implementation of the Kyoto Protocol. First, a party could consider subsidies for clean technologies that contribute to the objectives of the Kyoto Protocol. However, this may give rise to disputes under GATT when the sector benefiting from subsidies is open to foreign trade. Generally, Article 3.1 of the Agreement on Subsidies and Countervailing Measures prohibits government subsidies which are 'contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance' and 'subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods'. This means that direct subsidies to low-GHG industry or subsidies made available for the use of domestic low carbon-emitting products over foreign high carbon-emitting like products, would *prima facie* be incompatible with GATT.[49] Accordingly, a subsidy may be challenged whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice.[50] The Agreement only allows for financial assistance to promote adaptation of existing facilities to new environmental requirements imposed by law provided it concerns a one-time non-recurring measure and is limited to 20 percent of the costs of adaptation.[51] While this may help industry to adjust to the new situation resulting from the Kyoto Protocol, it could not possibly take away any competitive disadvantage

49 It is unclear to what extent general exception clauses such as under Art. XX GATT apply to the text of Annex 1A including, inter alia, the 'Subsidies and Countervailing Measures Agreement'. John H. Jackson, *The World Trading System,* Cambridge etc.: MIT Press, 2000, p. 55.

50 Art. 7.1 Subsidies and Countervailing Measures Agreement.

51 Art. 8.2(c) Subsidies and Countervailing Measures Agreement.

in the long run. Offering subsidies is therefore an unattractive measure for offsetting competitive disadvantages. It is costly and the compatibility with the Subsidies and Countervailing Measures Agreement is questionable.

A second approach would involve the imposition of charges or taxes on imports of products from non-parties to the Kyoto Protocol (apart from duties following from tariff schedules). Charges to offset competitive disadvantages as a result of the implementation of the Kyoto Protocol must be compatible with the non-discrimination clause of Article III(2):

> 'The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.(…)'

Panels have confirmed that Article III(2) only prohibited discriminatory or protective tax burdens on imported products. What mattered was 'whether the application of the different taxation methods actually had a discriminatory of protective effect against imported products'.[52] Border taxes on imported products in excess of taxes borne by domestic products, are therefore deemed discriminatory. Consequently, when domestic products are charged for GHG emissions, than it seems acceptable that imported like products will be taxed up to an equal amount. The test of Article III(2) is therefore the non-discriminatory character of a border tax; not the method by which it is imposed.

The admissibility of border taxes for environmental reasons was discussed in the 1987 Panel Report on 'United States – Taxes on Petroleum and Certain Imported Substances'.[53] In this report an excise tax on imported products was imposed by the US at a higher rate than on like products and therefore the tax was rejected by the panel. The EU argued that the tax could not be imposed by the US as environmental problems of chemical substances occurred only during the production phase. Therefore, the EU held that the tax imposed by the US on certain chemicals should not be eligible for border tax adjustment because it was designed to tax polluting activities *within the territory* of the US only. According to the principle 'the polluter pays' the polluter already paid.

52 Panel Report on Japan – Customs, Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, 1987, BISD, 34th Suppl., 82 paras. 5.8-5.9.

53 Report of the Panel adopted on 17 June 1987, (L/6175 – 34S/136). Through the 'United States Superfund Amendments and Reauthorisation Act of 1986'. The objective of the Act was to clean up hazardous waste sites and deal with public health programmes caused by hazardous wastes.

The panel also made some notable comments on the irrelevance of the motives for a border tax:[54]

> 'the tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products; they do not distinguish between taxes with different policy purposes. Whether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of the eligibility of a tax for border tax adjustment. For these reasons, the Panel concluded that the tax on certain chemicals, being a tax directly imposed on products, was eligible for border tax adjustment independent of the purpose it served. The Panel therefore did not examine whether the tax on chemicals served environmental purposes and, if so, whether a border tax adjustment would be consistent with these purposes.

This finding appears to accept that environmental concerns are irrelevant when a non-discriminatory border tax adjustment is imposed. Apparently the test of Article XX is not required for border tax adjustments. This means that a border tax with the objective to restore competitiveness does not need the cloth of Article XX to be justifiable. Such tax may be imposed outright, taking into account the non-discrimination clause in Article III GATT.

There are, however, some important caveats. A condition for border taxes is that these can only be accepted if they are equivalent to taxes *directly* levied on domestic products. Thus sales taxes or value added taxes may be matched by border taxes, but not e.g. social security charges that appear on the employers payroll. Hence, there must be a *direct link* between the tax and the product.[55] Having said this, a key issue is whether the 'market based international mechanisms', as anticipated in the Kyoto Protocol, can be considered a direct tax. Indeed, this can give rise to disputes and settling these would put a heavy burden on the WTO Dispute Settlement Body. If the 'market based international mechanisms' is insufficiently linked to the product, Article XX may again become relevant. Finally, it may also be difficult to assess the costs associated with the 'market based international mechanisms' and, as a consequence, the level of an equivalent border tax will be difficult to calculate.

WTO practice on border tax adjustments could be summarized as follows. Border taxes are acceptable under Article III(2). Neither method of imposition nor motive of the tax seems to have troubled dispute settlement bodies. What

54 BISD 34S/136, para. 5.3.3-5.2.4.
55 CITES. op.cit. note 38.

counts is the "actual effect" of a border tax. When in fact discriminatory or protective, the border tax may be unacceptable.

7. Concluding remarks

The preamble of the UNFCCC clarifies the need for co-operation by all countries to address climate change, taking into account common but differentiated responsibilities and social and economic conditions. The preamble also reiterates the principle that states have responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. By insertion of the latter principle, it is difficult to conclude otherwise than that rules on state responsibility are applicable in the area of climate change. Consequently, non-parties to the Kyoto Protocol are susceptible to future claims for damages. States that are particularly affected by the consequences of climate change may consider claims against states that do not join the consensus established by the Kyoto Protocol. The relevance of international rules on liability and compensation for adverse effects of transborder environmental damage was also confirmed in the Rio Declaration.[56]

Moreover, the chapeau of Article XX GATT and Article 3 paragraph 5 UNFCCC on the relationship between trade and environmental rules demonstrate that trade measures against environmental free-riders are acceptable when not applied 'arbitrary or unjustifiable'. The Rio Declaration also accepts the 'arbitrary or unjustifiable' formula.[57] It is likely that the EC as party to the Kyoto Protocol may legitimately impose border taxes on imports from the US should the US pursue a policy of clear defiance of the substance of the Kyoto

56 Rio Declaration (1992) 'Principle 13: States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction'.

57 Rio Declaration (1992), 'Principle 12. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.'

Protocol. It would be a welcome bonus when the proceeds of border taxes were to be used for promoting the objectives of the UNFCC and Kyoto Protocol.

Another objective of border taxes is restoring competitiveness between parties and non-parties to the Kyoto Protocol. For this purpose it is inappropriate to invoke Article XX of the GATT as this was not written for the promotion of competitiveness. In the practice of the GATT there is however no need for a justification of a border tax to the extent that the tax is equivalent to taxes or charges directly levied on like domestic products.

The conclusion, finally, is that non-ratification of the Kyoto Protocol creates not only political but also considerable legal consequences. A recalcitrant state may face immediate costs – trade measures in the form of border taxes – and future costs – claims for compensation under the rule *sic utere tuo ut alienum non laedus*.[58] Failure to ratify the Kyoto Protocol may incur higher risks and costs than initially anticipated.

58 This means: do not use your property to harm another.

11

THE ROLE OF "SUSTAINABILITY LABELLING" IN THE INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT[1]

Mar Campins-Eritja and Joyeeta Gupta

Abstract

This chapter examines the developments in the area of sustainability labelling and certification schemes in the context of the evolving law of sustainable development. It argues that sustainable development has become a popular concept in the policy world and is becoming not just a legal principle but reflects a combination of a number of principles in an area that can be referred to as the law of sustainable development. This law, of course, can only provide the basic minimum common standards for international cooperation since this is economically efficient, politically acceptable and respects the sovereignty and diversity of nations. However, this does not go far enough for those social actors that want to intensify the protection of social and environmental rights. This is where such social actors have developed a number of self-regulatory codes, and labelling and certification schemes in order to promote certain values and in response to criticism from environmental and social non-governmental actors. As long as there are multiple such schemes, they are unlikely to have a major impact on international law; but as these schemes are increasingly being

1 This paper has been conceived as a part of a broad research project on "Sustainability Labelling and Certification: Towards an Integrated Legal, Economic, Ecological and Social Approach" (EC Project EVG1-CT-2000-00031, EC V RDT Program); and it also uses research from the ongoing Vrije Universiteit Amsterdam project on the Law of Sustainable Development.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 251-270.*

aligned with each other, made coherent, comparable and comprehensible within an increasingly vertically integrated market, such schemes will become quasi law, substitute for regulation and gradually influence the development of soft and hard law. In the process such schemes may range from moral imperialism through green colonialism to disguised protectionism in the eyes of developing countries who see their competitive power being increasingly affected by the development of such schemes at international level. It thus becomes relevant to question the very legitimacy of these unilaterally and/ or privately developed schemes.

1. Introduction

A key element of globalisation is the way international law is used as a tool for intergovernmental problem solving in the fields of economic, social and environmental issues. There is a significant increase in the number of treaties negotiated every decade in relation to these three fields. These developments fall in the category of 'governed' globalisation. Trends from the three fields tend to indicate that there is a gradually growing area of law that can be referred to as the law of sustainable development.

The purpose of this law is to promote development in all parts of the world, but not at the cost of the natural environment and human rights. While there is a clearly discernible political and legal (if not legally binding) commitment to sustainable development globally, many critics argue that this is no more than rhetoric. This has led many non-state actors to seek innovative ways to promote sustainable development. One of these innovative tools is that of sustainability labelling and certification schemes for products bought and sold in the market. Since the commercialisation of most of these products have an international dimension, sustainability labelling and certification inevitably has an international impact, and arguably comes under the purview of international law. These developments can be referred to as part of the 'spontaneous' globalisation process.

The speed of spontaneous globalisation is far ahead of governed globalisation. This raises the question whether the developments that fall under spontaneous globalisation are in line with the principles and norms of international law and whether they provide more guarantees with regard to the achievement of sustainable development.

In order to address the above question, this chapter first outlines the international governed globalisation context for promoting sustainable development.

This is followed by a discussion on spontaneous globalisation in the field of sustainability labelling and certification schemes. A short analysis of the North-South aspects completes the analysis.

2. The international legal context for promoting sustainable development

This section analyses first the articulation of the principle of sustainable development and then it discusses its content and legal nature.

2.1 Articulation of the principle of sustainable development

Sustainable development is a relatively new concept in the context of international law. The United Nations Charter and other statutory agreements of the main intergovernmental organisations adopted just after World War II clearly did not include this principle. The term came into prominence in the Brundtland Report on *Our Common Future*[2] and has gained currency since then. This term aimed to integrate economic, development, human rights and environmental issues which were mostly discussed separately in individual treaties till then. The Bretton Woods institutions arranged economic and financial issues and different bodies of the UN promoted the development of social issues, human rights and later environmental issues. The developing countries argued successfully in favour of the adoption of the New International Economic Order[3] (NIEO) in 1974, but the related instruments were never implemented.[4] Since 1992, there is emphasis being paid to integration of the different issue areas and this is expressed in the concept of sustainable development. The developments since then reveal that there are discernible elements of an emerging law

2 World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Oxford, 1987.

3 Declaration on the establishment of a New International Economic Order, UN Doc. GA Res. 3201 (1974) and Programme of Action, UN Doc. GA Res.3202 (1974).

4 Garcia-Amador, F.V., *The Law of Development: A New Dimension of International Economic Law*, Oceana Publications, New York, 1990. Schrijver, N., "Sovereignty over Natural Resources: Balancing Rghts and Duties in an Interdependent World, 1995, Thesis, Rijksuniversiteit Groningen. See also the Proclamation of the UN Fourth Decade for the Development, were this approach is not even mentioned (UN Doc. GA Res. 45/199 (1990).

on sustainable development, although development aspects as defined and expressed by developing countries are seen as a neglected element of this law.[5] Although developing countries have argued that the gap between them and the rich has a structural character and requires a modification of the global economic structure, there has been strong emphasis paid at international level to address this gap, on the one hand, through promoting free trade and on the other hand, through international aid.[6]

Then in the eighties, the Brundtland Commission defined sustainable development as the social, economic, and political progress "that meets the needs of the present without compromising the ability of future generations to meet their own needs".[7] It explained further: "In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations".[8] The Report concluded that sustainable development calls for seven measures. These include a political system that allows citizen participation in decision making, an economic system that generates surpluses and technical knowledge on a self-reliant and sustained basis, a social system which allows for the identification of solutions for societal tensions; a production system that is compatible with the conservation of the resource base; a sustainable international trade and finance system and an administrative system that allows for self-correction.[9]

Five years later, at the UN Conference on Environment and Development, the concept of sustainable development was adopted in the key products of the Conference, the Rio Declaration,[10] the Climate Change Convention, the Bio-

5 Schrijver, N., "On the Eve of Rio Plus Ten: Development – the Neglected Dimension in the International Law of Sustainable Development", Dies Natalis, lecture at the Institute of Social Studies, The Hague, 11 October 2001.

6 See the UN General Assembly Resolutions concerning the UN First Decade for the Development (1960-1970): UN Doc. GA Res. 1515 (XV) and 1710 (XVI); and Second Decade (1970-1980): UN Doc. GA Res. 2626 (XXV), 2543 (XXIV).

7 World Commission on Environment and Development, *Our Common Future*, *op. cit.*, at p. 43.

8 World Commission on Environment and Development, *Our Common Future*, *op. cit.*, at p. 46.

9 World Commission on Environment and Development, *Our Common Future*, *op. cit.*, at p. 65.

10 UN Doc. A/CONF.151/26/Rev.1 (Vol.I) (1992).

diversity Convention and Agenda 21.[11] The concept held promise because it was to provide the key to integrating environmental with social and developmental concerns. Although there was some criticism of the agreements made at Rio,[12] these led to the next generation of laws and declarations based on the concept of sustainable development. This provided the new conceptual context for the North-South dialogue.

But while the term is increasingly included in legal texts, there is still confusion regarding its articulation. The Rio Declaration, strictly speaking, does not define sustainable development, but clarifies that "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".[13] Beyond this there is no further elaboration in the existing legally binding instruments.[14] What is interesting to note is that the Framework Convention on Climate Change (FCCC)[15] articulates sustainable development as a right and an aspiration of parties.[16] However, in elaborating further on the concept, the Climate Convention tends to create more confusion than clarity. On the one hand it argues that "economic development is essential for adopting measures to address climate change",[17] and therefore reach sustainable development and, on the other hand, it recognises that sustainable development is an alternative to development. While in the literature it is argued that developed countries support sustainable development and developing countries want development, the Climate Convention shows that the compromise text was also made to keep the developed countries on board since it is included in the Article aimed at the developed countries.[18] However, the ambiguity disappears in the Kyoto Protocol[19] and the Marrakesh

11 UN Doc. A/CONF.151/26 (1992).

12 See, for example, Chatterjee, P and M. Finger, *The Earth Brokers*, Routledge, London, 1994.

13 Article 3 of the Rio Declaration, *op cit*.

14 See, for instance, the ninth Whereas of the UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 (UN Doc. A/AC.241/15/Rev.7); or the The Fifth Whereas of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses,1997 (UN Doc. A/51/869).

15 UN Doc. A/CONF.151/26 (1992).

16 Article 3.4 of the FCCC – U*nited Nations Framework Convention on Climate Change*, (New York) 9 May 1992, in force 24 March 1994; 31 I.L.M. 1992 which says: "The Parties have a right to, and should promote sustainable development".

17 Article 3.4 of the FCCC, *op cit.*

18 See Art. 4.2ª of the FCCC, *op. cit.*

19 UN Doc. FCCC/CP/1997/7/Add.1 (1997).

Accords of 2001.[20] This does not mean that there is any clarity regarding the content of the concept.[21] The concept of sustainable development has become so "inescapable" that it is increasingly adopted by intergovernmental organisations as a general matrix to guide the achievement of their specific objectives. This trend must be linked with the global partnership for sustainable development as it is referred to in Agenda 21,[22] which involves the UN system but also other international organisations.

Given that the principle has never been clearly defined or elaborated in legal documents, it is argued that the principle is too normative and vague and that it lacks an autonomous character.[23] It is seen by some as a conceptual matrix[24] "définissant la perspective générale dans laquelle les principes déjà établis (…) doivent être resitués".[25] The International Court of Justice (case Gabćikovo-Nagymaros, 1997) saw the notion of "sustainable development" as a mere concept.[26] This would imply that the principle of sustainable development can be used to justify any definition of growth and even the current *status quo* between countries.[27]

However, there are others like Judge Weeramantry who expressed a separate opinion in the Gabćikovo-Nagymaros case, arguing that the principle of

20 UN Doc. FCCC/CP/2001/13 (2001)

21 See Arts, K. and Gupta, J. "Sustainable Development in Climate and Waste Law: Implications for the Progressive Development of International Law", in Schrijver, N. and F. Weiss (eds.). … forthcoming.

22 UN Doc. A/CONF.151/26 (1992), at par. 1.3.

23 Sohnle, J. "Irruption du droit de l'environnement dans la jurisprudence de la CIJ: L'affaire. Gabćikovo-Nagymaros", *Revue Générale de Droit International Public* 1998-1, p. 85, at p. 109.

24 Dupuy,P. -M., "Où en est le droit de l'environnement à la fin du siecle?", *Revue General de Droit International Public* 1997-4, p. 873, at p. 886. Although this author below refers to the legally-binding nature of the principle, at p. 887. See also Kamto, M., "Les nouveaux principes du droit de l'environnement", *Revue Juridique de l'Environnement* 1993-1, at p. 20.

25 Dupuy,P. -M.,"Où en est le droit de l'environnement à la fin du siecle?", *op. cit*. at p. 886-887.

26 Case concerning the Gabćikovo-Nagymaros project (Hungry/Slovakia), par. 140, Judgment of 25 September 1997, *ICJ: Reports of Judgments, Advisory Opinions and Orders*, at p. 78.

27 See Pieratti, G., "Droit, économie, écologie et dévelopement durable: Des relations nécessairement complementaires mais inévitablement ambigúes", *Revue Juridique de l'Environnement*, 2000-3, p. 421, at p. 436.

"sustainable development" has a normative character[28] as far as it constitutes a principle that allows balancing the environmental concerns and the considerations regarding economic development. In addition, such a principle presently constitutes a "part of modern international law", not only because of "its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community".[29]

In further articulating the content of this principle, one can argue that sustainable development has two dimensions. Firstly, it calls on states, intergovernmental organisations and other actors to promote international and intergenerational equity. Secondly, it calls on states and social actors to integrate environmental and social concerns in economic activities. When organisations and states adopt sustainable development as a goal for some or all of their activities, they are arguably estopped from claiming that the principle of sustainable development does not apply to the rest of their activities.[30] At the same time, judicial reasoning[31] provides some clarity because it allows the judge to delimit the proper and balanced application of other principles and legal provisions. The International Court of Justice recognizes that : "this need to reconcile economic development with protection of environment is aptly expressed in the concept of sustainable development".[32] However, in the actual implementation process, it is becoming clear that the issue is not so much of integrating different values, but of trade-offs between different values, so long as there is compensation for the trade-offs.[33]

Thus the concept calls for modifying production and consumption patterns to make them consistent with the social and environmental protection and economic development, not just from a domestic perspective but from an

28 Case concerning the Gabćikovo-Nagymaros project (Hungry/Slovakia), *op. cit.,* Separate Opinion of Vice-President Weeeramantry, at p. 88.

29 *Ibid*. at p. 95.

30 Handl,G., "The Legal Mandate of Multilateral Development Banks as Agents for Change Towards Sustainable Development", *American Journal of International Law*, Vol.92, 1998, p. 642, at p. 648.

31 Lowe,V., "Sustainable Development and Unsustainable Arguments", in Boyle,A.-Freestone,D., *International Law and Sustainable Development*, Oxford University Press, 1999, p. 19, at p. 31 and 34.

32 Case concerning the Gabćikovo-Nagymaros project (Hungry/Slovakia), *op. cit.*, par. 140, at p. 78.

33 Banuri,T.-Weyant,J., et al., "Setting the Stage: Climate Change and Sustainable Development", in Metz, B.-Davidson,O.-Swart,R.-Pan, E (eds.), *Climate Change 2001: Mitigation*, Cambridge University Press, Cambridge, 2001, at p. 87.

international perspective.[34] In other words, sustainable development is not just one principle, but reflects a bundle of principles with a hard core[35] which includes the principles of integration, equity and sustainable use,[36] and a periphery of principles like limited sovereignty over natural resources, intergenerational equity, the common but differentiated obligations of countries, the recognition of the special needs and interests of economies in transition and least developed countries, the common heritage and the common concern of humankind, the precautionary principle, the polluter pays principle, public participation and access to information, and good governance including democratic accountability.[37]

2.2 Towards a law on sustainable development

In an effort to codify the law on sustainable development, the International Law Association adopted the New Delhi Declaration on Principles of International Law relating to Sustainable Development at its 70th Conference.[38] This codification does not distinguish between core and peripheral principles and includes principles focusing on the duty of states to ensure sustainable use of natural resources, the principle of equity and the eradication of poverty, the principle of common but differentiated responsibilities, the principle of the precautionary approach to human health, natural resources and ecosystems, the principle of public participation and access to information and justice, the principle of good governance and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

34 Sands, Ph., "Sustainable Development: Treaty, Custom and the Cross-fertilization of International Law", in Boyle, A. & Freestone, D., *International Law and Sustainable Development*, Oxford University Press, 1999, p. 39, at p. 43.

35 *See* Sands, Ph., "International Law in the Field of Sustainable Development", *British Yearbook of International Law*, 1994, p. 303, at p. 338-348; Sands, Ph., "International Law in the Field of Sustainable Development: Emerging Legal Principle", in Lang, W. (ed), *Sustainable Development and International Law*, Graham & Trotman / Martinus Nijhoff, London, Dordrecht, Boston, 1995, at p. 53.

36 See Pieratti, G., "Droit, économie, écologie et dévelopement durable: Des relations nécessairement complementaires mais inévitablement ambigues", *op. cit.*, at p. 427.

37 Schrijver, N., "On the Eve of Rio Plus Ten: Development – the Neglected Dimension in the International Law of Sustainable Development", *op. cit.,* and Sands, Ph., "International Law in the Field of Sustainable Development", *op. cit.*

38 Resolution 3/2002 of the International Law Association: The New Delhi Declaration of Principles of International Law Relating to Sustainable Development.

These principles have been derived from an analysis of international declarations and treaties, the work of jurists, case law and state practice. These principles have differing status in international law, but together they are seen to be an elaboration of the emerging law of sustainable development.

This attempt at codification is likely to ease developing country concerns that sustainable development is not just about adopting unaffordable development patterns for developing countries but also about international equity. In other words, sustainable development is not a principle that will be used to prevent the development of the South; on the contrary, sustainable development aims at reducing the inequities globally while protecting the environment. One could argue that some evidence of the acceptability of the concept to the South is evident in the adoption of the Kyoto Protocol and the Marrakesh Accords which unambiguously commit them to the concept. But clearly, there is a gap between principle and policy; and although the developed countries have committed themselves to this principle, the exit of the United States from the climate change negotiations indicates that it is unlikely to support any move to change the status quo between states.[39] In order to make the concept operational it will be necessary to define a legal methodology that will assist in the determination of whether development is sustainable or not. In the words of Judge Weeramantry, that "(…) will, of course be a question to be answered in the context of the particular situation involved".[40] At the same time, in the climate change negotiations, such determinations are left to the nation state and no one else has authority to question such definitions.

This brings us to the next question, if sustainable development is a vaguely defined concept and is mostly adopted in non-binding instruments, then what is its legal value? One can argue that sustainable development is part of the 'soft law' arena of recommendations, declarations and norms, "as opposed to the binding 'hard law' represented by custom, treaty and the established general principles of international law".[41] This means that "although enforcement of these soft law instruments in a judicial sense may present difficulties, it is a more flexible approach to the progressive development of state practice that

39 See, for details on the US withdrawal from the climate change regime, Gupta, J., *Our Simmering Planet: What to do About Global Warming*, Zed Publishers, London, 2001.

40 Case concerning the Gabćikovo-Nagymaros project (Hungry/Slovakia), *op. cit.*, Separate Opinion of Vice-President Weeeramantry, at p. 92.

41 Birnie, P. - Boyle, A., *International Law and the Environment,* Oxford University Press, Oxford, 1992 at. p. 16.

promotes defined goals".[42] Soft law, according to Shelton[43] consists of "normative texts (…) addressed to the international community as a whole or the entire membership of the adopting institution or organisation". Such law inspires new standards, reconfirms ideas and standards that have been stated in previous documents and may even further elaborate on such ideas. It is not legally binding like hard law.

This implies that there is a clear legal distinction between soft and hard law. However, is there any *de facto* difference between hard and soft international law especially in the area of environmental issues? Hard binding law can be weakened by indeterminate text, reservations, and flexible clauses to facilitate implementation. Furthermore, one can argue that although soft law is, by definition, weaker than hard law, it represents a first step in the process leading to binding hard law. It is also seen as authoritative guidelines for States and it can thereby gradually influence state practice. It can set precedents and become gradually incorporated in national, regional and international treaties. There is enough evidence to indicate that such soft law is gradually being referred to in policy and legal documents and that a process of legal socialisation is thereby initiated.

This leads us to argue that the precise nature of the legal text is less relevant than the compliance-pull of these texts. This depends on a number of factors including the legitimacy of the text, the extent of legal socialisation taking place and the pressure from the non-state actors. What is thus evident is that at the international level, there are a number of initiatives to promote the principle of sustainable development. Some of these are in the soft law field and some in the hard law field. While there is a *de jure* distinction between the two relevant for dispute resolution in an adjudication body, the *de facto* compliance pull is more relevant for determining the effectiveness of the legal instrument. While compliance with hard law is eased through flexibility measures, compliance with soft law is difficult to measure and the causality difficult to ascertain.[44] At the same time, unilateral enforcement of soft law measures is also becoming a reality.

One of the major challenges in relation to sustainable development is developing common standards for all countries. Is this possible and desirable

42 Dervort, T.R., *International Law and Organization: An Introduction*, *op. cit*, at. p. 219.

43 Shelton, D., "Compliance with International Human Right Soft Law", in Weiss, E.B., *International Compliance with Non-Binding Accords*, American Society of International Law, 1998 p. 119, at p. 120.

44 Ibid.

given the huge economic, political and structural differences between countries? Although international organisations and negotiations attempt to create some common policy objectives, this is a slow and time-consuming process. The intergovernmental processes are the only legitimate, authoritative processes to attempt at reaching such common standards. Possibly their role is not so much in articulating the standards as it is in serving as agents of change in the process of transition towards sustainability.[45]

Thus, while there is conflict of opinion about whether sustainable development is a mere concept or has become a generally accepted legal principle, there is not much conflict about the fact that its content remains vague, although its legal content has to some extent been articulated by the International Law Association.

Clearly, for several social actors, the process of negotiation is not going fast enough. They are developing initiatives of their own to promote sustainable development. This brings us to the following section.

3. Sustainability labelling and international law

This section examines the emerging spontaneous globalisation trend of labelling schemes as a means to achieve sustainable development and the role of non-state actors in developing such schemes.

3.1 Labelling schemes

Within the domestic context of developed countries, environmentalists are 'pushing' other social actors to adopt norms to protect the environment, conserve resources and to achieve sustainable development.[46] Sometimes, industry is 'pulling' other social actors to buy their products. These economic agents are apparently aiming at developing "business strategies and activities that meet the needs of the enterprise and its stakeholders today while protecting, sustaining and enhancing the human and natural resources that will be needed in the

45 Handl,G., "The Legal Mandate of Multilateral Development Banks as Agents for Change Towards Sustainable Development", *op. cit*, at p. 645.

46 K. Webb (ed.) *Voluntary Codes: private Governance, the Public Interest and Innovation*, Carleton University Research Unit for Innovation, Science and the Environment, Ottawa, Canada, 2002.

future".[47] This push and pull process is leading to the development of labelling and certification schemes in various countries.

In fact, a new sort of legitimising behaviour is emerging. This is based on immediate self-interest of the organisation because it wants to compete and find a niche in the market, a moral legitimacy because it wants to have good publicity and public support and cognitive legitimacy because it uses international standards.[48]

The purpose of these ecological and social labelling schemes is to promote sustainable development, conservation of natural resources, protection of the ecosystem and protection of human and social rights. These are not just normative goals, they are translated into practical measures in terms of criteria in relation to the production, design, transport and use of a particular product. In other words such schemes operationalise the concept of sustainable development. In doing so, such schemes go far beyond that which is required by international and/or national (municipal) law. These schemes then try to promote environmentally and socially conscious behaviour on the part of the consumers by attracting them to these products because of the claims made by the producers with regard to the way these products have been produced.

While these schemes go beyond existing international legal requirements, they need to remain compatible with the rules of international trade. The purpose of international trade law is to liberalise the trade systems world-wide. States are the key actors in international trade law, since they provide the domestic legal infrastructure for facilitating trade. International trade law is based on the assumption that all countries will be better off if there is an open system of trade where each country can exploit its own comparative advantages. In doing so, trade law chooses to ignore the processes and production methods within the domestic context. In other words, countries may not differentiate between products by reference to non-product-related processes and production methods. Doing so would imply discrimination between physically similar products on the basis of environmentally or socially unsound processes and production methods and is thus not accepted. This, in effect, implies an incentive to coun-

47 International Institute for Sustainable Development, *Business Strategy for Sustainable Development: Leadership and Accountability for the '90s*, Winnipeg, Canada, 1992, at p. 116.

48 Cashore cited in Webb 2002, note 47 above.

tries to utilise their human and natural resources in order to be able to compete in the international market. This can, therefore, provide an incentive for further environmental degradation and social exploitation. Labelling and certification schemes attempt at countering this problem and are generally voluntary in nature. This implies that such schemes were not likely to fall foul of WTO regulations, while still promoting environmental protection.

With the adoption of the Technical Barriers to Trade Agreement (TBT Agreement), however, such schemes have become subject of intense debate within the WTO.[49] There is discussion as to whether labelling and certification schemes that are based on production and process methods fall under the definitions of "technical regulation" and "standard" under the Technical Barriers Trade Agreement. Both technical regulation and standard take into account 'related' processes and production methods. There is some dispute as to the interpretation of 'related'.[50] But as labelling and certification schemes become more and more important and increasingly based on the life-cycle approach, the question of whether such schemes are in line with WTO rules will become more and more pertinent. The complex dimensions of this question have resulted in a heated debate among WTO Members and has not yet led to consensus.[51]

Since the panel decisions adopted under the GATT 1947[52] system does not have a *stare decisis* effect, it clearly seems that such issues need to be addressed on a case-by-case basis.[53] In doing so, it is necessary to seek for a "line of equilibrium" to guarantee "a balance (…) between the right of a Member to invoke an exception (…) and (...) the treaty rights of the other Members", as it has been emphasised by the WTO Appellate Body.[54]

49 See on this debate, Tietje,Ch., "Voluntary Eco-Labelling Programmes and Questions of State Responsibility in the WTO/GATT Legal System", *Journal of World Trade*, 1995-5, p. 123; Chang,S.W., "GATTing a Green Trade Barrier – Eco-labelling and the WTO Agreement on Technical Barriers to Trade", *Journal of World Trade*, 1997-1, p. 137.

50 M. A. Cole, "Examining the Environmental Case Against Free Trade", *Journal of World Trade*, 1999-5, at p. 183.

51 S. W. Chang, "GATTing a Green Trade Barrier- Eco-labelling and the WTO Agreement on Technical Barriers to Trade", *op. cit*., at p. 141-142.

52 GATT Doc. DS21/R; also reported in BISD 39S/155.

53 See, Fernández, X., working paper "The WTO Committee on trade and environment", for EC Project EVG1-CT-2000-00031 (Sustainable Labelling and Certification).

54 See United States – Import prohibition of certain shrimp and shrimp products, WTO Doc. WT/DS58/AB/R, at pars. 156-159.

3.2 The role of non-state actors

With globalisation there is a growing critique of the inefficiency of the command and control approach[55] and there is a trend towards the use of market-based instruments.[56] The inefficiency is attributed to the fact that such command and control methods do not take into account the specific conditions of the economic agents, nor are they the cheapest means to achieve a societal goal. It has also been noted that the governmental concerns regarding the establishment of rigid technical standards constitute in practice a relevant barrier to determine the State's environmental and social objectives and the way in which they should be achieved.[57]

The command and control approach has given way to industrial self-regulation and the use of market instruments. This has led to a proliferation of such self-regulatory schemes at national and international level aimed at environmental and/or social protection and sustainable development. This also implies that there are fewer public enforcement mechanisms to defend the public interest. The growing attention being paid to these alternatives by non-state actors has influenced intergovernmental and supranational organisations to take action.[58]

A key actor in the area of making standards is the International Standardization Organization (ISO). This federation has members from at least 100 national standards organisations and the delegations include producers, consumers, other stakeholders and government representatives. This is an organisation where the private sector dominates. The standards are voluntarily adopted by the private organisations and the effectiveness of the system depends on the workings of the market. Although ISO standards are voluntary in nature, they are arguably becoming very influential. Companies use ISO standards in order to be able

55 See Stewart, R.B. "Economics, Environment, and the Limits of Legal Control", *Harvard Environmental Law Review*, 1985-9, p. 5; Sunstein, C.R., "Paradoxes of the Regulatory State", *University of Chicago Law Review*, 1990-57, p. 407.

56 *See* Steinzor,R.I., "Reinventing environmental regulation: The dangerous journey from command to self-control", *Harvard Environmental Law Review*, 1998-22, p. 103, at p. 113.

57 Steinzor, R.I., "Reinventing environmental regulation: The dangerous journey from command to self-control", *op. cit*., at p. 117.

58 For instance, it is worth mentioning the EC's eco-label award scheme. It was established by Council Regulation (EEC) 880/92 of 23 March 1992 on an EC eco-label award scheme (EUOJ L99, 11 April 1992), and amended by Regulation (EC) 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised EC eco-label award scheme (EUOJ L237, 21 September 2000).

to compete in the international arena. They are also used by potential consumers to judge the quality of the products bought and sold in the international arena. In this way they may even substitute for national or international standards and regulation.[59] Thus, such standards are becoming in effect mandatory. But if that is the case, then the key question is: Are these standards legitimate and who is actually making them? Clearly the standards are made by private organisations on the basis of a discussion between them, but there is no real democratic and legitimate process in which all concerned actors are involved, and all relevant factors are taken into account.[60] Although the justification is that the standards are of a technical and scientific nature, and hence it is not necessary to guarantee participation to all concerned actors, clearly the degree of technicality is one that is open to interpretation.

At the same time, some multinational firms are developing their own codes of conduct in relation to, for example, labour standards. This is used to improve their public image and to keep in line with changing moral standards. This has also been encouraged by certain negative publicity that multinational firms have faced through information released by, for example, the Fair Labour Association, CERES, CSR Europe or SAI with regard to their labour practices. Thus, for example, the Business Council of Sustainable Development has adopted the Valdez Principles. A Business Charter for Sustainable Development has also been adopted. These standards are used to promote the fact that Business increasingly take the issue of Corporate Responsibility seriously and are not unscrupulously exploiting humans, nature and the environment.

Such schemes are voluntary in nature, and therefore, should not be affected by international law. They are also aimed at the top end of the market and so cover an area that cannot normally be touched by international law, since international law tends to reflect the lowest common denominator. This is because harmonising standards at international level is seen as economically inefficient and politically impossible leading to a decrease in welfare as well as being environmentally ineffective and running the risk of being seen by many as implying trade protectionism.[61] On the other hand, minimum standards protect certain basic universally agreed and legitimate values, provide a frame-

59 See BEE, *ISO 14001: An uncommon perspective. Five public policy questions for proponents of the ISO 14000 series*, BEE, Brussels, 1995, at p. 11.

60 Esteve Pardo, J., *Tecnica, riesgo y derecho*, Ariel Derecho, 1999, Barcelona, at p. 123.

61 See, Parker, R.W., "Choosing Norms to protect Compliance and Effectiveness: The Case for International Environmental Benchmarks", in Weiss, E.B. (ed.), *International Compliance with Non-Binding Accords*, *op. cit*., p. 145.

work for controlling the activities of companies while expanding the market for environment friendly production and promote a level playing field where all countries can exploit their own comparative advantages. Such minimum standards do not infringe on the sovereignty of nations or override the fundamental diversity of nations and their success may depend on "unacceptable" trade sanctions for effectiveness.[62]

Such labelling and certification schemes fill in the gaps in international regulation. But such schemes set a normative standard by which products traded are judged. This may make companies operating in the international arena feel obliged to follow such standards whether they subscribe to them or not or take the risk of losing their market niche. This may make consumers in the international market feel obliged to change their consumption patterns in order to keep in line with the changing norms of international society. Such schemes influence the articulation of soft law[63] and eventually of hard law. In doing so, they both replace regulation or are in fact becoming, de facto, law. And, hence it becomes relevant to ask the question: How legitimate are these processes? How objective are the standards and schemes?

These questions become even more important in the context of the fact that companies are trying to adopt norms and principles with respect to, for example, labour standards, but do not refer to or feel constrained by the ILO Declaration of Fundamental Principles and Rights at Work (1998), nor do they refer to the right to bargain collectively and the freedom of association. In other words they are re-writing international law, on the grounds that it is voluntary and that it is morally right.

4. Sustainability labelling and north-south issues

These questions become significant especially when these standards affect North-South trade. Southern countries are already facing trade barriers in respect of agricultural products and textiles. Now they run the risk of losing their competitive advantage as stricter technical, environmental, managerial and social criteria are unilaterally imposed on them by a highly vertically integrated market. Such standards could never have been reached through negotiated agreements at international level. In the perception of the South, negotiated

62 *Ibid.*

63 See Shelton, D., "Compliance with International Human Rights Soft Law", *op. cit.*, at p. 120.

agreements are being bypassed by unilateral decisions based on a foreign morality and claims to legitimacy that are not always justified. This is seen as just another pattern in the asymmetrical relations between North and South where the North dominates discussion through agenda –setting, forum shopping (moving from UN to Bretton Woods Institutions;[64] from global to regional negotiations – e.g. MAI), non-implementation of inconvenient agreements (e.g. the New International Economic Order),[65] manipulation of the rules of procedure (moving from majority voting to double majority and consensus), and marginalisation of South-friendly UN organisations (e.g. UNEP, UNCTAD, Habitat) till they change their practices.[66]

It is these historical experiences of the South in the post-colonial period that makes the South suspicious of these quasi-legal instruments that are emerging as part of the new liberal paradigm in the context of globalisation. There is an increasing fear that those very products in which the developing countries have a comparative advantage will be covered either through exceptions to legal regulations (i.e. agricultural products), or through the new quasi-legal instruments (e.g. forest products, and products made by children). This, they expect will harm their competitiveness and their ability to export in the international arena.[67] They also doubt the environmental and social legitimacy and effectiveness of the new instruments.[68] They fear that the new morality is being used to disguise protectionist efforts by the developed countries,[69] And, of course,

64 Riflin, B., "Development Dilemmas and Tensions at the UN", International Social Science Journal, 1995-2, p. 333; Shiva,V., Monocultures of the Mind, Zed Books, London, 1993, p. 76; Bakker, D., "Public versus private rights in international protection of industrial property: An analysis of the current legal framework", Graduation Paper, Law Faculty, Vrije Universiteit, Amsterdam, 1996.

65 Schrijver, N., "Sovereignty over natural resources: balancing rights and duties in an interdependent world", *op. cit.*

66 Gosovic, B., *The Quest for World Environmental Cooperation: The Case of the UN Global Environment Monitoring System*, Routledge, London, 1992, at p. 223.

67 Jha, V.G., "Conclusions and Policy Recommendations", in Jha, V.G.-Hewison, G.-Underhill, M. (eds.), *Trade, Environment and Sustainable Development. A South Asian Perspective,* McMillan Press Ltd. Hampshire and London, 1991, at p. 217.

68 Nath, K., *Selected Statements on Environment and Sustainable Development*, *op. cit.* at p. 17.

69 Bharucha, V., "The impact of environmental standards and regulations set in foreign markets on India's exports", in Jha, V.G., Hewison, G., Underhill, M. (eds.), *Trade, Environment and Sustainable Development. A South Asian Perspective, op. cit.*, p. 123, at p. 126.

where such labelling and certification schemes call for the use of efficient technologies, these schemes may in fact be a way to expand the market for Western technologies.[70] The feeling thus is that such schemes are inherently unfair because they can be used by the economically powerful to further their own interests, at the cost of, and through the ostensible protection of, the poor. As Nath, the former environmental minister of India, concludes that: "In fact the whole concept of international eco-labelling based on the processes by which products are manufactured amounts to a legitimisation of extraterritorial interference by one country over another's domestic affairs. It is a kind of green imperialism".[71]

5. Conclusions

This chapter has argued that with globalisation the process of managed governance is gradually leading to negotiated agreements in the area of international environmental, social and developmental law. Arguably we are witnessing the development of a law of sustainable development. While international legal agreements promoting sustainable development are being made, they are not seen as developing fast enough. On the one hand, the development aspects remain a neglected part of the international law of sustainable development; on the other hand, others argue that social and environmental issues are not adequately covered. The latter has encouraged international and national non-state actors to come up with a range of initiatives to step into the perceived gap in international law. This is also justified by the argument that international law can only make the minimum agreements within which social actors operate since that is both economically efficient, politically acceptable while it respects the sovereignty and diversity of countries. The upper level standards can only be made by individual social actors who cater to different segments of society.

As long as there is a free market with a number of different market oriented actors focused on different segments of society, and the adoption of standards, labels and certification schemes is entirely voluntary, such schemes do not contravene international law. But, as has been argued in this chapter, such standards are gradually setting the norms by which products and processes are

70 Nath, K., *Selected Statements on Environment and Sustainable Development*, *op. cit.* at p. 17.

71 *Ibid.* at p. 18.

being judged by producers and consumers; in vertically integrated markets, where large buyers adopt labels, these lead to a de facto application of such norms on a wide scale, pushing out existing sellers from the market unless they can conform to the new norms. In other words they are becoming quasi legal instruments, replacing the need for formal regulation. They may even at a later stage be referred to in legal agreements, and gradually enter the realm of soft law and graduate to the level of hard law norms. At such moments it is critical to question the legitimacy and effectiveness of such norms. This is particularly necessary when these norms are unilaterally developed and the key stakeholders are not involved in the development of the norms, and when these norms bypass carefully negotiated international agreements, for example, within the context of the ILO.

This problem is even more pertinent in the context of the structural divide between the average Northern country and the average Southern country. Here the new unilateral developments in terms of sustainability labelling and certification schemes are seen at best as a form of disguised trade barriers and at worst as a form of green colonialism aiming to protect the South from its own exploitative tendencies with respect to human and natural resources.

But while such sustainability and labelling schemes may themselves aim to sell products produced through good governance systems with good labour regulations and environmental protection, they may themselves not be produced through democratic processes involving the concerned stakeholders. Thus in order to protect top-end values, there is a shift in decision-making processes from the international law arena to the private sector and its self-regulatory urges. These self-regulatory urges raise the issue of democratic accountability.[72] We believe that as long as there are a wide range of competing labelling and certification schemes with a wide range of norms, such schemes will not raise major legal issues. But as these labelling and certification schemes merge and as a common core of norms are adopted in the Western world in order to secure coherence between these schemes and clarity towards the consumer, they will

72 See Majone, G., "International Regulatory Cooperation: A Neo-Institutionalist Approach", in Bermann, G.A, Herdegen, M., Lindseth, P.L. (eds.), *Transatlantic Co-operation: Legal Problems and Political Prospects*, Oxford University Press, Oxford, 2001, p. 119, at p. 142; and Slaughter, A.M., "Agencies on the Loose: Holding Government Networks Accountable", in Bermann, G.A, Herdegen, M., Lindseth, P.L. (eds.), *Transatlantic Co-operation: Legal Problems and Political Prospects*, *op. cit.* p. 521, at p. 525.

begin more and more to substitute for formal (inter)national regulation and the question of legitimacy and legality will become increasingly more important.

B

FOREIGN INVESTMENT

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12

SUSTAINABLE DEVELOPMENT THROUGH A SOCIALLY RESPONSIBLE TRADE AND INVESTMENT REGIME

Paul J.I.M. de Waart

Introductory remarks

The demise of the communist system and the corresponding victory of the capitalist system resulted in a renewed interest in the civil society as a mediator between the State and the market. For the worldwide embrace of the political dogma of the free market enforced the argument that it is not the responsibility of States but of civil society to put the market in the service of men. It gave rise in the 1990s to two new concepts, i.e. socially responsible investment (SRI) and corporate social responsibility (CSR). The impact of civil society on both concepts appears from the increasing number of codes of conduct covering working conditions, human rights and environmental aspects of the activities of companies and sectors. Although these codes aim at the promotion and protection of a socially responsible international economic order, they are voluntary and are thus only complementary to international laws and binding rules, intending to ensure, for instance the application of minimum standards to all.

The present chapter discusses the rule of law in international trade on the basis of the views of John Rawls and Immanuel Wallerstein's on international economic order. It argues that in the interest of good governance civil society should prevent rich states from looking back in anger on poor states because of the dramatic terrorist attack on the New York World Trade Centre on 11 September 2001. After all, the putting into practice of the New Delhi Declara-

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 273-294.*

tion of Principles of International Law relating to Sustainable Development, adopted by the 70th Conference of the International Law Association (ILA) in April 2002 may result in an international social order that provides more effective barriers to terrorism than whatever strong arm strategies might ever achieve.

1. Rule of law in international trade

Combining the ideas of the Greek historian Thucydides (460 – 395 B.C.) on international relations as the ongoing struggle for wealth and power, and of the French lawyer Montesquieu (1689 – 1755 A.D.) on commerce leading to peace, Rawls surmised in the Law of Peoples that liberal peoples could acquire more easily and cheaply by trade what they lack in commodities.[1] Moreover, 'being liberal constitutional democracies, they would not try to convert other peoples to a state religion or other comprehensive ruling doctrine.[2]' Rawls admits that not all peoples have set up liberal constitutional democracies as yet. He overcomes this difficulty by introducing four groups of nonliberal domestic societies, i.e. decent hierarchical peoples, outlaw states, societies burdened by unfavourable conditions and finally benevolent absolutisms. As for the decent hierarchical peoples, unlike the outlaw states, they have no aggressive aims and recognize that they must gain their legitimate aims through diplomacy and trade and other ways of peace.[3] Liberal peoples and decent peoples form the core group of well-ordered peoples upon which the *Law of Peoples* hinges.

Rawls' *Law of Peoples* extends to the international level the hypothesis of a social contract concluded by peoples in the original position's "veil of ignor-

1 John Rawls, *The Law of Peoples*, Harvard University Press, 1999, p. 46. It is said that international relations have not changed since Thucydides' days (ibid.).

2 According to Rawls, the three basic features of liberal peoples are a reasonable just constitutional democracy, unity by common sympathies and a moral nature (ibid. pp. 23-25).

3 Ibid. p. 90. The latter two have in common that they respect the *Law of Peoples* as 'a particular political conception of right and justice that applies to the principles and norms of international law', albeit that they need the help of liberal or decent peoples to overcome their unfavourable conditions-"burdened societies" – or that they reject meaningful peoples' participation in political decision making ("benevolent absolutisms").

ance" that underlies his treatise on *A Theory of Justice* for domestic societies.[4] The latter book read, so to say, as an underpinning for American-style liberal political arrangements.[5] Rawls based his (political) justice in domestic societies on two main principles: 'First: each person is to have an equal right to the most extensive liberty compatible with a similar liberty for others; Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.'[6] However, in the *Law of Peoples* the ultimate concern is not the well being of individuals but 'the justice and stability for the right reasons of liberal and decent societies as members of a society of well-ordered peoples.'[7]

1.1 Four Freedoms

The *Law of Peoples* reminds one of Franklin D. Roosevelt's famous statement on the Four Freedoms – i.e. the freedoms of speech and religion, and the freedoms from fear and want – as a definite basis for a kind of world which 'is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.'[8] In order to pull the United States out of the great economic crisis in the beginning of the thirties of the last century, President Roosevelt pledged himself on the occasion of his presidential nomination on 2 July 1932, 'to a new deal for the American people. This is more than a political campaign, it is a call to arms.' His 1941 Statement contained a similar pledge for the recovery of the post Word War II world.

Roosevelt's Four Freedoms still offer an adequate framework for giving shape to the duty of states to take the necessary steps, in accordance with their constitutional processes and with the provisions of the International Bill of Human Rights, to adopt such legislative and other measures as may be necessary to give effects to the civil and political – shortly freedom – rights and economic,

4 Ibid. pp. 3-4 and 30-35. See John Rawls, *A Theory of Justice*, Harvard University Press, 1971, pp. 12 and 136-142.

5 Patrick O. Gudridge, book review of *The Law of Peoples*, *American Journal of International Law,* 2001/3, pp. 714-720, at 720.

6 Rawls, *A Theory of Justice*, *supra* note 4, p. 60.

7 Rawls, *supra* note 1, pp. 120-121.

8 Statement of the late American president Franklin D. Roosevelt (1882-1945) in his message to the American Congress on 6 January 1941.

social and cultural or solidarity rights for everyone everywhere in the world.[9] These very rights play a special role in the quest for the implementation of distributive justice among peoples as 'a necessary, though not sufficient standard for decency of domestic political and social institutions.'[10] Strikingly, the focus thus is on domestic institutions. The *Law of Nations* marginalizes the role of international organizations. The civil society and international non-governmental entities do not occur at all as recognised entities.

The *Law of Peoples*' assumption that democratic peoples engaged in commerce do not go to war with each other are illusory since it wholly overlooks the important role of international non-state actors in the global market such as business partners, consumer organizations and the like. As for international governmental organizations (IGOs), Rawls brings them only up in passing as a means to regulate cooperation among peoples, albeit without the authority to offer incentives for their member peoples to become more liberal.[11] After all, 'well-ordered peoples' should observe a duty of non-intervention towards other domestic societies with the exception of outlaw states. Only organizations capable of speaking for all the societies of the world, like the United Nations may express for the society of 'well-ordered peoples' their condemnation of unjust domestic institutions in other countries and of clear cases of violations of human rights and, if necessary, to correct them by economic sanctions or military means.[12]

However, the fall of the Berlin Wall in 1989 made it once and for all crystal clear that the failure of the UN to harmonize the actions of states in the attainment of its common ends effectively, was not due to the cold war between East and West at all. The rulers of the planet still determine to what extent a league of nations may establish conditions under which the UN can maintain justice and respect for the obligations arising from treaties and other sources of international law. This may explain why the global free market economy has still not resulted in the interpretation and application of the Most Favoured Nation (MFN) clause in international trade in the interest of the wealth of individual nations as well as of the freedom from want for everyone everywhere in the world. The unbalanced relationship between the rich North and the poor South reached rock bottom through the 11 September 2001 terrorist attacks on the World Trade Centre in New York.

9 ICCPR, Article 2(2), ICESCR, Article 2(1).
10 Rawls, *supra* note 1, p. 79-80.
11 Ibid. p. 42-43.
12 Ibid. pp. 36 and 70.

1.2 Core v. Periphery

It would appear that the well-ordered peoples in Rawls' "veil of ignorance" follow the Preamble of the UN Charter in that they must establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, albeit, unlike Roosevelt's Four Freedoms, not for everyone everywhere in the world. For the *Law of Peoples* holds that inequalities among peoples are only unjust when they affect the main features of the basic structure of the Society of Peoples, i.e. toleration of and respect for nonliberal peoples but not for outlaw states.[13]

Be that as it may, the *Law of Peoples* shows more the marks of World War II than of the Cold War.[14] What is more, it does not give an answer to the troubling questions resulting from the post-Cold War capitalist domination of the world-economy. Whatever the role of well-ordered peoples, capitalism 'as a system of production for sale in the market for profit and appropriation of this profit on the basis of individual and collective ownership has only existed, and can be said to require, a world-system in which the political units are not coextensive with the boundaries of the market economy.'[15] Discussing the inequalities of core and periphery in the latter years of the second millennium, when the concept of the (a) New International Economic Order was launched, Immanuel Wallerstein took the position that the genius of the capitalist system is the interweaving of two channels of exploitation, i.e.

- Control by ruling groups through access to decisions on the nature and quantity of the production of goods via property rights, accumulated capital, control over technology and the like;
- Unequal exchange between core and periphery through appropriation of surplus from the producers of low-wage but high supervision, low-profit, low-capital intensive goods.[16]

13 Ibid. pp. 59-62 and 113.

14 Gudridge, *supra* note 5, p. 719.

15 Immanuel Wallerstein, *The Capitalist World-Economy*, Cambridge University Press 1979, p. 66. See also his *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century*; *and The Modern World-System II: Mercantilism and the Coordination of the European World Economy, 1600-1750,* Academic Press, 1974 and 1980.

16 Ibid. p. 162.

However, this ingenuity relates to the production of wealth in the global village and not yet to the worldwide redistribution of accumulated wealth. For that reason Wallerstein is still of the opinion that the modern capitalist world system of a rich North and a poor South will finally give way under the load of an increasing polarization, may be even within twenty years from now. According to him the extent of this implosion will largely depend on the political choices of the United States as the power base of the present world economy in conducting the war against the axis of evil after the dramatic collapse of the World Trade Centre in New York on 11 September 2001.[17]

The contemporaries Rawls and Wallerstein apparently hold in common the importance of (re) distributive justice among peoples as a condition for their states to sustain just institutions for political and economic self-determination not only in the core countries but also in the (semi) peripheral countries of the capitalist world-economy (Wallerstein) or the well-ordered – liberal and (other) decent – peoples on the one side of the Society of Peoples and burdened societies and benevolent absolutisms on its other (Rawls). They differ, however, in the role they attribute to the free market.

1.3 Redistributive justice

According to Wallerstein an adequate redistribution of wealth is hardly thinkable without a kind of socialist world government, which can overcome the difficulty that in the present world-system the political units are not coextensive with the boundaries of the market economy.[18] For no free market has ever existed within a capitalist world-economy: 'The hypothetical free market is an intellectual construct (…) Rather, capitalists seek to maximize profit on the world

17 Immanuel Wallerstein in the public debate of 28 February 2002 on 'What good is globalization for developing countries?' that opened the programme of public debates in 2002 under the title of 'Beyond Development? Meeting New Challenges', organized by the Institute of Social Studies (ISS), The Hague, on the occasion of its fiftieth anniversary. In his *magnum opus The Modern World-System (supra* note 5) Wallerstein identified as the characteristic features of the modern world the fantasy of its profiteers and the lack of self-confidence of its oppressed.

18 Wallerstein (1979), *supra* note 15, pp. 66 and 73.

market, utilizing whenever it is profitable, and whenever they are able to create them, monopolies and/or other forms of constraint of trade.'[19]

Rawls, on the other hand, expects everything to come from the duty of well-ordered peoples to assist peoples living under unfavourable conditions that prevent them to have a just or decent political and social regime: 'Since the affinity among peoples is naturally weaker (as a matter of human psychology) as society-wide institutions include a larger area and cultural distances increase, the statesman must continually combat these shortsighted tendencies.'[20] In that regard he showed more optimism than the father of economic liberalism, Adam Smith (1723-1790), who in his famous *The Wealth of Nations* limited the responsibility of states to the defence of the territory, the administration of justice and the provision of public works.

Smith' classic treatise left the international acquisition of wealth and the distribution of employment as the source of personal wealth to the invisible hand of the market: 'The statesman who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.'[21]

In a *Theory of Justice* the invisible hand of the market coordinates the conduct of individuals to achieve results which, although not intended or perhaps even foreseen by them, are nevertheless the best ones from the standpoint of social justice. It is the aim of the ideal legislator in enacting laws and of the moralist in urging their reform.'[22] In the *Law of Peoples* 'the representatives of liberal constitutional democracies reflect on the advantages of the principles of equality among peoples.' The principles must also satisfy the criterion of reciprocity between citizens as citizens and between peoples as peoples.[23] The *Law of Peoples* thus endorses the view that, as a horizontal system legal system,

19 Ibid. p. 149. Wallerstein referred to Smith' suggestion that the division of labour is a necessary consequence of a 'certain propensity in human nature … to truck, barter, and exchange one thing for another' (ibid), p.138; Adam Smith, *The Wealth of Nations*, [1776], New York: The Modern Library – the Cannan edition, 1937, p. 13.

20 Rawls, *supra* note 1, pp. 37 and 105-113, at 112.

21 Smith, *supra* note 19, p. 423.

22 Rawls, *supra* note 4, p. 57.

23 Rawls, *supra* note 1, p. 57.

'international law rests upon the logic of reciprocity in its entirety.'[24] Reciprocity is indeed central to the negotiating framework for the rule of law in international trade. However, the so-called enabling clause in GATT 1994 allows the least developed countries – Rawls' burdened societies – to make in the context of trade negotiations only contributions, which are consistent with their individual development, financial and trade needs.[25]

2. Not looking back in anger

It might be no coincidence that the American response to the disastrous 11 September 2001 attacks on New York World Trade Centre better fits in the Law of Peoples than in the UN Charter. For, unlike the latter, the former provides to well-ordered peoples a legal basis to expose outlaw states as an 'axis of evil'. Well-ordered peoples have the right not to tolerate outlaw or rogue states and to wage a just war against them, albeit that the former should distinguish between an outlaw state's leaders and officials and the civilian population. For, since outlaw states are not well ordered, their civilian members cannot be held responsible for violations of the *Law of Peoples*.[26]

It strikes one that the American government stressed that it conducted its Afghan war against the Taliban government and Al Qaeda and not against the people. Moreover, according to Rawls, only well-ordered peoples may engage in a war in self-defence in order to protect and preserve the basic freedoms of their

24 Bruno Simma, 'Reciprocity', in Rudolf Bernhardt (editor), *Encyclopedia of Public International Law*, Elsevier Volume IV, 2000, pp. 29-33, at 33.

25 Decision on Measures in Favour of Least-Developed Countries, International Legal Materials, 1994, p.1248; Peter-Tobias Stoll, 'World Trade Organization', in Bernhardt, *supra* note 24, pp. 1529-1542, at 1534 and 1535/1536; Ernst-U Petersmann, 'World Trade, Principles', ibid. pp. 1542-1552, at 1551: 'Due to governments' insistence on reciprocity, post-war international economic law continues to be largely based on international treaty law with only a few recognized principles of international economic law.' The enabling clause was added to GATT 1947 in 1965 as Article XXXVI (8).

26 Rawls, *supra* note 1, pp. 94-95. Articles 5 and 6 of the UN Charter give the General Assembly , on recommendation of the Security Council, the authority to suspend states from membership of even to expel them. In that they differ from the *Law of Nations*, which allows well-ordered peoples individually, and collectively to wage a war against outlaw states. The UN never suspended or expelled a member state. See Bruno Simma (editor), *The Charter of the United Nations: a Commentary*, Oxford University Press, 1994, pp. 177 and 192.

citizens and their constitutionally democratic institutions.[27] The *Law of Peoples* thus differ from the UN Charter, which prohibits the use of force among states with the exception of self-defence and the application of enforcement measures under Chapter VII.[28] The one-sided emphasis on one freedom for one region – the freedom from fear in the West – threatens to be at the expense of the other freedoms elsewhere in the world. History shows that suffering individuals may believe that the end of putting a stop to unjust inequality may justify terrorist means, whether or not misled by religious extremists.

Of old, the UN has declared war not only on terrorism but also on poverty – War against Want – illiteracy and other man-made disasters, such as AIDS.[29] However, the rich North did not seize as yet the destruction of the New York World Trade Centre to provide the declarations of war against poverty with a legal basis. But it did so almost immediately by applying Article 5 of the North Atlantic Treaty to the action against terror in response to Chapter VII of the UN Charter. As if Chapter IX of the UN Charter did not exist![30]

In 2001 the UN General Assembly intensified its efforts for the elaboration of a draft comprehensive convention on international terrorism. This convention should provide the legal basis for an effective framework to prevent, combat and eliminate 'criminal acts intended or calculated to provoke a state of terror

27 Ibid. p. 91.

28 UN Charter, Articles 2, 42 and 51. Simma, *supra* note 26, pp. 662 – 663. See also Nico Schrijver, 'Responding to International terrorism: Moving the Frontiers of International Law for "Enduring Freedom"?', Netherlands International Law Review, 2001, pp. 271-291, at p. 290.

29 Special Commentary by the president of The World Bank, James D. Wolfensohn, in Fall 2001 on 'Fight Terrorism *and* Poverty': International action on global issues includes 'confronting terrorism and internationalized crime and money laundering, but also combating communicable diseases like AIDS and malaria, building an equitable global trading system, safeguarding financial stability to prevent deep and sudden crises, and safeguarding the natural resources and environment on which so many poor people depend for their livelihoods' [World Bank Development Outreach, www1.worldbank.org/devoutreach/special asp].

30 Simma, *supra* note 26, p. 794. Admittedly, the pledge of all member states in Article 56 of the UN Charter to take joint and separate action with the UN to achieve the purposes – not substantive obligations – set forth in the preceding Article, differs from Article 25 in which the members agree to accept and carry out the decisions of the Security Council in accordance with the UN Charter. However, although the 'universal respect for, and observance of, human rights and fundamental freedoms have been formulated as an objective, the additional words "without distinction as to race, sex, language and religion" already circumscribe a fixed and directly executable legal obligation.'

in the general public, a group of persons or particular persons for political purposes'. Fortunately, there is now a world-wide consensus that such acts 'are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.'[31] This framework might only become really effective if it will be accompanied by a similar legal basis for an effective framework to prevent, combat and eliminate at least absolute poverty for everyone everywhere in the world.[32] According to the *World Development Report 2000/2001* 'aid is not enough – prospects for poverty reduction depend on policy changes in high-income countries and cooperative actions at the global level.'[33] For that reason the burden of the heavily indebted poor (HIPC) countries should be relieved by donor countries' financing of the Enhanced HIPC Initiative with money *additional* to their aid budgets.[34]

At their Social Summit in Copenhagen in 1995, the Heads of States and Governments committed themselves to strengthen, at the international level, not only international peace and security but also social development. This commitment concerned, amongst others, the creation of a supportive economic environment and the assurance that international agreements relating to trade, investment, technology, debt and official development assistance are implemented in a manner that promotes social development.[35] The Declaration requested the General Assembly to hold a special session in the year 2000 for an overall review and appraisal of the implementation of the outcome of the Summit and to consider further actions and initiatives.

31 A/RES/56/88 of 12 December 2001, paragraphs 2 and 17, adopted without a vote.

32 The concept of absolute poverty was introduced by the World Bank in its *World Development Report 1980*, which focused on absolute poverty as 'a condition of life so characterized by malnutrition, illiteracy and disease as to be beneath any reasonable definition of human decency' (ibid. p. 32). According to the *World Development Report 1990*, p. 4 'no task 'should command a higher priority for the world's policymakers than that of reducing global poverty'. To that end it even introduced the poverty line for the measuring the standards of living: 'A consumption-based poverty line can be thought of as comprising two elements: the expenditure necessary to buy a minimum standard of nutrition and other basic necessities and a further amount that varies from country to country, reflecting the cost of participating in the everyday life of society. (ibid. p. 26).

33 *World Development Report 2000/2001,* p. 188.

34 Ibid., p. 204.

35 A/CONF/166/9 of 19 April 1995, Annex I, Copenhagen Declaration on Social Development, paragraph 29, Commitment 1.

The special session, entitled "World Summit for Social Development and beyond: achieving social development for all in a globalizing world" showed that the greatest "talkers" are not always the best "doers. The targets set forth in 1995 for 2000 in respect of making progress with education, adult literacy, life expectancy, adequate shelter and the like, remained highly unsatisfactory. What is more, in many countries, the number of people living in poverty increased and the provision of social services deteriorated.[36] Besides a reaffirmation of the ten commitments in social development from 1995, the 2000 Social Summit produced little new.[37] This poor result may explain that it did not decide to have a follow-up review and appraisal session after another five years or beyond.

The present American President, George Bush, a republican, should not disregard the warning of his democratic predecessor, the late Franklin D. Roosevelt, that freedom from want and freedom from fear go hand in hand. Danger threatens that he is taking up in the global village the position of a benevolent absolutist who allows himself to create a new world order by the crash of a bomb. Anyhow, the European Union should counterbalance any policy of looking back in anger by stressing the need of creating an international market in the service of men.

3. Responsibility of civil society

The worldwide embrace of the political dogma of the free market enforced the argument that it is not the responsibility of states but of civil society to put the market in the service of men. The civil society rightly put the ball back into the states' court by highlighting the rule of international law in international economic relations. For exactly states oppose in the World Trade Organization (WTO) a too strong involvement of NGOs. The 1994 Agreement Establishing the WTO stated that the General Council might make appropriate arrangements for consultation and cooperation with NGOs concerned with matters related

36 A/RES/S-242 of 15 December 2000, paragraphs, 12 and 10.

37 The international network of citizens' organizations struggling to eradicate poverty, to ensure an equitable distribution of wealth and the realization of human rights, called Social Watch, concluded in the Social Watch Report 2002 Prologue that no other cause campaign on the combat against poverty as the 2000 Social Summit and the 2002 World Economic Forum in New York 'has ever enjoyed such strong moral support … and so few actual results' [www.socwatch.org/eng/Thematic%20reports/prologue_2002.htm].

to those of the WTO (Article V.2). By virtue of this Article the General Council adopted in July 1996 Guidelines for arrangements on relations with NGOs.

3.1 WTO Guidelines for NGOs

In the Guidelines WTO members have pointed out the special character of the WTO as a legally binding intergovernmental treaty of rights and obligations among its members as well as a forum for negotiations. For that reason it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. By way of a palliative, the Guidelines hold out prospects for closer cooperation with NGOs that could be met constructively at the national level where primary responsibility lies for taking the different elements of public interest into account in trade policy-making.[38]

The Guidelines explain why the WTO symposium on issues confronting the world trading system held in July 2001 was controversial and not widely supported by states. The WTO Director-General Mike Moore stated in his opening speech plainly: 'Many Ministers and Ambassadors say it is not the job of the WTO to embrace NGOs and the civil society. They say that should be done at the national level in the formation of national policy positions. They are correct but only 90% correct.' Moore did not bother to clarify why the WTO members – staged by him as 'our owners' – were ten percent incorrect in jealously defending their rights and prerogatives towards the civil society. He only said a few words on a code of conduct for the civil society, including

- The rejection of violence;
- Transparency of NGOs as to their membership, their finances, their rules of decision-making;
- Governments, business and foundations should insist on rules of transparency and adhere to an agreed " code", before they provide funding.

In so doing, the WTO Director-General made the subtle remark that there is a fundamental difference between transparency and participation on the one hand and negotiations on the other 'which in the end only Governments can do.'[39] Or, in the opening words of the European Trade Commissioner, Pascal

38 Guidelines for arrangements on relations with Non-Governmental Organizations, Decision adopted by the General Council on 18 July 1996, paragraph VI.

39 A Summary Report of the WTO Symposium on Issues Confronting the World Trading System. In Sustainable Developments Volume 55, Number I of 23 July 2001, p.1; WTO

Lamy, NGOs should have a voice, not a vote.[40] The international President of World Vision, Dean Hirsch, hurried in his opening remarks to observe on behalf of the civil society that the growing distance between the wealth of the North and the poverty of the South should then be at stake in any new Multilateral Trade Negotiations.[41]

The WTO symposium on issues confronting the world trading system had no impact on the results of the fourth WTO Ministerial Conference held in Doha, Qatar from 9 to 14 November 2001. Admittedly, the Ministerial Declaration stated that international trade could play a major role in the promotion of economic development and the alleviation of poverty. In so doing, it stressed the commitments of the members to the WTO as the unique forum for global rule making and liberalization without making any reference to the rule of law in international economic relations, civil society and NGOs.[42] The Doha outcome challenges the International Law Association (ILA) once again to elaborate in its Declaration on Legal Aspects of Sustainable Development – on the agenda of the seventieth ILA Conference, New Delhi April 2002 – not only the rule of international law in trade relations but also the role of civil society, particularly NGOs interested in the world trading system.

3.2 ILA New Delhi Declaration on Legal Aspects of Sustainable Development

ILA Resolution No. 15/2000 on Legal Aspects of Sustainable Development noted the increasingly recognized status of sustainable development as a concept of international law, especially in treaty law, judicial decisions at international and national levels and in legal literature.[43] Resolution No. 2/2000 on International Trade Law laid down the Declaration on the rule of law in international trade, including the Declarations regarding the Exhaustion of Intellectual Property Rights and Parallel Trade (Annex I), Competition Policy (Annex II) and The rule of Law in International Trade (Annex III).[44]

NEWS: Speech DG Mike Moore, 'Open Societies, Freedom, Development and Trade', 6 July 2001.

40 Sustainable Developments, supra note 39, p. 1 [http://www.wto.org/english/forums].

41 Ibid.

42 WTO/MIN (01)/Dec./1.

43 ILA, *Report of the Sixty-Ninth Conference*, London 2000, pp. 37-38.

44 Ibid. pp. 18-25.

The ILA Declaration on the Rule of Law in International Trade recommended the WTO members to strengthen the rule of law in international trade by enhancing the legitimacy and acceptance of WTO rules by improving the full transparency of the WTO

- By creating an Advisory Parliamentary body to be consulted regularly by the WTO organs in the decision making;
- Opening the WTO dispute settlement for observers representing legitimate interests in the respective procedures;
- Allowing individual parties, both natural and corporate, an advisory *locus standi* in those settlement procedures where there own rights and interests are affected;
- Promoting the consistency of WTO rules and general international law.

Moreover, the Declaration looked forward to the further increase in WTO membership by admission to the WTO of all States willing and able to exercise the rights and fulfil the obligations of WTO membership in order to achieve early and universal acceptance of the rule of law in international trade.[45] In so doing, the ILA rightly amended its 1986 Seoul Declaration on Legal Aspects of a New International Economic Order, which in the spirit of those days focused on the rule of public international law in international economic relations between states only. After all, then the main problem was still the absence of a comprehensive economic world order due to the existence of two competing international economic systems, i.e. the command economy of socialist states and the free market economy of capitalist states.[46]

Resolution No. 19/2000 affirmed the need to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international organisations to their members and third parties, and of members and such parties to such organisations. This is highly relevant for the UN family and the WTO, being no member as yet of that family. According to its Charter, the UN is not a supranational entity but a centre for harmonizing the actions of nations in the attainment of the common ends of maintaining international peace and security, the development of friendly relations among nations on the basis of their sovereign equality and to achieve international cooperation in solving international problems of an economic, social, cultural and humanitarian character including the promotion an encouragement of respect for human rights and fundamental freedoms.

45 Ibid. pp. 24-25.

46 ILA, *Report of the Sixty-Second Conference*, Seoul 1986, pp. 1-12.

The fourth Report of the ILA Committee on Legal Aspects of Sustainable Development, submitted to the London Conference (2000) stated that the hegemonic or parochial "Green Room" process of the present WTO decision-making should be modernized.[47] The fifth and final report, submitted to the New Delhi Conference (2002) concluded amongst others that international law is both a value system consolidating an integrated approach to the environment and development, and a concrete regulatory framework for co-operation between all relevant actors. Current trends in 'decent entrepreneurship' expressed through e.g. codes of conduct for transnational/multinational corporations and the 'market' deserve attention. For that reason the New Delhi Declaration of Principles of International Law relating to Sustainable Development – ILA Resolution 3/2002, adopted at the 70th ILA Conference at New Delhi on 6 April 2002 – addressed not only states but also the business community and the civil society and individuals in the context of the principle of common but differentiated responsibilities, the precautionary approach to human health, natural resources and ecosystems, the principle of public participation to information and justice and the principle of good governance.

4. Good governance in a sustainable civil society

The 1974 Charter of Economic Rights and Duties of States (CERDS) emphasised the sovereign equality of states. The failure of the underlying NIEO was due to the self-interest of the rich West embodied in the freedom of the market.[48] Admittedly, the CERDS neglected that enterprises and individuals are the main actors in international trade, finance and investment. But the market economies overlooked that the freedom of the market should not be at the expense of equality and solidarity. The 1986 ILA Seoul Declaration marked the transition from the NIEO to *a* NIEO and with that to participatory development as a cornerstone of good governance. Its elaboration paved the way for a growing awareness that constitutional orders provide an essential and enforceable framework for sustainable development on condition that their legitimacy results from a genuine and effective process of popular participation and from giving effective legal remedies for putting the principle of state sovereignty in the perspective of state accountability. This implies that the strengthening of institutions of civil society is an important element in developing good

47 ILA, *supra* note 43, pp. 655-712, at 660.
48 A/RES/3281 (XXIX) of 12 December 1974.

governance as an essential dimension of sustainable development. To that end the members of the EU made a firm stand for the interrelation and interdependence of human rights, democracy and good governance in its development co-operation with the ACP-countries since the mid-1970s.[49] According to ILA Resolution 3/2002 'Civil society and non-governmental organizations have a right to good governance by States and international organizations. Non-state actors should be subject to internal democratic governance and to effective accountability.'

4.1 Doha Ministerial WTO Conference

Industrialized countries are still reluctant to attune international law to the needs of developing countries. The failed efforts of the latter countries in the 1970's and 1980s to get support for the UN draft Codes of Conduct on Transnational Corporations and on Transfer of Technology, as well as for the WIPO revision of the 1883 Paris Convention for the Protection of Industrial Property are poignant examples of a conservatism at the expense of a fair and just distribution of wealth and income.[50] For, selfishness of states – their own happiness and perfection – still is the mainstay of law and economics in the best tradition of the eighteenth century contemporaries Emery de Vattel and Adam Smith.[51]

49 Pieter VerLoren van Themaat, 'Ten Years after the ILA Declaration of Seoul', in Erik Denters and Nico Schrijver (editors), *Reflections on International Law from the Low Countries in Honour of Paul de Waart*, Martinus Nijhoff Publishers (1998), pp. 13-27, at 24-27.

50 Klaus Pfanner/Joseph Strauss, 'Industrial Property/International Protection', in Bernhardt, *supra* note 24 Volume II, 1995, pp. 964-976, at 973; Guillermo Cabanellas/Friedl Weiss, 'Transfer of Technology', ibid. Volume IV, pp. 776-789, at 781-782.

51 Emery de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*, Leiden (1758), Préliminaires, paragraphs 13 and 14: 'La première Loi générale, que le but même de la Société des Nations nous découvre, est que chaque Nation doit contribuer au bonheur & et à la perfection des autres tout ce qui est en son pouvoir. Mais les devoirs envers soi-même l'emportant incontestablement sur les devoirs envers autrui, une Nation se doit premièrement & préférablement à elle-même tout ce qu'elle peut faire pour son bonheur & pour sa perfection. (Je dis ce qu'elle *peut*, non pas seulement *physiquement*, mais aussi *moralement*, c'est à dire ce qu'elle peut faire légitimement, avec justice et honnêteté). Lors donc, qu'elle ne pourroit contribuer au bien d'une autre sans se nuire essentiellement à soi-même, son obligation dans cette occasion particulière, & la Nation est censée dans l'impossibilité de rendre cet office.' See also Smith, *supra* note 19, pp. 669: 'In modern war the great expence of fire-arms gives an evident advantage to the nation

Small wonder that developing countries have not been enthusiastic about the Western espousal of the concept of good governance in the context of development co-operation. The business community opposed these efforts because it considered codes of conduct on transnational corporations and the like as unwanted regulations. The idea of codes of conducts for enterprises – transnational corporations or otherwise – was dropped in the early nineties.[52] Instead, full partnership between developing countries and the business community became the order of the day. Liberalization redefined the relationships of the principal actors in the market in a globalizing world economy. The focus is now on the concept of corporate social responsibility.[53]

The Doha Ministerial Conference showed a small political breakthrough by stressing the importance it attached to the implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines.[54] In this connection, it adopted a separate Declaration on the TRIPS Agreement and Public Health which recognized the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics. Moreover, it recognized that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.[55]

The Conference instructed the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002. It remains to be seen whether the Ministerial Declaration and the annexed separate Declaration only sit on the fence or will elaborate the concept of corporate social responsibility in the pharmaceutical sector. After all, the separate Declaration only stated the TRIPS Agreement is subject to Principles laid down in its Article 8 that reflects the scope and content of the General

which can best afford that expence; and consequently, to an opulent and civilized, over a poor and barbarous nation.'

52 Ernst-Ulrich Petersmann, 'Codes of Conduct', in Bernhardt, *supra* note 24, Volume I, 1992, pp. 627-632, at 631-632.

53 UNCTAD World Investment Report *Transnational Corporations, Employment and the Workplace*, 1994, pp. 384, 320 – 339.

54 WT/MIN(01)DEC/1 of 20 November 2001, Ministerial Declaration of 14 November 2001, paragraph 17.

55 WT/MIN(01)/Dec/2 of 20 November 2001, Declaration on the TRIPS agreement and public health of 14 November 2001, paragraphs 1 and 6.

Exceptions clause of Article XX GATT 1994 and Article XIV of the Agreement on Trade in Services. For that reason it is no novelty that the Trips Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. The same holds true for the reaffirmation of the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.[56]

4.2 Corporate Social Responsibility

It is telling that the industries concerned were apparently able until now to prevent their home states from being flexible. The Doha WTO Ministerial Conference did not extend the legal room for manoeuvre of these states to be flexible without the cooperation of these industries. While maintaining the commitments of the WTO members in the TRIPS Agreement, the separate Declaration recognizes that these flexibilities include:[57]

a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
b. Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
c. Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
d. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 (National Treatment) and 4 (MFN Treatment).

Moreover, as the European Trade Commissioner stated in the above-mentioned symposium, the real test, in terms of good governance, is, whether the WTO members leave policy making to the sausage machine of the WTO dispute

56 Ibid. paragraph 4.
57 Ibid. paragraph 5.

settlement mechanism, or whether governments take the responsibility to make the sausages themselves.[58] For GATT panels interpret permitted unilateral infringements on the freedom of trade as restrictive as possible in order to prevent protectionism in disguise.[59] For that reason the Green Paper 'Promoting a framework for Corporate Social Responsibility', published in July 2001, defined as the political context for corporate social responsibility (CSR) the building of a dynamic, competitive and cohesive knowledge-based economy taking into account best practices of lifelong learning, work organization, equal opportunities, social inclusion and sustainable development.[60]

The EU is concerned with CSR in conformity with the strategic goal set at the Lisbon European Council 'to become the most competitive and dynamic knowledge based economy in the world, capable of sustainable growth with more and better jobs and greater social cohesion.'[61] According to the EU Commission's Communication on sustainable development at the Göteborg European Council, public policy has also a key role in encouraging a greater sense of CSR and in establishing a framework to ensure that business integrate environmental and social considerations into their activities. 'Business should be encouraged to take a pro-active approach to sustainable development in their operations both within the EU and elsewhere'.[62]

The CSR applies within the company and in the external relations of the company. The internal dimension includes human resources management, health and safety at work, adaptation to change and management of environmental impacts and natural resources. The external dimension extends to local communities, business partners, suppliers and consumers, human rights and global environmental concerns. As for the external dimension, the Green Paper argues that while CSR can only be taken on by the companies themselves, their stakeholders – such as employees, consumers and investors – can play a decisive role in prompting companies to adopt socially responsible activities. Such a

58 Opening remarks on the NGO symposium of the WTO [WTO website http://www.wto.org].

59 See the author's 'Quality of life at the mercy of WTO Panels: GATT's Article XX an empty shell?', in Friedl Weiss, Erik Denters en Paul de Waart, editors, *International Economic Law with a Human Face*, Dordrecht: Kluwer Law International, 1998, pp. 130-131.

60 COM(2001) 366 final of 18 July 2001, Green Paper *Promoting a European framework for Corporate Responsibility* (presented by the Commission), paragraphs 2 and 13.

61 Ibid. paragraph 6.

62 Ibid. paragraph 15.

holistic approach requires integrated management, reporting and auditing, quality in work, social and eco-labels, as well as socially responsible investment.[63]

However, the Green Paper's proposals have in common with the OECD Guidelines for Multinational Enterprises (MNEs) that they are recommendations to the business community and thus are built on the voluntary nature of CSR and not on the rule of law in international economic relations. The role of the EU institutions is determined as stimulating the debate, giving political support and organizing an exchange of information and knowledge about CSR. It remains to be seen to what extent the outcome of the consultation process might be really left to the assumed beneficial effect of the global free market.

5. Global market in the service of man

The WTO has a point that the world trading system does not destroy jobs and worsen poverty.[64] Nobody less than the World Bank are its witness in that respect.[65] However, the key question is whether further progress in the liberalization of the global market will also push back the figure of people living below the poverty line. The World Bank warned against unrealistic expectations in its report on Workers in an Integrating World, particularly if there would be no proper policy choices for a liberalization of the international labour market.[66] Such liberalization depends upon the social responsibility of entrepreneurs, trade union leaders, governments and their respective stakeholders or constituencies in the rich North.[67] As for the latter, practice shows that the subject of their constant concern is first and foremost whether the former exert themselves in the best tradition of Vattel and Smith for the international pro-

63 Ibid. sections 2.1 and 2.2.

64 See the WTO leaflet *10 common misunderstandings about the WTO*: 'Finally, while about 1.5 billion people are still in poverty, trade liberalization since World War II has contributed to lifting an estimated 3 billion people out of poverty.'

65 *World Development Report 1980*, p. 35 en *World Development Report 1990*, *Poverty*, pp. 1 en 5.

66 *World Development Report 1995*, pp. 118-125.

67 For critical comments on the tripartite structure of the ILO see Virginia A. Learey, 'Lessons from the Experience of the International Labour Organisation', in Philip Alston, editor, *The United Nations and Human Rights: a Critical Appraisal*, Oxford: Clarendon Press, 1992, pp. 584-586 and 619. See also Robert W. Cox, 'Labor and Employment in the Late Twentieth Century', in R. St. MacDonald. D.M. Johnston en G.L. Morris, editors, *The International Law and Policy of Human Welfare*, Alphen a/d Rijn: Sijthoff & Noordhoff, 1978, p. 542.

tection of the freedom of a global market that safeguards and increases first and foremost its wealth.

Admittedly, consumers increasingly do not only want good and safe products but also socially responsibly produced products.[68] However, their impact is not yet strong enough to convince entrepreneurs that sustainable entrepreneurship nowadays should ideally fill a gap in the global free market caused by the shortage of socially responsible investment (SRI).[69] According to the WTO, a decrease of trade barriers, particularly in the agricultural sector by one third would give the world economy a new impulse of about $ 600 billion. Doing away with all trade barriers would even multiply this effect thirty fold.[70] Such astronomic figures should provoke the public demand that a truly sustainable trade and investment policy will be at stake in trade negotiations, widely differing from the abortive OECD draft Multilateral Investment Agreement (MAI).[71]

It might be no coincidence that both the WTO and the ILO organized meetings of government representatives, politicians, academics, social experts and others to tackle the social consequences of globalization. To that end, the ILO launched a top level World Commission on the Social Dimension of Globalization, to examine ways in which all international organizations can contribute to a more inclusive globalization process that is acceptable and fair to all by establishing the facts and outline the main contours and dynamics of

68 COM(2001) 366, *supra* note 60, section 3.4.

69 COM(2001) 366, *supra* note 60, sections 3.4 and 3.5. See J. Gregory Dees, 'The Meaning of Social Entrepreneurship', 31 October 1998, Stanford Graduate School of Business news [http://www.gsb.stanford.edu/services].

70 WTO News: Speech Director General Mike Moore on 23 January 2002 in the Parliamentary Assembly of the Council of Europe**: '**Cutting by a third barriers to trade in agriculture, manufacturing and services would boost the world economy by $613 billion, according to one study from Michigan University. That is equivalent to adding an economy the size of Canada to the world economy. Doing away with all trade barriers would boost the world economy by nearly $1.9 trillion, or the equivalent of 2 Chinas. The World Bank in its report on Global Economic Prospects estimates that abolishing all trade barriers could boost global income by $2,800 billion and lift 320 million people out of poverty by 2015.'

71 Andrew Walter, 'NGO's, Business, and International Investment: The Multilateral Agreement on Investment, Seattle, and Beyond'. *Global Governance: a Review of Multilateralism and International Organizations,* Volume 7 Number 1, 2001, p. 52: 'To prefigure the argument, the basic reason for NGO opposition to both the MAI and the next WTO round is the NGO belief that government policies and negotiating strategies have been captured by the big corporate lobbies in the major countries.'

the process of globalization. It will examine the perceptions of workers, enterprises, investors and consumers as well as different expressions of civil society and public opinion from all parts of the world.

The Commission will analyze the impact of globalization on employment, decent work, poverty reduction, economic growth and development. It will also forge a broad consensus on the issues, including the involvement of all interested international organizations, as well as governments and organizations representing workers and employers. Finally, it will launch a process for addressing the key issues posed by the global economy to make globalization sustainable and to promote the fair sharing of benefits. The Commission, which met for the first time on 25 March 2002, is expected to complete its deliberations and present an authoritative report to the ILO's Director-General in the course of 2003.[72]

The WTO hosted a public symposium on 'The Doha Development Agenda and Beyond' from 29 April to 1 May 2002 to discuss the challenges and opportunities from the Doha Ministerial Conference. The topics included opportunities for development; market access issues related to trade; services and industrial goods; the trade and the environment after Doha; proposals to include new subjects in the negotiations and the functioning and financing of the WTO. According to the WTO Director-General Moore, Doha represented a watershed for the WTO as the beginning of a new era of negotiations, which can and should provide real and lasting opportunities for the developing countries to participate in the multilateral trading system.[73]

Both initiatives give a ray of hope that the principles laid down in the ILA New Delhi Declaration on Legal Aspects of Sustainable Development will be put into practice in and through the world trading system in the foreseeable future. This Declaration may promote a proper and effective legal framework for the operation of a global market in the service of man. If it succeeds in doing so, it will mark a new era reaping the benefits of Rawls' *Law of Peoples* and Wallerstein's *The Modern World System*. It thus may pave the way for the rule of law in a socially responsible international trading system aiming at sustainable development throughout the world by definitively putting away the outdated ideas of Vattel and Smith on the selfishness of states and accepting the views of Rawls and Wallerstein on the importance of (re)distributive justice among peoples and for sustainable development in theory and practice.

72 ILO News [http://www.ilo.org/public/englishg/wcsdg].

73 Doha Development Agenda: Symposium. http://www.wto.org.

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GLOBAL DEVELOPMENT THROUGH INTERNATIONAL INVESTMENT LAW: LESSONS LEARNED FROM THE MAI

Eva Nieuwenhuys

1. Introduction

Around 1960 the Canadian media prophet Marshall McLuhan predicted that humanity would be brought together into a single 'global village' as a result of television and satellite connections.[1] Since then considerable changes have indeed taken place in international politico-economic relationships. As a result of the collapse of the planned economies of Eastern Europe and the former Soviet Union, the free-market system has been introduced almost all over the world, while technological innovation has facilitated the expansion of international financial, investment and trade flows. As a result, transnational corporations,[2] in addition to states and international organisations, have become increasingly important factors in the world order. This globalisation in the commercial-economic area, however, has not resulted in the emergence of a 'global village'. On the contrary. The result has been considerable macroeconomic growth. However, (as yet) little has come of the plans for a global policy in

1 In this regard, see J. Heilbron and N. Wilterdink (ed.), *Mondialisering* (Amsterdams Sociologisch Tijdschrift/Wolters-Noordhoff-Groningen 1995), pp. 7-8.

2 In this article, the term 'transnational corporation' will be used and not the equally common term 'multinational corporation' in relation to companies which partially or fully own and/or control production or service facilities in one or more countries outside of their home countries. With regard to the various ways that the term transnational corporation may be defined, see P.T. Muchlinski, *Multinational Enterprises and the Law,* (Blackwell Publishers Ltd-Oxford 1995), p. 12-15.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 295-307.*

relation to social development, which the member states of the UN decided on in Copenhagen in 1995. As appears from the wealth of figures in the development report published by the UN in June 2000, despite economic growth the gap between the rich and the poor has only widened, both within countries and between countries.[3] The number of people that live in absolute poverty is increasing. A large part of the world's population is deprived of fundamental labour standards, the right to work and an adequate standard of living, health and education. Considerable discussion is taking place on the social effects of the economic process of globalisation and the question of how this can be given a 'human face'. Due to the decisive role that transnational corporations play in this process, this discussion has concentrated on the question of the social role of these organisations.

Transnational corporations invest internationally in countries throughout the world.[4] Through their worldwide investment in production, technologies and ideas they are able to enrich the lives of people all over the world and contribute to the socio-economic development of countries. But to realise this goals they have to invest under the appropriate conditions. In international forums however, agreement has not yet been reached with regard to appropriate conditions for such investments. Partly because of this corporations are not legal persons under international law and they cannot be established and registered internationally.[5] There is also (as yet?) no general investment treaty or a world investment organization comparable to the world trade system and the international monetary system. Investment law governing transnational corporations consists of a variegated system of national laws and bilateral, regional, sectoral and multilateral rules, codes of conduct and treaties. This system, however, is inadequate and unstructured. The international rules that are intended to regulate the behaviour of transnational corporations are not compulsory and enforceable.[6] They do not enable democratically elected governments to watch over the general welfare of their countries. The international rules that are

3 UNDP *Human Development Report* 2000.

4 With regard to transnational corporations, as forms of international investment, see D.K.Fieldhouse, 'The Multinational: A Critique of a Concept' in: A. Teichova, M.L. Leboyer and H. Nussbaum, *Multinational Enterprises in Historical Perspective* (Cambridge University Press 1986/Paperback edition 1989), pp. 9-30, at p. 11.

5 Transnational corporations do have limited legal personality under international law in so far as they may appear in dispute resolution proceedings. This appears to be the case, for instance, with regard to the proceedings of ICSID, *cf.* footnote 17.

6 Such as the text of the OECD Declaration on International Investment and Transnational Corporations and the OECD Guidelines of 1976, as revised in June 2000, and the most

compulsory and enforceable are mainly intended to protect investors and to guarantee proper, equal and fair treatment. Furthermore, they only relate to particular sectors,[7] a limited region,[8] or to certain topics, such as dispute resolution or the insurance of political risks.[9]

In order to bring about a global investment system, the Organisation for Economic Co-operation and Development (hereinafter OECD) started negotiations on a Multilateral Agreement on Investment (hereinafter MAI). On 24 April 1998,[10] however, the OECD negotiations on the MAI were stopped. The United States and the European Union were divided on a number of aspects of the MAI. What weighed more heavily, however, was the fact that it became more difficult for political leaders in the United States, France and other OECD countries to obtain the necessary political support at home for the MAI. Non-governmental organisations[11] and developing countries had serious criticisms of the MAI. The aims of the treaty were too limited. The text of the treaty had not been drawn up democratically. Above all, the treaty related mainly to the treatment of transnational corporations by host countries. It did not include the behaviour of transnational corporations in relation to the environment, human rights, consumer protection, sustainable development and labour conditions in developing countries. It was feared therefore that the treaty would constitute a threat to all of the above.

recent version of the text of the Draft UN Code of Conduct for Transnational Corporations.

7 The Energy Charter Treaty of 1994 provides, for instance, for investment protection and the promotion of transnational corporations in the energy sector.

8 The Inter-Arabic Investment Protection Treaty of 1980, the ASEAN Agreement for the Promotion and Protection of Investments of 1987, Chapter XI of the North-American Free Trade Agreement of 1992 and the Lomé Treaties between the European Union and a large number of countries in Africa, the Caribbean and the Pacific Ocean provide for the promotion and protection of investments.

9 *Cf.* footnote 17. with regard to the various systems of rules applicable to international investments, see A.A. Fatouros, "Introduction: Looking for an International Legal Framework for Transnational Corporations" in: A.A. Fatouros (ed.), *Transnational Corporations: the International Legal Framework* (United Nations Library on Transnational Corporations, Vol. 20 Routledge-London and New York 1994), pp. 1-28.

10 The MAI negotiating document dates from 24 April 1998. On 14 October 1998 Prime Minister Jospin of France announced that France was withdrawing from the negotiations.

11 In practice, sectors of 'civil society' are increasingly involved in international organisations. Under pressure from global social movements, international organisations have to adjust their policies and their regulations. In this regard, see R. O'Brien, A.M. Goetz, J.A. Scholte and M. Williams, *Contesting Global Governance* (Cambridge University Press-Cambridge 2000).

In this article the central question is what lessons may be learned from the failure of the MAI and what form a future multilateral investment treaty could and should take. Of course, it is not possible to discuss all aspects of a future investment treaty here. Special topics such as tax regulations, environmental protection and procedures for dispute resolution lie beyond the scope of this discussion. This contribution deals with the aims of the treaty; the forum in which this treaty is negotiated, who should be involved in the negotiations, why human rights and fundamental labour rights should form part of the treaty and how the position of developing countries can be strengthened.

2. Human Values As Aims of a Multilateral Investment Treaty

'The real wealth of a nation is its people. And the purpose of development is to create an enabling environment for people to enjoy long, healthy and creative lives. This simple but powerful truth is too often forgotten in the pursuit of material and financial wealth'. These are the opening lines of the UN Development Report for 1999.[12]

This quote should be the basis of a future multilateral investment treaty. The aim of this treaty should be to give people a freer and more meaningful existence. The aim of the MAI was the protection of the proprietary rights of transnational corporations and increasing their opportunities for investment. According to the preamble of the MAI, summarised briefly here, a worldwide liberal investment system must be established consisting of open, standardised markets, in which transnational corporations are entitled to an equal, fair, transparent and predictable treatment in order to promote the efficient use of economic resources, to create employment, to improve living standards and to promote the sustainability of economic growth.[13]

This aim has been defined too narrowly. It focuses on the efficient use of economic resources and the increase in the total wealth of nations and individuals without including as part of this the just distribution of wealth. In an investment system in which human beings have pride of place, the principle should be acknowledged that economic growth, employment and an adequate standard of living are valuable and that every person is equal before the law

12 UNDP *Human Development Report* 1999, p. 1.

13 See the MAI negotiation document, as approved on 24 April 1998.

and must therefore be entitled to claim a share of this wealth.[14] From the preamble of a future multilateral investment treaty it should be clear that the treaty is meant to establish a worldwide investment system in which international investments would be protected and promoted in such a way that they could contribute to the creation of conditions in which every person could enjoy the rights to freedom, equality and a proper standard of living for himself and his family. An aim such as this supposedly expresses social ethics which may also be economically profitable. The winner of the Nobel Prize for Economics, Amartya Sen, states in his book *Development as Freedom*[15] that society benefits if individuals can develop to their maximum potential. He regards freedom therefore not only as the consequence of economic development, but also as its cause. Social development, according to Sen, both arises from the total of advantages and from the distribution of these. For this reason, without social development no economic development will be achieved.

3. Forum for Negotiations and Participants in the Negotiations

With regard to the emergence of an investment treaty aiming to increase human prosperity and the conditions for individual freedom worldwide, such a treaty would have to come about on the basis of democratic negotiations between states. For this reason, negotiations should have to take place in a forum in which all the states involved are represented. One of the major points of criticism of the MAI was the fact that the negotiations on this were held within the OECD and that the developing countries were excluded from the negotiations, while it was the intention that they should join the MAI.[16] Developing countries would like the negotiations to take place in a global forum in which they

14 I have derived the proposition with regard to 1) the value of prosperity and 2) the equivalence of sharing in prosperity from the comparison which Amartya Sen makes between 1) the value of personal freedom and tolerance and 2) the equivalence of personal freedom and tolerance. If personal freedom and tolerance are important values, according to his argument, the personal freedom and the tolerance guaranteed for one individual must be guaranteed for all in a good society. See Amartya Sen, *Development as Freedom* (Uitgeverij Contact 2000), p. 225-227.

15 See above.

16 While it appears from the preamble of the MAI that the MAI aims to bring about a framework for international investments, only a few developing countries were involved in the negotiations, namely Mexico and South Korea, as OECD member states, and nine countries, including Argentina, Brazil, Chile, Hong Kong, China and Slovakia, as states with observer status.

actually have a say. For this reason, global forums such as the World Bank, the International Monetary Fund (hereinafter IMF) and the World Trade Organisation (hereinafter WTO) are not uncontroversial as forums for negotiations on a multilateral investment system. This despite the fact that these organisations have already carried out considerable work in the area of international investment law.[17] In these organisations, however, the rich countries have control and developing countries have less influence. For this reason, some developing countries do not wish to hold further negotiations on investments within the WTO.[18] Disagreement with regard to the question of whether international investments should be placed on the agenda for a new negotiating round was partly the reason that the WTO's 'Millennium Round', which began in Seattle in December 1999, ceased after only a few days.

Developing countries fear that within the WTO the rich countries will focus mainly on the relationship between trade and investments and the necessity of ensuring that measures relating to investment do not obstruct or frustrate free trade. Developing countries on the other hand wish to ensure that governments are not deprived of opportunities to ensure that these investments are consistent with their development policies.[19] They point to the increasing link between investments and sustainable development and would like their economic growth to be an integral part of a future multilateral investment treaty. In this

17 In 1956, the World Bank set up the International Finance Corporation. On 18 March 1965, the World Bank set up the International Centre for the Settlement of Investment Disputes (ICSID). On 11 October 1985, the World Bank Convention establishing the Multilateral Investment Guarantee Agency (MIGA) was accepted. In September 1992, the Development Committee of the IMF and the World Bank approved a report in which guidelines were set out in relation to the proper treatment by host countries of foreign direct investment by transnational corporations. In the Uruguay Round, which was concluded in 1994, agreements were reached with regard to international investments. Since the WTO was established in 1995, these agreements have been in force within the WTO.

18 This information is derived from a paper given by M. Koulen, the adviser of the Trade and Finance Division of the Secretariat of the WTO in Geneva, and was given during a seminar organised by the Faculty of Law of Leiden University on 1 April 1999 with regard to the nature and content of a future multilateral investment treaty.

19 In the UN, an international forum in which developing countries have a majority, developing countries have called for international recognition of their sovereign right to regulate the flow of capital, money and goods within their territories. They did so ever since the beginning of the Fifties. In this regard, see E.C. Nieuwenhuys, "Het Multilaterale Akkoord inzake Investeringen," *Internationale Spectator*, October 1998, pp. 509-516.

regard, they view the United Nations Conference on Trade and Development (hereinafter UNCTAD) as a suitable forum for negotiations.

With a view to democratic decision-making, UNCTAD may indeed be a suitable forum for negotiations. UNCTAD adopts positions which earn both the confidence of developing countries and that of the OECD countries. In their annual reports, they call on developing countries to adopt adjustment programmes and a market orientation. Furthermore, they are presently carrying out highly relevant research into the relationship between investments and sustainable development and they are creating new concepts for investment treaties which will result in a balance between the specific needs of developing countries for diversity, heterogeneity and flexibility and the needs of transnational corporations for predictability, transparency and legal certainty.[20]

4. Transnational Corporations, Social Rights and Human Rights

Transnational corporations may be described as parent companies,[21] which usually have their home base in one of the OECD countries[22] and carry out activities in a variety of countries through fully-owned subsidiaries, joint ventures or contractual partners. To ensure that international activities are as profitable as possible, the central management of the parent companies wish to exploit optimally the comparative advantages they have. Their aim is to have a liberal multilateral investment treaty adopted that enables them to convert into money the type and quantity of capital and labour at their disposal. Furthermore, this treaty has to enable them to use their money and their goods, services and knowledge, which can be valued in money terms, to develop as many activities as are consistent with their corporate strategies. In addition, they wish

20 UNCTAD conducts research into concepts for investment treaties that provide the necessary flexibility in the interests of developing countries. The International Investment Agreements: Concepts Allowing for a Certain Flexibility in the Interest of Promoting Growth and Development, Note by the UNCTAD Secretariat TD/B/COM.2/EM.5/2, 5 February 1999 and the Report of the Expert Meeting on International Investment Agreements: Concepts Allowing for a Certain Flexibility in the Interest of Promoting Growth and Development, 6 MAY 1999 TD/B/COM.2/17; TD/B/COM.2/EM.5/3.

21 The term 'parent company' is used here as this relates to corporations which have control over other companies, either on the basis of their share capital or on the basis of clauses in their Articles of Association or contracts.

22 Although a number of transnational corporations have their home bases in countries such as Brazil, India and South Korea, the share of these investment countries in the total volume of investment is proportionately small.

to be able to organise these activities on the basis of an efficient internal organisational structure, which enables them to manage, coordinate and integrate dispersed investments, in whatever form and in whatever country or in whichever activity or sector of the economy, across national borders and to match these to the interests of the transnational corporation as a single economic entity. The managements of corporations wish to be able to match investment decisions with regard to the global allocation of capital, knowledge and employment with the efficient use of economic resources without having to take social interests into consideration in taking their decisions.

The MAI was a liberal multilateral investment treaty, as described above. The concept of investment was broadly defined within this treaty and included direct investments in the form of money, goods, services and knowledge, as well as portfolio investments. In addition, the MAI gave transnational corporations the greatest possible freedom with regard to their corporate strategies and access to as many possible sectors in as many possible countries, subject to the fewest possible conditions. Under the MAI, the managements of corporations could decide independently where and in what form they wished to invest the capital and/or technological knowledge of the transnational corporation and where they wished to base their financial management, rights to control the company and their research and development facilities. The MAI did not include compulsory social clauses and clauses relating to environmental protection. It mainly extended to transnational corporations rights to proper treatment and mainly imposed on states the obligation to deregulate and privatise.

Since the MAI did not oblige corporations to do business in a socially responsible manner and because it compelled states to implement far-reaching liberalisation of the flow capital, defenders of human rights feared that the MAI would result in a deterioration in the protection of human rights worldwide and to a 'race to the bottom' in the developing countries, which only have cheap labour at their disposal.[23] After all, under the MAI, limitations imposed on investments in favour of public health, the environment, human rights and sustainable development could, in principle, conflict with the free flow of capital or could be regarded as a disguised form of protectionism.[24] Nation states

23 To strengthen their competitive position in attracting international investment, compared to other low-wage countries, these countries have to offer transnational corporations increasingly larger tax advantages and increasingly lower wages and more favourable conditions with regard to social rights and the environment.

24 In this regard, see M. Sassòli, 'The Impact of Globalisation on Human Rights' in *Globalisation, Human Rights and the Rule of Law*, The Review, International Commission of Jurists, 1999 No. 61, pp. 67-81 (p. 68).

would increasingly become less able to carry out their traditional obligations to protect and implement human rights. The far-reaching deregulation and privatisation of international economic relationships has already resulted in considerable breaches of human rights. In Latin America and Asia, the national currencies have been devalued and companies have gone bankrupt as a result of financial crises, partly caused by uncontrolled speculation on the international financial markets.[25] In the Middle East and in Eastern Europe, the rapid deregulation and privatisation of state enterprises has contributed to an increase in unemployment, poverty, illness, inequality and social unrest.[26]

To ensure that the globalisation of the economy does not undermine human rights, a future investment treaty must not compel states to liberalise their markets to such an extent that they are forced to breach their obligations under international human rights treaties.[27] Transnational corporations may perhaps be expected to behave as good citizens, but this does not exempt states from their obligation to promote the interests of their citizens.[28] With a view to the protection of human rights, states must be able to stop the flow of capital, whether or not temporarily. In addition, a future investment treaty must also contain provisions that oblige transnational corporations to respect, protect and, where possible, realise labour rights and human rights affected by their activities.[29] Investment law is the only area of international law that can extend rights and impose obligations directly on transnational corporations. For this reason, a multilateral investment treaty is an obvious instrument for imposing

25 The proponents of the liberalisation of financial markets initially attributed the financial crises in Latin America and Asia exclusively to the macroeconomic policies adopted by these countries and the way in which the banking sectors were organised in these countries. However, it is now almost generally accepted that these crises cannot be attributed exclusively to internal factors, but are also due to external factors, such as the instability inherent to deregulated international financial markets.

26 With regard to the situation in the Central and Eastern Europe, see UNDP's *Human Development Report for Central and Eastern Europe and the CIS* of 1999.

27 In this regard, see M. Sassòli, 'The Impact of Globalisation on Human Rights', *op. cit*., footnote 24, p. 71.

28 The American political philosopher, Barber, for instance, has called for years for stricter government regulations in relation to transnational corporations and is of the opinion that it is nonsensical to expect transnational corporations to behave as good citizens on the basis of private codes of conduct. In this regard, see B.R. Barber, *Jihad versus Mc World*, (Ballantine Books-New York 1996).

29 For extensive information on the responsibilities of transnational corporations with regard to human rights, see M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations (*Kluwer Law International-The Hague 1999).

mandatory obligations on transnational corporations to respect labour rights and human rights.[30] In this regard, the treaty must refer to the revised OECD Guidelines for Multinational Enterprises[31] and to topics of greater international scope than those intended in the Guidelines, which are set out in the ILO treaties[32] and the International Bill of Human Rights.[33]

From the OECD Guidelines, the ILO documents and the international human rights treaties, a number of negative obligations may be derived that apply to corporations. On the basis of these documents, the treaty will have to contain provisions which require the corporations, subsidiaries, joint ventures and commercial contractual and other partners to refrain from breaches of certain rights. The prohibition on breaching the right to life, freedom and inviolability of the person; the right not be subjected to torture, nor to cruel, inhuman or degrading treatment or punishment; the right not to be obliged to perform forced

30 See L. Dubin, 'The direct application of Human Rights Standards to, and by, Transnational Corporations' in *Globalisation, Human Rights and the Rule of Law*, *op. cit.* footnote 24, pp. 35-66 (p. 37).

31 The OECD Guidelines for Multinational Corporations were drawn up for the first time in 1976 as part of the OECD Declaration on International Investments and Multinational Corporations. At the end of June 2000, the OECD Council of Ministers approved the revised Guidelines. The revised Guidelines contain, for instance, guidelines in the areas of employment and labour relations, human rights, consumer interests and corruption. For the text of the revised *Guidelines for Multinational Enterprises,* see http://www.oecd.org/daf.investment/guidelines/mnetext.htm.

32 Over time the ILO has adopted a series of human rights treaties and adopted resolutions which relate to conditions of employment and outlaw forced labour and the worst forms of child labour and which grant rights to equal treatment and freedom of association and collective bargaining. On the basis of the ILO Charter and the ILO Declaration of 1998 on the Fundamental Principles and Rights at Work, ILO member states are obliged to adhere to these fundamental labour rights even if they have not ratified the respective treaties. See the ILO Declaration of Fundamental Principles and Rights at Work as adopted on 18 June 1998 in Geneva during the annual International Labour Conference. With regard to the ILO Declaration of 1998, see K. Tapiola, The ILO Declaration of Fundamental Principles and Rights at Work and its Follow-up in: R. Blanpain, *Multinational Enterprises and the Social Challenges of the XXIst Century* (Kluwer Law International-London 2000), pp. 9-17.

33 The International Bill of Human Rights consists of the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966. The Universal Declaration of Human Rights of 1948 is a resolution of the General Assembly of the UN and has the status of a recommendation. This Declaration now has such authority that it is deemed to be binding. In this regard, see P. de Waart, *Mensenrechten, Mensenwerk* (Uitgeverij Kok-Kampen 1996), p. 11.

labour or the worst forms of child labour; the right to adequate pay and the right to health and safety at work, may be declared to apply directly to them.[34] It may also be argued that a number of positive obligations apply to corporations on the basis of the ILO documents and the International Bill of Human Rights.[35] Corporations should withdraw from countries in which serious breaches of human rights occur. They should also use their influence to force the governments of states to respect human rights. In addition, the right to family life, the rights to schooling and education, the right to social security and the like should be reformulated in such a way that corporations can implement these rights, where necessary, by providing suitable housing for their employees, training and education of their employees and protection against arbitrary dismissal. The extent to which each company should make an effort in practice will have to depend on the type of activity carried out by the company, the company's market share and the degree of influence that the company can exercise in a particular country.[36]

5. Strengthening the Position of Developing Countries

International investments are crucial for the social and economic progress of developing countries, but they must provide them with capital, technology and knowledge, as well as the expansion of production capacity and export markets. Developing countries must therefore be in a position to set conditions for the establishment of transnational corporations on their territories. All the present highly industrialised countries based their policies in the past on a hybrid form of free trade and cautious protectionism and it is precisely this system of rules, borders and government intervention that was the source of their economic

34 See also L. Dubin, 'The direct application of Human Rights Standards to, and by, Transnational Corporations' in *Globalisation, Human Rights and the Rule of Law*, *op. cit.* footnote 24, p. 66.

35 The positive obligation that corporations have to respect, protect and realise human rights may be derived from the preamble of the Universal Declaration of Human Rights, which is directed both at states and non-statal entities, in so far and is it reads: "…that every individual and every organ of society (...) shall strive by teaching and education to promote respect for these rights and freedoms and (...) to secure their universal and effective recognition and observance..." In this regard, see M. Kamminga, 'Aansprakelijkheid van multinationale ondernemingen voor schendingen van internationaal recht' in: *NJCM-Bulletin*, Vol 22 1997, No. 6, pp. 784-790 (p. 789).

36 See M. Sassòli, 'The Impact of Globalisation on Human Rights' in *Globalisation, Human Rights and the Rule of Law*, *op. cit.* footnote 24, pp. 67-81 (p. 76).

prosperity.[37] Under the MAI, it was not possible for developing countries to ensure the redistribution and more balanced spread of money, knowledge, power and employment. In principle, developing countries, which found themselves in various stages of development, had to integrate into the world economy at the same time, at the same rate and subject to the same conditions as the OECD countries.[38] A future multilateral investment treaty should give countries more or less equal opportunities by first enabling them to create the conditions under which they could participate in the global market. Where necessary, it must be made possible for developing countries to introduce such regulations and set up such institutions as are necessary to regulate the free market with a view to the welfare of their populations. For the time being, countries with capital markets that do not function adequately should only be required to allow direct investment and no portfolio investments. Countries in which small and medium-sized enterprises have not developed far enough, or in which the regional spread of economic activities is still uneven, should be able to protect their small and medium-sized enterprises temporarily and to promote a balanced regional spread of economic activities.

6. Concluding Remarks

If a future multilateral investment treaty is to be acceptable to broad layers of the global community, it will have to deviate from the principles on which the MAI was based in a number of important respects. Firstly, the aims of the treaty will have to be more balanced and will therefore have to relate both to economic growth and increasing profits and to a just distribution of the increased wealth. The treaty will also have to come about in a democratic manner. Not only the OECD countries and international business will have to be involved in the negotiations, but also the developing countries and representatives of governmental and non-governmental organisations. Furthermore, the treaty will have

37 See P. Bairocht, *Economics and World History: Myths and Paradoxes* (Harvester/Wheatsheaf-New York 1993).

38 From the Human Development Report of 1999 of the UN Development Programme, it appears, for instance, that countries such as Madagascar, Niger, the Russian Federation, Tajikistan and Venezuela benefit little from their integration into the world economy since it offers them insufficient access to markets and technology. Due to the vagaries of the world market and fluctuations in the prices of raw materials, these countries have often become even more marginalised as a result of their integration. See the *Human Development Report*, *op. cit.* footnote 12, p. 2.

to relate not only to the way states may and must treat transnational corporations, but also to the way in which transnational corporations should behave. In other words, the treaty must have a broader scope than the MAI and should also include mandatory environmental protection clauses and social clauses. It must not compel states to liberalise their markets to such an extent that they are no longer able to fulfil their duties in relation to protecting human rights. A future multilateral investment treaty must also compel transnational corporations to promote the economic growth and progress of developing countries. A system such as this should enable them to do business in an ethically responsible manner and to make profits without doing so at the expense of people, countries or the environment.

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SUSTAINABLE DEVELOPMENT IN INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT: THE ICSID AND NAFTA EXPERIENCE

Esther Kentin

1. Introduction

It is a challenging job to find recognition of the concept of sustainable development in investment dispute settlement. However, a careful search reveals the occasional references to elements of sustainable development, but in particular the lacunae in this field of international law. This situation merits a discussion.

Part of the debate has been sparked off by developments concerning the North American Free Trade Agreement (NAFTA) Chapter 11. NAFTA Chapter 11 encompasses admission and protection of foreign investment, including dispute settlement through international arbitration. The first NAFTA Chapter 11 cases provoked a wave of criticism especially regarding the consequences for domestic environmental regulation. Besides, concerns have been raised regarding the procedure of international investment dispute settlement.

The concept of sustainable development has emerged cautiously in the jurisprudence of international law. In the Gabćikovo-Nagyramos case, sustainable development made its debut in the jurisprudence of the International Court of Justice. The Court referred to the effects on the environment and the risks for present and future generations of human activities. The new norms and standards, that have been developed and laid down in a great number of legal instruments, should be taken into consideration: "This need to reconcile economic development with protection of the environment is aptly expressed in

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 309-338.*

the concept of sustainable development", according to the Court.[1] Earlier, in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court qualified Principle 24 of the Rio Declaration on Environment and Development, stating that "warfare is inherently destructive of sustainable development",[2] as an additional argument for the view that environmental aspects should "be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict."[3]

Also the WTO Appellate Body has referred to the concept of sustainable development in its case law. For the interpretation of the phrase "exhaustible natural resources" in Article XX of the General Agreement on Tariffs and Trade (GATT) the Appellate Body cited the Preamble of the Agreement Establishing the World Trade Organization (WTO Agreement) as an "explicit recognition of by WTO Members of the objective of sustainable development."[4] Although references to sustainable development in jurisprudence may be scant, these recent years hopefully prove to be only the initial phase of recognition of the concept of sustainable development.

This chapter will examine whether and, if so, how the concept of sustainable development plays a role in the settlement of international investment disputes after 1990. The year 1990 is chosen, as after 1990 the concept of sustainable development was placed in the centre of the international political arena by the 1992 United National Conference on Environment and Development (UNCED) in Rio de Janeiro and, ten years after, the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg. Sustainable development started to appear in various international legal instruments, within the context of these conferences, namely the Rio Declaration and the Johannesburg Political Declaration, but also in other agreements, such as the above mentioned WTO

1 *Hungary v. Slovakia* (*Gabćíkovo Nagymaros* case), Judgment of 25 September 1997, ICJ Reports (1997), p. 7, para. 140.

2 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ Reports (1996), p. 20, paras. 30. The full quotation reads: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

3 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ Reports (1996), pp. 20-21, paras. 30-33.

4 Report of the Appellate Body on United States-Import Prohibition on Certain Shrimp and Shrimp Products (*Shrimp-Turtle*s case), WT/DS58/AB/R, 12 October 1998, para. 131.

Agreement. Moreover, since the late 1980s the number of investment disputes has grown considerable compared to the period before.

After a brief examination of the integration of the concept of sustainable development into international investment law in section 2, section 3 first deals with the way elements of sustainable development are reflected in the procedures of Investor-State dispute settlement. Many of these procedures are based on commercial arbitration practices, stemming from a time when foreign investment was often accompanied by commercial contracts between Investor and host country. As the procedure is often reflected in decisions it is important to analyze whether the procedural rules comply with the concept of sustainable development. Indeed, the concept of sustainable development contains principles that deal explicitly with procedures, for example the principle of good governance and the principle of access to information and public participation. An often criticized feature of international investment dispute settlement is in fact the confidentiality of proceedings of investment arbitration. Second, in section 4, the substantive aspects of sustainable development in investment cases will be studied, discussing mainly NAFTA cases as the concept of sustainable development has not been materialized in other investment cases yet. In which way have environmental aspects been taken into consideration in recent investment cases? Is the concept of sustainable development reflected in the interpretation of investment provisions such as expropriation? The chapter winds up with concluding remarks and prospects for the future.

2. Sustainable development in international investment law

The 1972 Stockholm Declaration was one of the first instruments to link environment and development as a common aim, although environmental aspects dominated. The Rio Declaration of 1992 was a real breakthrough for sustainable development as a legal concept. Not only did it use the term sustainable development thirteen times, its principles covered the whole spectrum of sustainable development, from environmental protection to peace and poverty eradication. Moreover, the Declaration acknowledges the importance of international trade and investment policies. This is, for instance, reflected in principle 16 which deals with the polluter pays principle. Principle 16 reads as follows:

> "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach

> that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

Indeed, an important responsibility for achieving sustainable foreign investment can be put on national policies and regulation. Domestic rules have to set, for example, standards on environmental pollution and have to respond to new forms of industries and potential adverse impacts. In this regard a remark has to be made on the differences between developed and developing countries. While many developed countries have this kind of domestic regulation in place, this is not always the case for developing countries. Especially with regard to environmental protection and social justice, regulatory and judicial systems in developing countries can and must be improved, to intercept adverse impacts of both domestic and foreign investment.

Thus, while foreign investment is increasingly regulated internationally, these rules have to allow for national policies and regulation, dealing with public concerns. As will be discussed below, investment cases under the NAFTA have demonstrated that investment provisions may qualify national environmental regulation as discriminatory or leading to expropriation. This issue is addressed in Principle 12 of the Rio Declaration which reads:

> "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."

This principle draws attention to the issue of adopting domestic regulation in the name of public interests, which in fact is discriminatory to foreign trade or investment. Furthermore, principle 12 particularly underlines the importance of addressing environmental problems within the international economic system.

Nevertheless, as Agenda 21 of UNCED, points out, foreign direct investment serves as an important financial resource for sustainable development.[5] Agenda 21 underlines that countries should remove barriers, e.g. extensive administrative procedures, and promote investment in general, including both domestic and

5 See Agenda 21, Chapter 2.23, A/CONF.151/26 (Vol. I): (...) Sustainable development requires increased investment, for which domestic and external financial resources are needed. Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources. (...)

foreign investment. It further stipulates the important role of transnational enterprises by pursuing responsible entrepreneurship, including environmental management, minimizing ecological impact, adopting clean production methods and involving stakeholders, such as trade unions.

The 2002 World Summit on Sustainable Development in Johannesburg emphasized the importance of continuing the implementation of sustainable development on different levels. Its Political Declaration referred to corporate social responsibility of the private sector and to the challenges of globalization, including investment flows, of which the costs and benefits are unevenly distributed. Also the Johannesburg Plan of Implementation stipulates the essential role for international investment in various sectors, such as energy, tourism and infrastructure.[6]

Hence, the concept of sustainable development provides a number of principles that can be integrated rather directly into international investment law. The recent ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development presents a useful and comprehensive enumeration of principles.[7] The integration principle, the polluter-pays principle, the concept of corporate social and environmental responsibility as well as the principle of sovereignty over natural resources have frequently been related to international investment regulation. In addition, principles such as public participation and access to information are equally relevant for international investment law. An often expressed point of criticism is that those which may be affected in their direct environment by foreign investment are totally neglected in any rule of international investment regulation. Indeed, negotiations between foreign investors and host countries usually take place on federal or state level and it depends on host country policies whether local stakeholders are involved.

Other principles may have, at first glance, a rather vague or abstract relation with investment regulation, such as the principle of equity and eradication of poverty and the principle of common but differentiated responsibilities, including the recognition of the special needs of developing countries. But these principles still affect the development and interpretation of investment law. An example of the principle of recognition of the special needs of developing countries can

6 Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/20, August 2002.

7 Text in ILA, *Report of the Seventieth Conference, New Delhi 2002*, (London, ILA, 2002). Text also in UN Doc. A/57/329, 31 August 2002.

be found in the General Agreement on Trade in Services (GATS) of the WTO that accommodates implementation according countries own time schedules.

The concept of sustainable development is emerging – though slowly – in international law, including international economic law.[8] The reference to sustainable development in the Preambles of the WTO Agreement[9] and NAFTA[10] and the elaboration on sustainable development in the Environmental Side Agreement of NAFTA[11] demonstrates this development successfully. NAFTA's Environmental Side Agreement includes principles, such as the sovereign right over natural resources, intergenerational equity, transparency and public participation.

Initially, the emphasis of international investment law has been particularly on investment protection. The first NAFTA awards enlightened the potential conflict between the protection of foreign investment and domestic environmental regulation. This raised serious concerns from a variety of quarters, such as non-governmental organizations (NGOs) and academic scholars, but also the NAFTA States themselves, in particular Canada. These concerns may have caused or at least contributed to the defeat of the project for a Multilateral

8 See generally A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, (Oxford, OUP, 1999); P. Sands, 'International Law in the Field of Sustainable Development', *British Year Book of International Law*, 65 (1995), pp. 303-381; F. Weiss, E. Denters and P. de Waart (eds.), *International Economic Law with a Human Face*, (The Hague, Kluwer Law International, 1998); N.J. Schrijver, 'Fifth and Final Report of the ILA Committee on Legal Aspects of Sustainable Development: Searching for the Contours of International Law in the Field of Sustainable Development', *Report of the Seventieth Conference, New Delhi 2002*, (London, ILA, 2002).

9 The first phrase of the Agreement Establishing the World Trade Organization (WTO Agreement) Preamble reads as follows:
Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of *sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development [emphasis added].
Reprinted in *International Legal Materials*, 33 (1994), p. 15.

10 The NAFTA Preamble keeps it simple as it reads: "Promote sustainable development", Reprinted in *International Legal Materials*, 32 (1993), p. 297.

11 North American Agreement on Environmental Cooperation, 1993, reprinted in *International Legal Materials*, 32 (1993), p. 289.

Agreement on Investment (MAI), which was negotiated under the auspices of the Organisation for Economic Co-operation and Development (OECD) till 1998.[12] Indeed, the Draft MAI provisions on environment and labour raised considerable disagreement among the negotiating countries. Several OECD countries were concerned about the consequences the MAI could have on their right to regulate domestic interests with respect to the protection of the environment and cultural activities. The failure of the MAI demonstrated that the protection of investment and investors has to be complemented by acknowledgement of other interests, such as those regarding development, environment, human rights and labour. This issue touches upon an essential principle of sustainable development, namely the principle of integration. According to the integration principle, economic, financial, social, and environmental activities and objectives are interdependent and thus require an integrated approach. Indeed, the challenge of sustainable development is to ensure that regulation takes into account all impacts of foreign investment and that it not only promotes economic development, but melts comprehensively economic, environmental and social goals.

3. Concerns on procedural aspects of international investment dispute settlement

3.1 Review of international investment dispute settlement mechanisms

Several institutes and organizations are involved in international investment dispute settlement. The International Centre for Settlement of Investment Disputes (ICSID) was established in 1966 and is part of the World Bank Group. The ICSID Convention provides rules for conciliation and arbitration. Furthermore, it foresees in an additional facility which may administer cases that fall outside the scope of ICSID, because one of the parties is not a member of ICSID. The number of ICSID cases has grown enormously in the last decade. While in the 1970s and 1980s only 9 and 17 cases respectively were initiated at ICSID, in the 1990s 42 cases were started and in the first three years of the

12 See for analyses of the MAI, UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development*, (United Nations, New York and Geneva, 1999); S. Picciotto and R. Mayne (eds.), *Regulation International Business: Beyond Liberalization*, (London, Macmillan, 1999); E.C. Nieuwenhuys and M.M.T.A. Brus (eds.), *Multilateral Regulation of Investment*, (The Hague, Kluwer Law International, 2001).

new millennium already 32 cases were brought to ICSID. ICSID is likely to be of growing importance in the field of international disputes settlement.

The Iran-U.S. Claims Tribunal was established in 1981 after the hostage crisis in Iran.[13] All Americans were forced to flee the country leaving behind their property and investments, while Iranian assets in the United States were frozen since the hostage crisis. The Tribunal dealt with claims of nationals of the U.S. and Iran, as well as with claims between the two States. A large number of claims consisted of claims of U.S. investors, whose assets were nationalized or otherwise expropriated, directly or indirectly. The work of the Tribunal has resulted in a substantial quantity of jurisprudence on various issues such as the meaning of expropriation and the standard of compensation. It should however be kept in mind that the Tribunal was a result of a serious political situation between two countries. This is also reflected in difficulties regarding the resignations and appointments of judges during the early days of the Tribunal and in the rather differing awards regarding compensation. On other issues such as the meaning of expropriation, the Tribunal has produced more coherent jurisprudence. Nevertheless, the Tribunal's contribution to public international law has been criticized by a number of authors, in particular from developing countries. They claim that the decisions are of limited value for international investment law in general for reasons enumerated above.[14]

The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) contains rules for the settlement of commercial disputes. These rules can be adopted by parties when signing a contract, but also ad hoc, and guide the parties through the process of arbitration. A number of disputes under NAFTA have been settled according the UNCITRAL Arbitration Rules recently. The UNCITRAL rules have provided the basis for other arbitration rules such as the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State and the Optional Rules for Arbitrating Disputes Between Two States.[15] On

13 See for a comprehensive reading on the Tribunal, C.N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal*, (The Hague, Martinus Nijhoff Publishers, 1998).

14 See M. Sornarajah, *The Settlement of Foreign Investment Disputes*, (The Hague, Kluwer Law International, 2000), p. 284, and S.K.B. Asante, 'International Law and Foreign Investment: a Reappraisal', *International and Comparative Law Quarterly*, 37 (1988), pp. 588-628, p. 603.

15 According to the introduction of these rules "experience in arbitrations since 1981 suggests that the UNCITRAL Arbitration Rules provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements, although they were originally

occasion, the Permanent Court of Arbitration functions as facility for international investment dispute settlement. Recently, the Permanent Court has adopted a new set of arbitration rules concerning the settlement of disputes relating to natural resources and the environment.[16] These *ad hoc* rules, also based on the UNCITRAL Arbitration Rules, may well be applicable to international investment disputes concerning the conservation of natural resources or the environmental protection. Moreover, as these rules provide for multiparty arbitration, including any combination of parties, counting States, intergovernmental organizations, NGOs, multinational corporations and other private entities, they could overcome difficulties regarding the involvement of other stakeholders, such as NGOs and local communities.

Partially based on the UNCITRAL Arbitration Rules are the ICSID Rules of Procedure for Arbitration Proceedings. The vast majority of recent concluded BITs refer to the ICSID Convention as one the means for dispute settlement. ICSID provides not only rules but also facilitates dispute settlement, by providing a panel of arbitrators, place of arbitration (often Washington D.C., though not necessarily) and administrative assistance, all based on the consent of the parties.

Chapter 11 of NAFTA foresees in Investor-State dispute settlement according to the ICSID Convention or the UNCITRAL Arbitration Rules. Furthermore, NAFTA presents additional rules such as on applicable law and publication of the award.

The general criticism on international arbitration procedures involves the privilege position it awards to foreign investors. It seems that foreign investors have an additional procedure at disposal, which is not available for domestic investors. Suppose a host country decides to adopt legislation that restricts the production of a certain product in an industry as a whole. It is very well conceivable that a foreign investor may claim expropriation for its lost profits. A comparable situation was dealt with in the *Pope & Talbot* case, which will be discussed in section 4.

On the other hand, in the early days foreign investment disputes were drawn into the sphere of economic and politic relations and the use of diplomatic protection was not uncommon, which, according to some authors, led to 'gun

designed for commercial arbitration."

16 The Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment were adopted on 19 June 2001, The Hague. Text in *International Legal Materials*, 41 (2002), pp. 202-221.

boat' strategies.[17] The adoption of investment dispute procedures such as ICSID resulted in a more rule of law approach,[18] an element of the principle of good governance. Then again, other principles of sustainable development such as the principle of public participation and access to information and justice have contributed to point out shortcomings of international investment arbitration. In this section several elements will be discussed in the view of the concept of sustainable development. Another point of criticism concerns the use of Investor-State dispute resolution by foreign investors as a strategic tool to exert pressure on governments.[19] The threat to resort to international arbitration and claim huge amount of compensation has already been used by corporation in their lobby strategies against governmental regulation.[20] Last but not least is the concern that the awards are not open for review by a court of appeal. Although this is the case for several other international dispute settlement mechanisms, such as the International Court of Justice, the panel of arbitrators is much smaller. Indeed, the WTO dispute settlement mechanism does provide for a seven-member Appellate Body, by which the case will be reviewed on issues of law and interpretation. The annulment procedure of ICSID as well as the resort to national courts on grounds of exceeding jurisdiction have been used as quasi appeal procedures, but it is obvious that this is not a satisfactory development.

3.2 Jurisdiction and local remedies rule

The local remedies rule allows States to adjust potential *faux pas* and should prevent the recourse to international dispute settlement for minor issues. As part of the Calvo doctrine,[21] it further stipulates the equality of foreign and

17 M. Sornarajah, 'Power and Justice in Foreign Investment Arbitration', in *Journal of International Arbitration*, 14 (1997), p. 103.

18 See on this trend in trade law, J. Cameron and K.R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body', *International and Comparative Law Quarterly*, 50 (2001), no. 2, pp. 248-298.

19 H. Mann, 'NAFTA and the Environment: Lessons for the Future', *Tulane Environmental Law Journal*, 13 (2000), pp. 387-410, p. 405.

20 D. Schneiderman, 'NAFTA's Taking Rule: American Constitutionalism Comes to Canada', *University of Toronto Law Journal*, 46 (1996), pp. 499-535, p. 525.

21 The Calvo doctrine was developed by the Latin American scholar Calvo (1822-1906) and stipulates, briefly summarized, that foreign investors should be treated as national investors. They are subject of national law and jurisdiction, and their governments are

domestic investors and debars premature interference of home countries in disputes between private investors and States. The local remedies rule does justice to the sovereign rights of States to pursue their own policies, of course within the framework of their international obligations. Furthermore, the access to justice of individuals and peoples as a principle of sustainable development is recognized in judicial and administrative procedures of a State,[22] but remains ambiguous in international arbitration. The local remedies rule, by some considered as customary international law, has, however, been bypassed in several investment cases, in the past and recently. This practice, inspired by the questioning of impartiality and capacity of domestic courts,[23] but also based on the assumption that the defending State has violated a rule of international law to be judged upon by an international panel, has led to vanishing of the local remedies rule in bilateral and regional investment treaties. Indeed, numerous bilateral investment treaties now include provisions that require a claimant to choose between either national courts or international arbitration.[24]

A consequence is that disputes that could still be resolved at a domestic court are drawn into the international arena. In a number of cases jurisdiction of the tribunal is challenged, which is certainly also a matter of course defence of the respondent, trying to wriggle out of international arbitration in the hope that its national court will decide more favourably for the defending State. In the *Methanex* case,[25] the United States argued that the doctrine of restrictive interpretation should be applied regarding jurisdiction clauses in Investor-State disputes, thereby maintaining state sovereignty in cases of ambiguity, but this argument was firmly rejected by the tribunal as it saw no reason to adopt this interpretation.

not entitled to interfere in case of disputes. See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, (Cambridge, CUP, 1997), p. 178.

22 See ILA New Delhi Declaration, op. cit. above (n. 7), principle 5.3.

23 See H. Mann and K. Von Molkte, *NAFTA's Chapter 11 and the Environment*: *Addressing the Impacts of the Investor-State Process on the Environment*, (Winnipeg, IISD, 1999), p. 13.

24 See the reference to the French Argentine investment agreement in *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Decision on Mexico's preliminary objection concerning the previous proceedings, 26 June 2002, para. 29, <http://www.worldbank.org/icsid/cases/waste_united_eng.pdf>

25 *Methanex Corp. v. United States of America*, First Partial Award, 7 August 2002, para. 105, <http://www.state.gov/documents/organization/12613.pdf>

In the *Robert Azinian* case,[26] the investor had sought recourse to the Mexican courts. The tribunal observed the findings of the Mexican courts, and, as the claimants had not challenged the Mexican laws, it limited its task to the question whether "the claim would be a finding of denial of justice or of pretence of form to achieve an internationally unlawful end on the part of the Mexican courts."[27] Although the claimants had not raised complaints against the Mexican courts, the tribunal felt that it was appropriate to examine the case. The claim was rejected as "the arbitral tribunal [found] nothing ... that appears arbitrary or unsustainable in light of the evidentiary record. To the contrary, the evidence positively [supported] the conclusions of the Mexican courts."[28] This case shows that after recourse to national courts the task of an international arbitrary tribunal should be restricted to the question whether denial of justice has taken place, instead of providing another court of appeal. This is not only time saving but also assumes due regard for the law and courts of a host country.

In the *Compañia de Aguas del Aconquija* case,[29] the tribunal dismissed a claim from an investor because the investor had not submitted its case to an administrative court as the concession contract exclusively provided for. According to the tribunal, the claims were based on a breach of contract by the Province of Tucumán, which was subject to initial resolution in the administrative court of Tucumán. In the annulment procedure of this case, the ICSID *ad hoc* Committee annulled the award partially, which led to a resubmission of the dispute.

In the *Emilio Agustin Maffezini* case,[30] the tribunal judged that the Argentine-Spain bilateral investment treaty did not require the exhaustion of local remedies, despite a clear reference to domestic remedies in Article X(2) and (3). The tribunal interpreted this provision as providing the investor to seek

26 *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, *ICSID Review*, 14 (1999), no. 2, pp. 538-575. Also in *International Legal Materials*, 39 (2000), p. 537.

27 Ibid., Introductory Note by A.A. Escobar, Counsel, ICSID, pp. 535-537.

28 *Robert Azinian* case, op. cit. above (n. 26), para. 120.

29 *Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No ARB/97/3), Award, 21 November 2000, *ICSID Review*, 16 (2001), no. 2, pp. 643-685 or *International Legal Materials*, 40 (2001), p. 426-453. Decision on Annulment, 3 July 2002, *International Legal Materials,* 41 (2002), p. 1135.

30 *Emilio Agustín Maffezini v. Kingdom of Spain*, (ICSID Case No. ARB/97/7), Award, 13 November 2000, *ICSID Review*, 16 (2001), no. 1, pp. 248-278 or *International Legal Materials*, 40 (2001), pp. 1148-1164.

redress at a domestic court and not preventing the investor to submit its claim to international arbitration after domestic procedures.

3.3 Competence of arbitrators

Allegations have been made that the arbitrators may not be completely unbiased, when they are appointed by the disputing parties.[31] In most cases a panel of three arbitrators is appointed, whereof two are appointed by the parties and the third member by agreement of the parties. As Merrills notes, "for obvious reasons the result of a collegiate arbitration often turns on the decision of the neutral member of members."[32] In contrast with a judge, an arbitrator is "a person usually inclined to favour the interests of domestic or international business rather than interests of national communities."[33] Examining recent cases, this pessimistic view does not do justice to the many very qualified and independent arbitrators today. In the past arbitrators may have been experts in commercial and contract law, hardly familiar with public international law. However, today the panel of arbitrators of ICSID lists experts in economic, investment and international law in general. Article 1124 NAFTA explicitly states that presiding arbitrators should be experienced in international law and investment matters. In the same vein, Article 14 ICSID stipulates that arbitrators shall be persons of recognized competence in the field of law. Fact is that parties are able to appoint an arbitrator who might have certain views on the subject, which remains true for both the party arbitrators as the neutral arbitrator.

In the annulment proceedings of the *Compañia de Aguas del Aconquija* case,[34] the independence of the President of the *ad hoc* Committee dealing with the annulment, was challenged. A partner the President's law firm had done legal, but unrelated and only limited, work for an affiliate of the claimant. The other two members of the Committee decided that the "mere existence of some professional relationship with a party is not an automatic basis for

31 Mann and Von Molkte, op. cit. above (n. 23), p. 14, and Sornarajah, op. cit. above (n. 14), p. 285.

32 See J.G. Merrills, *International Dispute Settlement* (3th edition), (Cambridge, CUP, 1998), p. 92.

33 See Sornarajah, op. cit. above (n. 14), p. 175.

34 *Compañia de Aguas del Aconquija* case, op. cit. above (n. 29), Decision on the Challenge to the President of the Committee, 3 October 2001, *ICSID Review*, 17 (2002), no. 1, pp. 168-181.

disqualification of an arbitrator of Committee member."[35] Only if established facts would lead to reasonable doubts an arbitrator could be disqualified, according to the decision.

3.4 Transparency of the proceedings

The confidentiality of proceedings according to ICSID, UNCITRAL and PCA rules stems from commercial arbitration. Commercial arbitration rules were originally set up to solve disputes between two private parties having their reasons to keep conflicts quiet. The development of these into Investor-State dispute settlement rules involving public interests justifies the question whether the procedures reflect these changes. The decision to disclose the case to the public is still left to the parties and to the arbitrators. This procedure has been widely criticized as issues of public concern were in stake in several cases. The principles of public participation, access to information and the right to transparent decision-making procedures may be seriously under pressure when cases are decided behind closed doors.

The *Ethyl* case,[36] which is discussed more comprehensively in section 4.2, has been seized by NGOs to demonstrate the effects of confidentiality of procedures. While the case involved environmental and health regulations, the proceedings were behind closed doors. The case was settled by the parties making Canada withdrawing the challenged regulation and paying of US$13 million damages. In the *Metalclad* case, of which an in depth analysis is found in section 4.1, the tribunal ordered that "[it] still appears to the Arbitral Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum."[37]

Cases initiated under NAFTA are increasingly published while not long ago it was very hard to find out which and how many cases were filed. Of the cases involving Canada and the United States, most documents can now be

35 Ibid., para. 28.

36 *Ethyl Corporation v. the Government of Canada*, Award on the Jurisdiction 24 June 1998, *International Legal Materials*, 38 (1999), pp. 700-737. See for a full overview of documents <http://www.dfait-maeci.gc.ca/tna-nac/ethyl-e.asp>

37 *Metalclad Corporation v. United Mexican States*, (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000, *ICSID Review*, 16 (2001), no. 1, pp. 168-202, para. 13.

found on governments web sites.[38] In the *UPS v. Canada* case the hearing on the objections to jurisdiction was even open to the public.[39] Of many other ICSID cases, publication of -part of the- documents takes only place after the award has been made.

An even more far-reaching development today in disclosing proceedings is the acceptance of *amicus curiae* briefs by a NAFTA tribunal. In the *Methanex* case,[40] the tribunal has cautiously opened the door for "friends of the court" briefs in order to involve local stakeholders and civil society, by accepting them in a preliminary decision. Similar developments are taking place at the WTO dispute settlement body. In the WTO *Shrimp-Turtles* case[41] the panel has allowed *amicus curiae* briefs of several NGOs as part of the appellant's submission, even when the appellant does not completely endorse their views. According to these progressive developments, NGOs may even obtain a better status then they would have in domestic and international courts. Indeed, so far the International Court of Justice has never accepted an *amicus curiae* brief of a non-State player as yet. The last words on the submission of *amicus curiae* briefs have, however, not been said yet, because the *Methanex* case is still pending and the tribunal has stated that it takes the final decision on such submissions in a later stage.[42]

The overall picture shows that, on the one hand, investment arbitration is less transparent, because of its confidentiality rules, and, on the other hand, increasingly accessible for non-parties through the disclosure of many documents and the provisional acceptance of *amicus curiae* briefs.

38 For cases involving Canada see <http://www.dfait-maeci.gc.ca/tna-nac/gov-e.asp>. For cases involving United States see <http://www.state.gov/s/l/c3741.htm>. The web site of the U.S. Department of State provides also information on other cases under NAFTA, see <http://www.state.gov/s/l/c3439.htm>

39 *United Parcel Service of America, Inc. ("UPS") v. Government of Canada*, < http://www.dfait-maeci.gc.ca/tna-nac/parcel-e.asp>, last visited 23 October 2002. See for the announcement on the hearing <www. worldbank.org/icsid/ups.htm>

40 *Methanex* case, op. cit. above (n. 25), Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001.

41 *Shrimp-Turtles* case, op. cit. above (n. 4).

42 *Methanex* case, op. cit. above (n. 40), para. 53.

3.5 Applicable law and interpretation

Critics have pointed out that, due to their background, arbitrators may be inclined to apply investment law in isolation of other fields of law. As discussed above, international investment law is, or was at least initially, mainly focussed on the protection of investments. These accusations were in the same vein as those expressed against the dispute settlement procedure of the WTO.[43] The principle of integration of the concept of sustainable development requires an integrated approach to economic, social and political policies, and might therefore demand due regard to other fields of law, including environmental, social, developmental and human rights instruments, in international investment dispute settlement.

In the WTO *Shrimp-Turtle* case,[44] the Appellate Body stressed the importance to get into multilateral agreements, to reach consensus on international environmental problems. It thereby referred to Principle 12 of the Rio Declaration. This case demonstrates clearly the attitude of the Appellate Body to decide on WTO cases not solely in terms of the WTO agreements, but in relation with other treaties. Unfortunately for the sake of this chapter, no decision has taken yet, which involved the balancing of conflicting obligations of, on the one hand, the WTO and, on the other hand, a multilateral environmental treaty.

The point of departure in international investment disputes is described in Article 42(1) of ICSID: if not otherwise agreed upon by the parties, the law of the contracting State party shall be applied, and such rules of international law as may be applicable, including bilateral and regional investment treaties which may be in place. This has been confirmed in several cases. Indeed, in the *Compañia de Aguas del Aconquija* case,[45] the tribunal referred the parties to a provincial administrative court in order to judge upon the contract between the investor and the province. In the *Alex Genin* case[46] none of the parties

43 Environmental NGOs have strongly criticized the WTO as an organization pursuing free trade without considering other interests, such as the environment. After the inclusion of the concept of sustainable development in the preamble of the WTO Agreement and the decision in the *Shrimp-Turtles* case the judgments are somewhat milder and differentiated. See for an overview of and different views on this development H. Ward and D. Brack (eds.), *Trade, investment and the environment*, (London, Earthscan, 2000).

44 *Shrimp-Turtles* case, op. cit. above (n. 4).

45 *Compañía de Aguas del Aconquija* case, op. cit. above (n. 29).

46 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, (ICSID Case No. ARB/99/2), Award, 25 June 2001, < http://www.worldbank.org/icsid/cases/awards.htm>

argued that particular rules of international law should be applied. The tribunal therefore applied Estonian law, seeing no reason to apply international law leading to another result in this case. In a later stage of the award, however, the tribunal reflected on the Estonian procedures, and noted that these "can be characterized as being contrary to generally accepted banking and regulatory practice," a clear reference to international and other national norms.[47] These circumstances affected the allocation of costs of the arbitration, leading to the decision that each party should bear its own costs.

The *Santa Elena* case[48] shows that the tribunal was well aware of the environmental obligations of Costa Rica under the World Heritage Convention, but that it saw no reasons to reflect these obligations in the amount of compensation.

The emergence of the integration and interrelationship principle of sustainable development, construed as integrating other fields of law such as environmental law, in international investment arbitration is rather hesitant. However, if the same trend will be followed as recently at the WTO, environmental law, as well as other fields of law, may take a more profound place in the settlement of international investment disputes in the future. Section 4 includes a more in depth discussion of this issue.

3.6 Status of the parties and their interests

The Investor-State procedure deviates from most other international dispute resolution mechanisms, as one of the disputing parties is a private party. As described above, commercial arbitration rules have provided the basis for most procedures. The access of private parties in international dispute resolution is not welcomed unanimously, as it is seen as an "unfettered ability to pursue a singular private interest at the international level."[49] The inequality of the parties and their concerns might not be reflected sufficiently in the different mechanisms. Indeed, the parties are equal before a tribunal, but are their

47 Ibid., para. 364.

48 *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica,* (ICSID Case No. ARB/96/1), *ICSID Review*, 15 (2000) no. 1, pp. 167-210.

49 Mann and Von Moltke, op. cit. above (n. 23).

interests equal or at least comparable?[50] The pursuit of own, private interests within a framework of those of others, that is private and public interests, can be regarded as an element of corporate social responsibility. As part of the principle of common but differentiated responsibilities, an element of the concept of sustainable development, it requires an investor to recognize and take into account interests of stakeholders, including local communities.

It is, however, not realistic that an investor in the course of arbitration will present interests other than its own, leaving it up to the State party to do so. Moreover, the State party may adopt an approach which suits its defense best, but which may not include all public interests involved. Part of this issue is addressed in the NAFTA Chapter 11 procedure which allows NAFTA Members which are not party to the dispute to submit their views on the dispute.[51] Furthermore, the NAFTA Free Trade Commission, composed of the representatives of the NAFTA Members, may provide binding interpretations of Chapter 11 provisions.[52] Public concerns of both the state in dispute as the other Member states of NAFTA can so be presented to the tribunal. The recognition of *amicus curiae* briefs, as discussed above, is another step towards involving potential other interests.

4. Substantive aspects of sustainable development at issue in international investment disputes

4.1 Right to regulate and investor's rights

The broad scope of expropriation provisions in many investment treaties have been seized by foreign investors to claim compensation for various governmental acts. In addition, the plea on non-discriminatory provisions and fair and equitable treatment in investment cases, as well as in WTO trade cases, have aroused concerns about the implication these provisions may have for the regulatory powers of host states. It is feared that the rights of investors prevail over public

50 See already GA Resolution 1803 (XVII), 14 December 1962, Declaration on Permanent Sovereignty over Natural Resources, which states that "... reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests."

51 Article 1128 NAFTA "Participation by a Party" reads:
"On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."

52 Articles 1131 (2) and 2001 NAFTA.

concerns States want and have to protect by domestic regulation. In a number of NAFTA cases,[53] foreign investors have indeed claimed that domestic regulation led to expropriation or discriminatory and unfair treatment of their investment, in the sense of hampering contemplated activities, or leading to a considerable depreciation of the investment. The question is which depreciation of foreign investment caused by governmental measures, in particular those concerning public interests such as human health and the environment, should be compensated, and which not. How far can the scope of expropriation be stretched? Which category of governmental actions can be qualified as lawful, in the sense that they are taken for a public purpose on a non-discriminatory manner, but at the same time do not have to be compensated?[54]

According to UNCTAD this issue forms an increasingly grey area, urgent for both developed and developing countries.[55] Regulatory legislation in developed countries is extensive and broad and continues to be developed and adjusted. In developing countries, on the other hand, there is often a need to develop and implement new regulatory legislation in different sectors, such as in the environmental, developmental and financial sector. Foreign investment could even initiate new legislation to regulate and manage new, developing sectors of the economy. In both developing as developed countries, new legislation may be hampered by the threat of paying high amounts of damages and compensation.

How can the concept of sustainable development contribute to solve this issue? The concept of sustainable development confirms the sovereign right of countries to manage natural resources according their own environmental and developmental policies. On the other hand, the principle of good governance requires fair and just procedures, including respect for human rights, such as the right to private property and not to be deprived of it. The implementation of national policies should not be coupled with injustice, though the threat of high costs should not prevent implementation of these policies from the very start. There is no ready-made answer to this issue, though the concept of

53 The issue of domestic regulation versus investment protection has only been considered in NAFTA cases. In the *Santa Elena* case the tribunal referred to the implementation of the World Heritage Convention in relation to the settlement of the amount of compensation. This case will be further discussed in section 4.3.

54 In many investment treaties lawful expropriation demands 1) a public purpose, 2) a non-discriminatory character, and 3) payment of compensation. Article 1110 NAFTA adds the requirement of due process of law.

55 See UNCTAD, *Taking of property*, (Geneva and New York, United Nations, 2000), p. 6.

sustainable development does provide guidance. It foresees in balancing the various interests: national economic interests, local environmental concerns, rights of foreign investors, but also on a more abstract level, such as being competitive in the search for investment and providing a transparent and predictable framework of regulation.

In this section the considerations of several tribunals regarding the provisions on which most foreign investors base their claims, thus expropriation, standards of treatment and compensation, are explored. An issue that comes up in many cases is that of the legitimate aim of domestic measure. What is the exact intent of the measure and is there an international obligation that supports this aim? How do panels consider the public interests of home countries? Could alternative measures have been taken without the adverse consequences for foreign investors? Another issue is whether the measure is non-discriminatory in its effects to foreign investors. Besides, which interests are taken into account by settling the amount of compensation? The amount of compensation determines the costs States may have to pay for issuing and implementing environmental or other regulation in the public interest and thus is of great significance, especially for 'poor' countries.

4.2 The scope of expropriation

In many investment treaties expropriation provisions distinguish between direct and indirect expropriation.[56] Indirect or "creeping" expropriation relates to measures that may not have the explicit purpose to expropriate or take over the investment, but still indirectly leads to the loss of control, use or management of the investment, or to a substantial loss of value of the investment. Initially, indirect expropriations included measures such as cancellation of licenses and permits, exorbitant taxation, failure to protect foreign property or property rights. In recent cases activities, such as enacting new legislation, have been claimed to lead to "indirect expropriation". An increasing number of investment treaties include protection against "measures tantamount to expropriation."[57] In the *Pope & Talbot* case[58] the investor argued that this additional

56 See generally on direct and indirect expropriation, G. Schwarzenberger, *Foreign Investments and International Law*, (London, Stevens, 1969). See also *United States of America v. Italy* (*ELSI* case), Judgment of 20 July 1989, ICJ Reports (1989), paras. 113-119.

57 See, for example, Article 1110 NAFTA and, in the same vein, "measures having equivalent effect" in the Draft MAI.

phrase in the expropriation provisions of NAFTA went beyond the meaning of indirect expropriation, thereby expanding the possibilities to claim compensation. A reasonable concern is that the scope of expropriation is stretched so far that any measure or activity that interferes with investment would constitute an expropriation and create a ground for compensation. Such a broad definition of expropriation would fail to acknowledge other interests, which are essential in the light of the concept of sustainable development. Balancing foreign investors' rights with State sovereignty over natural resources, environmental protection, eradication of poverty and public health, for example, remains fundamental in achieving sustainable development.

However, the tribunal in the *Pope & Talbot* case clearly rejected the investor's claim by stating that "tantamount" means nothing more than equivalent, so that it sees upon the same measures which fall under indirect expropriation.[59] It then considered the question whether "a particular interference with business activities amounts to an expropriation," as the investor contended that the measures had the effect of "substantially interfering" with their investments.[60] The panel reasoned that the interference must, indeed, be substantial enough to constitute an expropriation. The fact, however, that the investor was able to continue its business and earn substantial profits, although reduced, did not meet this requirement. This reasoning was confirmed by the tribunal in the *S.D. Myers* case.[61] In this case an foreign investor challenged an export ban on PCBs. The tribunal concluded that the PCB measure was discriminatory and that the NAFTA Articles 1102 and 1105 on national treatment and the minimum standard of treatment were violated. However, no expropriation had occurred because the measure had not entirely eliminate S.D. Myers' business, but just a part.

In the *Metalclad* case,[62] the environmental objections of the local community and, later in the process, of the province, impeded the activities of an US waste disposal company. This company, Metalclad, had taken over a Mexican company and its property to build a hazardous waste landfill in San

58 *Pope & Talbot, Inc. v. Canada*, Interim Award of 26 June 2000, <http://www.dfait-maeci.gc.ca/tna-nac/pope-e.asp>, last visited 23 October 2002. In this case a US investor challenged the Canadian Export Control Regime for softwood lumber which set quota's on the duty free export to the USA.

59 Ibid., Interim Award of 26 June 2000, para. 102.

60 Ibid., paras. 84 and 102.

61 *S.D. Myers Inc. v. Government of Canada*, Partial Award, 13 November 2000, *International Legal Materials*, 40 (2001), pp. 1408-1492.

62 *Metalclad* case, op. cit. above (n. 37).

Luis Potosi (SLP), a province of Mexico. While Metalclad had required all federal permits and had started construction in 1994, the municipal authorities of Guadalcazar opposed the landfill and refused to submit the construction permit. In order to resolve the conflict, Metalclad concluded an agreement, the so-called *Convenio*, with the federal authorities, *inter alia*, designating a 34 hectare protection zone around the landfill and providing medical care to the inhabitants of Guadalcazar. The governor of SLP and the municipal authorities, however, rejected the *Convenio*. All efforts to resolve the problems failed. After filing a claim against Mexico at ICSID, the governor of SLP issued an Ecological Degree declaring the area of the site a 'Natural Area for the protection of the rare cactus', making any future operation of the site impossible.

The tribunal concluded that the denial of a construction permit by the municipality amounted to a violation of Article 1105 on fair and equitable treatment, and therefore to expropriation as under Article 1110 NAFTA, because Mexico had failed to "ensure a transparent and predictable framework."[63] The panel awarded Metalclad a sum of $16 million as compensation.

The award in the *Metalclad* case has been widely criticized for several reasons. While it may have been utterly correct to decide that there was no transparent and predictable framework in place, NGOs have highlighted several circumstances that put a different complexion on the matter. The Mexican company which was taken over by Metalclad had a record of illegal dumping of hazardous wastes. While the site was initially meant as a transfer site, this company had stored over 20,000 tons of chemical waste. As this waste had been leaking into the soil, contaminating the groundwater which is used as drinking water, the local people had blocked operation of the site already in 1991. Metalclad knew or could have known that it would meet opposition from the local community, including the local authorities. The tribunal only reported that the municipality had no reason to deny the construction permit, overlooking the actual circumstances of the contamination and the denial of the permit as a kind of last resource for the local community. While it may be technically so that Metalclad got entangled in delicate procedures, it must have been aware of the problems that played in the preceding years.

Mexico has sought to set aside the Metalclad award at the Supreme Court of British Columbia, as Vancouver, Canada, had been the place of arbitration, on the ground that the tribunal went beyond the scope of the submission.[64]

63 *Metalclad* case, op. cit. above (n. 37), para. 99.

64 Ibid., Supreme Court of British Columbia, Reasons for Judgment of 2 May 2001, <http://www.worldbank.org/icsid/cases/awards.htm>

The court partially agreed with Mexico, but confirmed that the Ecological Decree indeed led to expropriation. It commented on it's "extremely broad" definition, though found it a question of law and therefore not reviewable. The procedure ultimately led to only a small adjustment of the compensation to be paid by Mexico.

A significant conclusion from the *Pope & Talbot* case, and also confirmed by the *S.D Myers* case, is that less rosy prospects do not constitute expropriation as losses must be substantial. These awards clarify that not every interference by the government have to be compensated. On the other hand, in the *Metalclad* case the scope of expropriation has been broadened, though the Canadian Court has partly reversed this. What is most striking in the *Metalclad* case is that the local interests are as good as neglected by the tribunal, while Metalclad plays ignorance. These concerns and therefore the reasons behind the events which took place have not been considered.

4.3 The legitimate aim of governmental measures

From the *Tuna-Dolphin* case and *Shrimp-Turtle* cases we learned that, the first step in analyzing governmental measures is by exploring whether the aim is legitimate and whether alternatives are available. This is to expose disguised objectives such as protection of domestic industry, an issue that has already been brought up by Principle 12 of the Rio Declaration. In the above discussed *Metalclad* case, also the Ecological Decree was considered as a measure that resulted in expropriation of the site. The panel argued as follow:

> The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.[65]

Thus, the tribunal explicitly stated that it did not need to consider the intent of the Ecological Decree, but it nevertheless did find that it was a measure tantamount to expropriation. This tribunal clearly deviates with this standpoint from awards in other cases, including those under WTO dispute settlement.

65 Ibid., para. 111.

Though, the panel in the *S.D. Myers* case[66] took a different path. In this case, the tribunal stipulated that the intent of the measure taken by Canada *was* important.[67] Canada had established an export ban on PCBs, making it impossible for S.D. Myers affiliate to transport its collected wastes for disposal to its mother company in the USA, which was previously possible under the Canada-U.S. Agreement Concerning the Transboundary Movement of Hazardous Wastes.[68] The panel concluded that the measure had a legitimate goal and that the indirect motive was understandable, but that there were legitimate alternative measures that could have been taken. This position was supported by the panel's review of the Basel Convention on the Control and Transboundary Movements of Hazardous Waste and Their Disposal, aimed at promoting disposal of hazardous waste within countries' own boundaries, and to reduce the movement of waste to a minimum consistent with the environmentally sound management of such wastes. The Basel Convention, ratified by Canada, and signed, but not ratified by the USA, does not forbid the movement of hazardous wastes as such, but aims at environmentally sound management and disposal of wastes, to protect human health and the environment against adverse effects. The Convention explicitly allows bilateral and multilateral agreements consistent with its principles that regulate the export and import of hazardous wastes. The NAFTA Commission for Environmental Cooperation came to the same conclusion, stating the supremacy of the Basel Convention and the Canada-U.S. Agreement over NAFTA in case of conflicting obligations.[69] The tribunal concluded that the PCB measure was discriminatory and that the NAFTA Articles 1102 and 1105 on national treatment and the minimum standard of treatment. However, no expropriation had occurred because the measure had not entirely eliminate S.D. Myers' business, but just a part. In the Second Partial Award the tribunal has granted S.D. Myers a sum of $6 million.[70] The case has, however, not come to an end yet, while Canada seeks to set aside the award at the Federal Court of Canada on the ground of exceeding jurisdiction.

66 *S.D. Myers Inc. v. Government of Canada*, Partial Award, 13 November 2000, *International Legal Materials*, 40 (2001), pp. 1408-1492.

67 Ibid., para 254.

68 The Agreement of the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Wastes, 26 October 1986, C.T.S. 1986 No. 39.

69 See North American Commission for Environmental Cooperation, *Status of PCB Management in North America*, (Montreal, CEC, 1986), p. 23.

70 *S.D. Myers Inc. v. Government of Canada*, Second Partial Award, 21 October 2002, <http://www.dfait-maeci.gc.ca/tna-nac/SDM-en.asp>, last visited 23 October 2002.

Why the tribunal in the *Metalclad* case disregarded the question whether this Ecological Decree was a measure with a legitimate aim is rather odd. Even when it came to the conclusion that it was legitimate, it could have decided that the Decree was nevertheless expropriating and thus compensable. More important is that this review could have enlightened whether alternatives were available and, moreover, what the intents of the provincial governor of SLP were. The concept of sustainable development requires a comprehensive survey of issues and interests for balancing the various concerns and consequences. In this light, the panel in the *Metalclad* case failed to deliver a satisfactory award.

4.4 Violation of non-discriminatory treatment and other standards of treatment

Practically all investment treaties provide obligation to treat a foreign investor in a non-discriminatory way. Non-discriminatory treatment can be divided in national treatment, granting foreign investors equal treatment as domestic ones, and most-favoured-nation treatment, granting the same treatment as other foreign investors. Besides these standards most investment agreement offer fair and equitable treatment and/or the international minimum standard of treatment. These standards of treatment are independent of any other standards and are open for interpretation as such. In the case *S.D. Myers* case the tribunal explained it as follows:

> The minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs. The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The "minimum standard" is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner. [...] The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from an international perspective.[71]

71 *S.D. Myers* case, op. cit. above (n. 66), paras. 259 and 263.

Also in the *Metalclad* case[72] the investor claimed a violation of fair and equitable treatment. The tribunal decided indeed that the investment "was not accorded fair and equitable treatment in accordance with international law."[73] As transparency was listed as a principle through which the objectives of NAFTA should be elaborated,[74] it was reasoned that the absence of clear rules and procedures regarding municipal construction permits led to "a failure on the part of Mexico to ensure the transparency required by NAFTA." The tribunal stated that:

> Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor or a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.[75]

In the judgement of the Supreme Court of British Columbia, where Mexico had sought to set aside the *Metalclad* award, this reasoning was abandoned. As there were no transparency obligations in Chapter 11 of NAFTA itself, it ruled that the tribunal had indeed decided a matter beyond the scope of the submission to arbitration.[76]

The first case under Chapter 11 of NAFTA, dealing with discriminatory treatment, was the *Ethyl* case.[77] A Canadian Act which banned the inter-provincial trade of MMT[78] harmed, in particular and also exclusively, the activities of a US investor. Ethyl, a producer of MMT, claimed to be expropriated, respectively to be treated in a discriminatory manner. Before the tribunal could decide on the merits the case was settled by the parties, leading to a payment of $13 million compensation and lifting of the ban. A dispute settlement panel under the Canadian Agreement on Internal Trade (AIT), an agreement between the provinces and territories of Canada, did, however, decide that the MMT Act was inconsistent with the "right of entry" and "no obstacles" provisions

72 *Metalclad* case, op. cit. above (n. 37).
73 Ibid., paras. 74-101.
74 Article 102 NAFTA contains the objectives of NAFTA.
75 *Metalclad* case, op. cit. above (n. 37), para. 99.
76 *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, Reasons for Judgment, 2 May 2001, 2001 BCSC 664, <http://www.worldbank.org/icsid/cases/metalclad_reasons_for_judgment.pdf>
77 *Ethyl* case, op. cit. above (n. 36).
78 MMT is an additive of unleaded gasoline and is considered harmful for human health.

of the AIT, and "that the inconsistency is not justified by the legitimate objectives test."[79] This was an indication the MMT Act might also not stand the test of the NAFTA provisions on fair and equitable, and national treatment. The enormous amount of damages claimed by Ethyl, namely over $200 million, however, shook up the NGO community.

In the still pending *Methanex* case,[80] the State of California has issued a ban on the use of MTBE, an additive to gasoline, to protect the groundwater. Methanex, a Canadian investor, is the major producer of methanol which is a key component of MTBE and sees a substantial part of its business being vanished. It argues that leaking gasoline tanks are the real problem of contaminated groundwater and that the ban on MTBE is a disguised and discriminating measure.

The "legitimate aim" requirement could have played a role in the *Ethyl* case, but the agreement between the parties averted a panel decision. Especially in cases with claims regarding non-discriminatory treatment the legitimate aim requirement may reveal disguised protectionist measures. Analogous to WTO cases, it is not unlikely that this issue will come up in forthcoming cases, in particular in times when economic growth is under pressure.

4.5 The amount of compensation

Compensation provisions in investment treaties often depart from the Hull-formula, requiring "prompt, adequate and effective" compensation. "Adequate" refers to the amount.[81] Another frequently designation of compensation relating to the amount of compensation is "fair market value,"[82] while other instruments such as UN instruments refer to "just" and "appropriate" compensation. As there is no clear guidance on what can be compensated it is up to the panels to decide. These panels are often confronted with high claims. Figures over $100 million are rather commonly claimed by foreign investors with peaks up to $1

79 Report of the Article 1704 Panel Concerning a Dispute between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act, File No. 97/98-15-MMT-P058, 12 June 1998, <http://www.intrasec.mb.ca/eng/0798/mmt.pdf>, 25 April 2001, p. 11.

80 *Methanex* case, op. cit. above (n. 25).

81 The Hull-formula is considered a rule of customary law, although few scholars suggest "fair" or "appropriate" compensation. See, for example, M. Sornarajah, *The International Law on Foreign Investment*, (Cambridge, CUP, 1994), p. 357-414 and Schrijver, op. cit. above (n. 21), pp. 352-359.

82 See, for example, NAFTA Article 1110.

billion. It must be noted, however, that these high claims are not exceptional in civil litigation before US domestic courts.

In the *Santa Elena* case,[83] the issue at stake concerned the amount of compensation. As Costa Rica had expropriated an estate of around 16,000 hectares in order to expand an adjacent situated national park. This expropriation was inspired by the World Heritage Convention. The Tribunal argued that:

> "Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."[84]

It further stated that the purpose of an expropriation had no effect upon the amount of the compensation. The tribunal maintained that the principle of *full compensation of the fair market value* should be applied and determined the amount in between the sums the investor and Costa Rica had calculated, namely $16 million, including almost $12 million of interest.

In the *Metalclad* case calculation of the compensation was based on the direct investment value approach, i.e. the value of the actual expenses. Future profits were not granted, because the landfill never operated and these would be "wholly speculative".[85] In the *Pope & Talbot* case[86] the panel granted only $461,566 of the over $125 million of damages claimed for. The calculation covered the actual expenses which were directly connected with the violation of the NAFTA provisions and based on clear evidence.

The overall picture shows a rather restrained attitude in awarding high amounts of damages with a few exceptions, as in the *Metalclad* and *Santa Elena* cases. Despite high claims and the claim culture of the US the panels maintain rather conservative, providing clear evidence and an actual connection with the violation, and rejecting more or less speculative future profits as damages.

83 *Santa Elena* case, op. cit. above (n. 48).

84 Ibid., para. 72.

85 *Metalclad* case, op. cit. above (n. 37), paras. 113-125.

86 *Pope & Talbot* case, op. cit. above (n. 58), Award in respect of damages, 30 June 2002.

5. Concluding remarks and prospects for the future

This chapter examined the question whether the concept of sustainable development or elements thereof are emerging in decisions for settlement of international investment disputes since the 1990s. The legal discourse on sustainable development truly took off with the Rio Conference on Environment and Development in 1992. Gradually, the concept of sustainable development has been adopted not only in environmental treaties but also, as an objective or guiding principle, in economic agreements, such as the WTO Agreement and NAFTA. This integration into 'other' fields of law is an fundamental element of the concept of sustainable development: it requires an integrated approach of economic, environmental and social aspects to truly flourish. Such an integrated approach surely failed at the negotiation table of the OECD MAI and was one of the causes of the failure of the entire project. Also in many other investment agreements, such as the over 2000 bilateral investment treaties, sustainable development is totally absent. The general part of NAFTA has brought some change: it refers to sustainable development in the Preamble and in its Environmental Side Agreement identifies several elements of the concept. The NAFTA dispute settlement indeed reveals that there is a growing demand for an integrated approach as some awards have raised considerable critique because of their bias for investment protection.

In section 3, the procedural aspects of Investor-State dispute settlement have been examined. Many rules of investment arbitration procedures stem from commercial dispute resolution and have not been updated to the new reality of foreign investment disputes. These rules often assume that only the parties to the dispute have an interest in the dispute, while increasingly other stakeholders can be pointed out. From a sustainable development perspective this situation does not do justice to the complexity of many investment disputes. Accordingly, to fully consider all interests, we may conclude that there are several elements ready for adjustment. The absence of an appeal procedure remains an issue for review, especially when Investor-State procedures increasingly deal with regulatory takings and discriminatory regulation. Not only the payment of compensation is at stake in these cases, but also the issue of withdrawing domestic regulation. These issues deserve a comprehensive and thorough procedure with an established chamber of appeal. Such an appeal chamber could be established through ICSID. Furthermore, much critique concerns the confidentially and inaccessibility of the Investor-State procedure. The plea for implementing the principles of public participation and access to information have not been unnoticed. A shift from essentially non-transparency

and secrecy of proceedings to the publication of all documents, access to hearings and the admission of non-parties such as NGOs as amicus curiae has taken place in only a few years. This can be marked as a progressive development towards these principles, and thus to the concept of sustainable development.

In section 4, several cases involving environmental regulation have been reviewed regarding the emergence of sustainable development elements. Recapitulating widespread criticism, the impact of expropriation and standards of treatment clauses on the right of countries to regulate is what concerns most. The so-called unfettered rights of investors have been labeled as a threat for environmental and social regulation. This issue has been considered in a number of NAFTA cases, but is likely to be a subject in future non-NAFTA cases as well. The implications of non-discrimination clauses and the scope of expropriation provisions have indeed led to the payment of damages in the *Ethyl* and *Metalclad* cases. On the other hand, the awards in the *Pope & Talbot* and *S.D. Myers* cases have restricted the scope of expropriation to those takings that form a "substantial interference", excluding minor depreciations. Furthermore, consistent with developments in WTO case law, the legitimate aim requirement has been adopted. This step should reveal disguised protectionism, but it also entails a consideration of public interests. An appropriate balancing of public and private interests is what failed in the *Metalclad* case according to many NGOs. It was felt that the federal government of Mexico was blind to the concerns of the local community, including those of the provincial and municipal authorities, which hampered the activities of the foreign investor. Also the tribunal practically neglected their concerns. The *amicus curiae* briefs can bring a welcome change in this respect.

To conclude, the last years have at least brought attention and awareness to issues of sustainable development within international investment arbitration. The increasing number of cases under NAFTA dealing with environmental domestic legislation have highlighted both procedural as substantial deficiencies. Change is on its way, but it remains to be seen whether the concept of sustainable development will acquire the position to which it is entitled.

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HUMAN RIGHTS

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15

IMPLEMENTING THE RIGHT TO DEVELOPMENT

Arjun Sengupta

Introduction

The 1986 Declaration on the Right to Development (the Declaration)[1] explicitly affirmed the human right to development. Although the controversy over the right to development's precise content and nature continues, the gist of the debate now focuses on methods of implementation. This chapter explores issues surrounding implementation issues concentrating specifically on the meth ods of implementing the right. In Section 1, the conceptual framework of the right to development is summarized in a manner that aims at furthering an understanding of how it can be implemented. Section 2 discusses national actions required for implementation and Section 3 focuses on international cooperation and its role in implementation.

1. The concept and the content of the right to development as the right to a process

With the adoption of the Declaration in 1986 the international human rights movement came round to where it started at the beginning of the post-World

1 The Declaration on the Right to Development, *adopted* 4 Dec. 1986, G.A. Res. 41/128 U.N. GAOR, 41st Sess., at 3, Annex, U.N. Doc. A/Res/41/128 Annex (1987) [hereinafter Declaration on the Right to Development].

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 341-377.*

War II reconstruction, when human rights were seen as an integrated whole of all human rights including civil, political, economic, social and cultural rights. The 1948 Universal Declaration of Human Rights[2] (the Universal Declaration) reflected that vision of integrated rights, and the international community set out to draft a single Bill of Rights, to concretise the Universal Declaration in the form of an international treaty. The subsequent history is well-known.[3] Cold War politics split the consensus about the integrity of rights and the United Nations ended up with two separate covenants, the International Covenant on Civil and Political Rights[4] and the International Covenant on Economic, Social and Cultural Rights.[5] Several other rights were also recognized in the years that followed, through the adoption of different human rights instruments. Despite the preambular statements in most of these instruments asserting the unity of all human rights, the world was landed with a large number of disparate rights with their own separate methods of implementation. The right to development, as adopted by the Declaration and reaffirmed in the Vienna Declaration of 1993,[6] reunified all these rights into an integrated and interdependent set of human rights, identified with a process of development.

1.1 Definition

Article 1, paragraph 1 of the Declaration states: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental

2 Universal Declaration of Human Rights, *adopted* 10 December 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948) *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949) [hereinafter Universal Declaration].

3 Arjun Sengupta, "Realizing the Right to Development", *Development and Change* Vol. 31, No. 3, June 2000.

4 International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 *(entered into force 23 March 1976)* [hereinafter ICPR].

5 International Covenant on Economic, Social and Cultural Right, *adopted* 16 Dec. 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 *(entered into force 3 Jan.* 1976) [hereinafter ICESCR].

6 Vienna Declaration and Programme of Action, U.N. GAOR, World. Conf. On Hum. Rts., 48th Sess., 22d plen. mtg., U.N. Doc. A/CONF.157/24 (1993) *reprinted in* 32 I.L.M. 1667 (1993); also available at <http://www.unhchr.ch/html/menu5/d/vienna.htm. [hereinafter Vienna Declaration].

freedoms can be fully realized." The Declaration's preamble defines development as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from." These two statements taken together would lead to the definition of the right to development as the right to a particular process of development in which "all human rights and fundamental freedoms can be fully realized," which is recognised as a human right and which is consistent with the basic approach of the human rights movement.[7] It refers to the realization of all the rights and freedoms recognized as human rights – civil and political rights and economic and social and cultural rights – in their totality as an integrated whole, as all these rights are interrelated and interdependent. The outcomes of development, as well as the way the outcomes are realized, constitute the process of development, which is also regarded as a human right. It is a process in time, not a finite event, and the elements that constitute development are interdependent, both at a point in time and over a period of time.

The right to development as the right to a process of development is not just an umbrella right or the sum of a set of rights. It is the right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value. The progressive realization of this right to development can be described in terms of an improvement of a "vector" of human rights, which is composed of various elements that represent the different economic, social and cultural rights, as well as the civil and political rights. All these rights, in turn, are dependent on each other, together with the growth of the gross domestic product (GDP) and of other financial, technical and institutional resources, in a manner that enables any improvement in the well-being of the entire population and the realization of the rights to be sustained.[8]

7 In his role as United Nations Independent Expert on the Right to Development the author has examined the content of the right to development in great detail. Please see; First Report, E/CN.4/1999/WG.18/2; Second Report, E/CN.4/2000/WG.18/CRP.1; Third Report E/CN.4/2001/WG.18/2 (referred to as First Report, Second Report, Third Report.) The OHCHR Web site (*www.unhchr.ch*) can be used to access the reports.

8 Please see the First and Second Reports.
Let R_D stand for the right to development, and Ri (i=1,2…n) for the indices of the individual rights, then $R_D=(R_1,R_2…Rn)$, and each Ri=f(Rj,g), and g stands for growth, g=f(Ri, S,P) a function of all the rights, S as initial stock of resources, institutions and technology, and P as a programme of policies. Increased realisation of the right to

The characteristics of this vector also specify the nature of the right to development and the methods of its realization. First, each element of the vector is a human right, just as the vector itself is a human right, since the right to development is an integral whole of those rights. This means that they all will have to be implemented in a "rights-based" manner, which is defined as a manner that follows the procedures and norms of human rights laws, and which is transparent, accountable, participatory and non-discriminatory, with equity in decision-making and sharing of the fruits or outcomes of the process. Secondly, all the elements are interdependent, both at any point in time and over a period of time. They are interdependent in the sense that the realization of one right, for example the right to health, depends on the level of realization of other rights, such as the right to food, or to housing, or to liberty and security of the person, or to freedom of information, both at the present time and in the future. Similarly, realization of all these rights in a sustainable manner would depend upon the growth of the GDP and of all other forms of resources, including institutions and technology, which in turn would depend upon the realization of the rights to health and education, as well as to freedom of information. Thirdly, an improvement in the realization of the right to development, or an increase in the value of the vector, will be defined as an improvement in all the elements of the vector (i.e. human rights), or at least in one element of the vector while no other element deteriorates (or any right is violated). Because all human rights are inviolable and none is superior to another, the improvement of any one right cannot be set off against the deterioration of another. Thus, the requirement for improving the realization of the right to development is the promotion or improvement in the realization of at least some human rights, whether civil, political, economic, social or cultural, while no other deteriorates or is violated.

1.2 Value Addition

The value addition of understanding the right to development as the right to a process can first be explained in terms of the evolution of thinking about development. In earlier years, the basis of development strategies was maximizing per capita GNP, as that would allow the fulfilment of all other objectives

development is indicated by an improvement of the vector R_D, as $dR_D > 0$ if for at least some i $dRi>0$, and all other rights $dRj=0$, or are non-negative.

of social and human development. This can be best explained by quoting the Nobel Laureate W.A. Lewis, who noted that the growth of output per head "gives man greater control over his environment and thereby increases his freedom".[9] Concerns were expressed that individuals might not automatically increase their "freedoms" unless specific policies were adopted to achieve those freedoms. However, social and human development were regarded mostly as the derived objectives of development, and almost always as functions of economic growth. Equity was seldom a central concern of these early development policies. For most countries the impact of equity concerns on the nature of development policies was confined to progressive taxation or some supplementary measures promoted by international organizations, (e.g., the Minimum Needs Programmes), which could be added to the usual policies of accelerating economic growth.

Supplementary policies extending social and human development were often dovetailed with the policies for maximizing GNP. It was recognized that economic growth was not always sufficient, even if necessary, and it was this recognition, which led to the paradigmatic shift in development thinking termed the human development approach. According to this approach, human development was defined as the expansion of capabilities and freedoms of individuals. Economic growth was neither a necessary nor a sufficient condition for adopting specific measures for human development, although it would be extremely helpful for implementing those measures, and especially for sustaining them over any period. Policies had to be designed taking into consideration specific institutional constraints, social arrangements and resource constraints. Economic growth would relax the resource constraints, but it would have to be linked with public action and special policies to bring about changes in social arrangements and institutional frameworks. Thus, the human development approach expanded the scope and the content of the traditional growth-focused thinking about development.

The human rights approach to development added a further dimension to development thinking. While the human development approach aims at realizing individuals' freedoms by making enhancement of their capabilities the goal of development policy, the human rights approach focuses on claims that individuals have on the conduct of the State and other agents to secure their

9 W.A. Lewis, *The Theory of Economic Growth*, London, Allen and Unwin, 1955, pp. 9-10, 420-421.

capabilities and freedoms.[10] As the *Human Development Report 2000* puts it, "human development thinking focuses on the outcomes of various kinds of social arrangements and many of the tools of that approach measure the outcomes of social arrangements in a way that is not sensitive to how these outcomes were brought about".[11] Human rights thinking, on the other hand, is primarily concerned with "how" these outcomes are realized, whether the State parties or the other duty holders have fulfilled their obligations and whether the procedures followed are consistent with the rights-based approach to development.

The right to development essentially integrates the human development approach into the human rights-based approach to development. It goes beyond accepting the goals of development in terms of human development and assessing the different forms of social arrangement conducive to those outcomes in terms of these goals of development. It converts those goals into rights of individuals and identifies the responsibility of all the duty holders, in accordance with human rights standards. It aims at the constant improvement of the well-being of the entire population on the basis of their active, free and meaningful participation and the fair distribution of benefits resulting therefrom. The concept of well-being here is broader than human development as it incorporates social, political and cultural process in the economic process of realizing rights and freedoms. In the *Human Development Reports*, concerns about civil and political rights and democratic freedoms have been discussed as they often are very important in schemes for enhancing the capabilities of the poor and the vulnerable segments of society. But they sit rather peripherally on these schemes, which would be better executed if there were more democracy or more enjoyment of civil and political rights, although it is not suggested that the schemes would be deemed failures if these rights and freedoms were violated. Conversely under the right to development approach, fulfilling civil and political rights

10 See A. Eide, C. Krause, A. Rosas, *Economic, Social and Cultural Rights: A Textbook*. Martinus Nijhoff, pp. 1-40. As all individuals are entitled to have all of their human rights respected, protected and fulfilled by States and other agents and the international community, the issue of accountability for any failures is of paramount importance, so that remedial action can be taken against those who are responsible for those failures. In assessing culpability, it is important to ensure that human rights and human rights principles have been respected by all parties, both in the design and implementation of development policies and projects.

11 UNDP, *Human Development Report 2000*, New York, Oxford University Press, 2000, p. 22.

would be as important as fulfilling economic and social rights, not just in their instrumental roles but also in their substantive constitutive role. A violation of any right would be tantamount to a failure to realize the right to development.

This approach, based on the assumption that development is a human right, broadens the human development approach, by making all the human development goals, for the provision of the corresponding goods and services, rights that belong to individuals. There is a further value addition where these rights are integrated into the right to development as a process. It is not merely the realization of those rights individually, but the realization of them together in a manner that takes into account their effects on each other, both at a particular time and over a period of time, within a framework of growth or a development programme, that leads to the realization of the rights. An improvement in the realization of the right to development in that programme implies that the realization of some rights has improved while no other right is violated or has deteriorated.[12]

1.3 A Development Programme to Realize the Right to Development

If the right to development is seen as an integrated process of development of all human rights, then economic growth consisting of the growth of resources, such as the GDP and progress in technology and institutions has to be included as an integral element in the programme to realize that right to development. In the human development literature it is sometimes suggested that human development does not necessarily follow from the growth of the GDP and other resources. It may not, however, be possible to achieve human development only by following the rights-based approach to development and ignoring policies for economic growth although for realizing any single right separately, reallocation of existing resources even without any growth may be sufficient. "The value added of the concept of the right to development is not just that the realization of each right must be seen and planned as dependent on all other rights, but also that the growth of resources (including the GDP, technology and institutions) must be planned and implemented as part of the right to development. Like the rights to health, education, etc. the growth dimension of the right to development is both an objective and a means. It is an objective

12 See Third Report, paragraphs 12-14, for further details.

because it results in higher per capita consumption and higher living standards; it is instrumental in that it allows for the fulfilment of other development objectives and human rights."[13]

To be recognized as an element of the programme for securing the human right to development, growth of resources must be realized in the manner in which all human rights are to be realized. It must follow the so-called rights-based approach, ensuring in particular equity or the reduction of disparities. That would imply a change in the structure of production and distribution in the economy to ensure growth with equity. It would entail a programme of development and investment that may require substantial international cooperation and not rely only on markets. Indeed, once the right to development is seen in the context of a development programme aiming at a sustained, equitable growth of resources, it becomes clear that national action and international cooperation must reinforce each other in a manner that goes beyond the measures for realizing separately the individual rights.

An example of a programme that will have universal acceptance under the right to development would be one aimed at the rapid reduction of poverty. A right to development approach to the reduction of poverty will be different from a simple trickle-down effect of increased growth of the GDP. As considerations of equity and justice are primary characteristics of the right to development, the whole structure of growth will have to be determined and reoriented by them. For example, if poverty has to be reduced and if the poor have to be empowered, and if such reduction in poverty has to be sustained, the poor must be free from vulnerability of exposure to sharp fluctuations in their income. That would require a development policy that focused on a change in the structure of production and income generation, with the poorest regions growing faster, with increased employment of the vulnerable and marginalized groups and with a social protection system that guarantees a minimum level of income for all concerned. That would also call for programmes that remove capability poverty in addition to income poverty through the expansion of education and training, health and nutrition. There must be other infrastructure programmes that develop and help the poorer regions and sections of the population.

13 Third Report paragraph 14.

The aim of such development policy should be to advance all this with the minimum of impact on other objectives of development, like the overall growth of output. But if there is a trade-off, such that the growth will be less than the feasible maximum, it will have to be accepted. If this development process has to be participatory, the decisions will have to be taken with the full involvement of the beneficiaries, keeping in mind that if this results in delays, these delays should be minimized. If a group of destitute or deprived people has to have a minimum standard of well-being, a simple transfer of income through doles or subsidies may not be the right policy. They may have to be provided with the opportunity to work or to be self-employed, which may require generating activities that a simple reliance on market processes may not be able to ensure.[14]

There is another significant sense in which the right to development adds value to the discourse on human rights related to the realization of different individual rights. The concept of the right to development as a right to a process of development that leads to the outcome of the constituent individual rights increases its acceptability in terms of the traditional thinking about the validity of human rights. Human rights remain "aspirational" or, as the philosopher Feinberg put it, as "manifesto" rights, and with objects of valid claims unless they can be related to the matching of rights with responsibilities.[15] A process of development can be identified with a programme of policies assigning precise roles to all the agents responsible for its implementation in phases, over a period of time. Looking at the right to development as a composite right lends it a coherence, which may sometimes be lacking in the specification of individual rights.

The fulfilment of all human rights is associated with both perfect and imperfect obligations.[16] Civil and political rights are usually associated with perfect obligations, and individuals are viewed as possessing rights that constrain State behaviour. It is also argued that precise obligations can be identified and imposed on the State for protecting or preventing violation of those rights. But

14 These are elaborated in the First Report.

15 For a comprehensive discussion of these issues see the introduction to M. E. Winston ed. *The Philosophy of Human Rights*, 1989.

16 The conceptual framework of the rights/duty relationship has been briefly discussed in paragraphs 6-8 of the Second Report. See also Amartya Sen, D*evelopment as Freedom,* Knopf, 1999.

in practice, fulfilment of those rights would entail not just protecting but also promoting them, which would entail obligations for a number of other parties besides the State, with differing degrees of specificity, and often 'contingent' upon others actions. Rights then relate to claims as the 'norms' of behaviour or actions of the duty bearers, and not always precisely specified obligations, which can be justiciable and enforceable. In the case of economic, social and cultural rights, the duty to promote these rights is viewed as the more important part of the set of obligations, and those obligations tend to be imperfect. A programme for realizing the right to development is built upon the identification and specification of duties for different agents, which informs the accountability of the agents, making their obligations less imperfect, increasing the validity of the right to that programme. If it is properly designed, the execution of that programme should most likely lead to the realization of the rights, civil, political, economic, social and cultural as the outcomes of the process of development, and increasing the likelihood of its execution. Further, the programme builds on the interdependence both at a point in time and over a period of time of the rights and the policies for realizing these rights. The obligations appropriately specified based on that interdependence would then make possible the fulfilment over time and in a sustainable manner all of these rights, which by their nature have to be realized through progressive improvement.

The outcomes of that process of development are human rights, which entail obligations. However, the right to that process is different from the right to the outcomes. It is a programme or plan executed over time maintaining consistency and sustainability, with phased realization of the targets, and that programme is expected, with a high probability, to lead to the realization of all those outcomes. This is what Sen describes as a "metaright". A metaright to something x can be defined as the right to have policies p (x) that genuinely pursue the objective of making the right to x realizable.[17] Even if the right to x remains unfulfilled or immediately unrealisable, the metaright to x, p (x),

17 Amartya Sen, "The right not to be hungry", in Philip Alston and Katarina Tomasevski eds., *The Right to Food*, SIM, Netherlands, 1984. Sen talked about the right while discussing how the right not to be hungry or the right to food which for many countries may not be possible to guarantee for all persons in the near future, though "policies that would rapidly lead to such freedom do exist". So a right to x, such as not to be hungry, or the right to adequate means of livelihood, may be an abstract, background right, but to give a person the right to demand that policy be directed towards securing the objectives of making the right to food or the right to adequate means of livelihood a realizable right is a right to p (x), as a metaright to x, will be a real right.

can be a fully valid right if all the obligations associated with p (x) can be clearly specified. The programme of actions and measures that is associated with the right to development has to be necessarily designed in a way that the obligations of all the different agents, the State authorities, the local governments, the multinational companies, the multilateral agencies and the international community have to be clearly specified. It thus becomes a complete right; having all the justification of a human right with fully identified duties and obligations.

2. National actions

Implementing the right to development will require both national and international actions. In the following paragraphs the range of actions necessary for implementation will be discussed in detail, which could form the guidelines for designing a practical programme for implementing the right to development.

The primary responsibility for implementing the right to development belongs to the nation-State. In order to fulfil these obligations all levels of government and public sector organizations must coordinate their actions. This coordination should be not only among themselves, but also with other parties within the State including NGOs, individuals and other national institutions, as well as with other States and international organizations. Such coordination, or at least the existence of a functioning coordination mechanism, would be essential for effective implementation of the right to development. But the absence of such coordination can not justify the non-fulfilment of an obligation. So long as the right is recognized as a human right, the obligation to deliver the right is absolute for all parties irrespective of whether others are fulfilling their obligations. For the State parties, such obligations "trump" all other duties and activities and have first priority in determining the allocation of financial, material and institutional recourses.

National actions should be aimed at the implementation of each of the constituent rights of the right to development, individually as well as in combination with each other, and as a part of the development process. That process would consist of a development programme with a set of policies sequentially implemented and a phased realization of the different rights and the corresponding freedoms. As noted above, the process itself as well as the outcomes of the process are all claimed as human rights and have to be realized in accordance

with human rights standards and norms of behaviour of the agents who are the duty-bearers and the beneficiaries who are the right holders.

It may be useful to elaborate on this point a bit further. A right to development approach in a development programme will be concerned with the most efficient provision of goods and services and changes in the institutions and social arrangements to realize a set of targeted objectives as human rights, identified as expansion of capabilities and freedoms. It will be concerned with the increase of both the availability of and the access to those goods and services. Availability is related to the growth of the economy and, therefore, to the policies that ensure sustainable growth of material and human resources, with macroeconomic stability and efficient allocation of those resources. Access is related to the distribution of resources and how the benefits of the process reach everybody without discrimination, especially the most vulnerable and marginalized sections of society. In short, such a development programme would aim at economic growth that realizes human rights and is carried out in accordance with human rights standards.

As I have suggested in earlier writings a programme for implementing the right to development may, initially aim at the eradication of poverty, which is the worst form of a violation of human rights.[18] This could include concrete goals such as reducing the level of income-poverty by half, by the year 2015, and removing three major aspects of capability poverty, i.e. hunger, absence of primary health care and lack of basic education, by a universal fulfilment of the right to food, the right to primary health and the right to basic education by that year. These specific targets are chosen because the rights have to be fulfilled in a step-by-step manner through progressive realization, as all the rights and corresponding freedoms cannot be realized immediately and simultaneously. There would also because there would be general agreement about the desirability of those targets leading to the acceptability of the programme. The countries concerned may choose to target other right(s) first, provided they follow appropriate participatory consensual procedures to decide on which rights to target. No matter which rights are chosen it is important that the availability of the corresponding goods and services is expanded in a manner that satisfies human rights principles and follows the rights-based approach to development.

18 See the First, Second and Third Reports.

2.1 Rights-based approach

In the human rights literature, such a rights-based approach is characterized by adherence to well-defined principles, such as participation, accountability, transparency, equality, non-discrimination, universality and indivisibility. From a human rights perspective the objectives of development are to be regarded as entitlements, or as rights that can be legitimately claimed by individuals, as right holders, against corresponding duty holders, such as the State and the international community, which may have specified obligations to enable those rights to be enjoyed. The objectives may be viewed as elements of human development, but they have to be realized as human rights, with the accountability and, where possible, the culpability for not realizing those rights, clearly established, leading to the adoption of remedial measures.

As human rights, all of them must conform to the principles of universality and indivisibility.[19] Universality implies that every individual is endowed with human rights, by virtue of being human, and that right belongs to the individual in all societies and in all countries, irrespective of cultural background. This principle is perfectly compatible with special rights such as group rights, minority rights, gender rights or community rights to be treated as human rights, even though their enjoyment is restricted to the members of the respective groups. But if such a special group right is accepted through proper procedures whose legitimacy and coherence are fully established, it should be treated as a universal right, to be enjoyed by all individuals qualified to belong to the group that is entitled to that special right without any discrimination among them, irrespective of their cultural background or citizenship, in all societies and in all countries.

Two implications which flow from this universality must be taken into account in implementing such human rights: (a) the obligations related to such rights are also universal, to be implemented to the best of their possibility by all agents who are in a position to help, whether they are the State authorities and others belonging to the same country, or other States and international organizations; and (b) that although the rights and obligations are universal, the exact method of implementing them or carrying out the obligations will depend upon the context in which the rights are to be enjoyed. As human rights, they should

19 These principles are very well explained in "A human rights-based approach to development programming in UNDP – adding the missing link", by Patrick van Weerelt, UNDP, 2001.

receive the highest priority in the use of resources and capacities of all these agents in fulfilling those obligations, "trumping" all other demands on them.

The principle of indivisibility is often associated with the principle of interdependence, though they are not the same. Two rights are indivisible if one cannot be enjoyed if the other is violated. Two rights are interdependent if the level of enjoyment of one is dependent on the level of enjoyment of the other. There is an improvement in the right to development only if at least one of the constituent rights improves and no other right deteriorates or is violated, which means the right to development conforms to the principle of the indivisibility of human rights. Similarly, the condition that each right (or the indicator representing the level of enjoyment of a right) is a function of all other rights or indicators representing them conforms to the principle of the interdependence of human rights. In the design of a practical programme to realize the right to development, these principles qualify the way the individual rights are to be realized. If a policy for realizing a right results in the violation of another right, whether the right is civil, political, economic, social or cultural, that policy cannot be included in such a programme. If a policy for realizing a particular right improves the enjoyment of other rights, that policy will be more acceptable than another, which does not take into account such interdependence. For example, providing a midday meal to children attending schools improves the rate of school attendance and, therefore, the right to education. In addition, it enhances the level of nutrition of the children and, therefore, the right to health, as well as the right to food. Such a programme will be more acceptable under the right to development approach than a programme of similar cost that focuses on, say, opening more schools which would make it possible for more children to attend school and thus secure their right to education. But it would not have the added value of improving other rights that a midday meal programme would have.

Two other principles, which are fundamental to human rights thinking and the implementation of human rights, are equality and non-discrimination. Indeed, the principle of equality derives from the principle of the equality of all human beings. However, there has been much debate about the content of equality. The human rights instruments talk about equality in law and equality in rights. In that sense, equality would mean that if anyone has a right x, then everyone has that right x and that the law prohibits any discrimination in the enjoyment of rights by anybody on any ground. But all these instruments stop short of providing for equality in income or the level or amount of benefits accruing

from the exercise of the rights. When questions of sharing those benefits are discussed, the human rights concerns are expressed in terms of "fairness" and of being "equitable and just", but not of absolute equality.

That does not mean that human rights laws and practice would ignore issues connected to inequality of income. When human rights, especially economic, social and cultural rights, involve the availability of and access to goods and services necessary to fulfil those rights for all individuals, then equality in rights implies equality of access to the availability of these goods and services. Equality in that sense has often been referred to as equality of opportunity, or equality of capabilities, and both these concepts would have income as a major determinant. They may not call for absolute equality of income, but any increased inequality of income would be incompatible with a process of increasing equality of opportunity or capabilities.

The principle of equality is essential to any programme aimed at implementing human rights, such as the right to development. It can be reflected in policies aimed at ensuring the equitable distribution of benefits and, following the Rawlsian principles of justice,[20] it would target the most vulnerable and marginalized segments of society. This would be achieved through specific policies to eradicate massive poverty, including policies to increase purchasing power, improve access to goods and services, remove income and capability poverty and fulfil the rights to food, health and education of those segments of society. But most importantly, all these policies and measures have to be implemented in a development framework that reduces income disparities or at a minimum does not allow any increase in inequality.

The principle of non-discrimination is also fundamental to human rights thinking and therefore to the process of implementation of a human right. In designing and implementing all policies and practices for realizing the right to development there cannot be any discrimination on the grounds of race, colour, sex, language, political or other opinion, religion, national or social origin, property, birth or other status, not only between the beneficiaries but also between the agents, even if they are not equally involved, remunerated or motivated. The principle of equality implies non-discrimination, but the latter does not *vice versa* imply the former. Even if the benefits are not equally shared and every-

20 John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

body does not have equal incentives or responsibilities regarding the execution of a project, there cannot be any discrimination between the agents, the stakeholders and the beneficiaries (the right holders) on any ground.

This principle is parallel to another human rights principle, the principle of participation, according to which all beneficiaries and agents involved in the implementation of the right to development are entitled to participate in, contribute to and enjoy the results of the process of development. In practice, the principle of participation is concerned with access to decision-making and the exercise of power in the execution of projects, which lead up to the programme for development. That, in effect, means that citizens need to be empowered and have ownership over the programme. However, there is no unique model of participation, as the nature of and the relationship between the beneficiaries and agents would vary from project to project, within a development programme. In any kind of interaction between them, their relative power and status would influence the effectiveness of their participation. Quite often, formal, nominal participation can be misleadingly taken as full participation and empowerment of the actors. That would frustrate the intent of the human rights approach to participation. It may, therefore, be necessary to focus on the creation of a mechanism to monitor the process and adjudicate on the grievances and complaints about the denial of effective participation by everybody concerned. If the local authorities or grass-roots agencies function truly democratically, they can be accorded the role of adjudicator, provided there is appropriate oversight of their activities. Otherwise, for each project special provisions have to be drawn up and implemented in order to ensure such participation.

Accountability and transparency are the two other principles associated with the human rights framework and the implementation of human rights and, therefore, with the right to development. They are also necessary for any effective process of participation. As has been noted earlier, human rights involve specification of obligations for the different duty-holders who would be accountable for carrying out those obligations. Depending upon how precisely the accountability can be fixed, it may be possible to establish culpability for the non-fulfilment of a right and apply appropriate corrective measures. But even if, in a world of imperfect obligations, such culpability cannot be clearly established, as the failure or non-fulfilment of the corresponding right may not be legally attributable to particular agents, the identification of the duty-holders and their respective obligations would be an essential part of any development programmes. In order to make that possible, the programmes must be designed

in a transparent manner, bringing out openly all the interrelations and linkages between different actions and actors. In short, accountability presupposes transparency in all the transactions and interconnections in the process of development, implemented as a human right, and both of them are necessary to ensure effective participation of all the actors in that process.

As in the process of participation, ensuring accountability and transparency in the implementation of a human right will require the establishment of appropriate adjudicating and monitoring mechanisms. This can be achieved either through a formal, legal process or through some other important and independent process of enforcing remedies or introducing counteractive adjusting measures.

2.2 The role of NGOs

NGOs have a major role to play in applying the principles of accountability, transparency and participation in implementing the right to development. In my approach to implementing the right to development, "the obligation to facilitate the right-holders realizing their claims falls not only on States and other institutions nationally or internationally but also on the civil society and on anybody in the civil society in a position to help. NGOs are one constituent of civil society that can and has often played a very effective role in the implementation of human rights. Indeed, when the rights are to be realized in a participatory manner, with participation of the beneficiaries in the decision--making and benefit-sharing, with accountability and transparency and in a widely decentralized process, NGOs may have to play an even more crucial role in monitoring the programmes and delivering the services and may often replace the existing bureaucratic channels of administration. They may also have to play an advocacy role as well as engaging in grass-roots mobilization and organizing of beneficiaries to participate in decision-making. Furthermore, the role of NGOs would not be limited to national-level actions. The concept of international civil society as a third force is increasingly gaining ground and NGOs may be very effective in not only an international advocacy role but also as facilitators of the delivery of international services. However, the issues of funding, the identities and the commitments of NGOs are quite complex.

All the functions of NGOs and of international civil society need to be reviewed carefully."[21]

2.3 Obligations of the State

As has been noted above, the primary obligations for realizing a human right belong to the nation-States of which the individual right-holders are citizens. In the human rights literature, these obligations of the State have come to be identified with the obligations to respect, protect and fulfil.[22] The State has the obligation to respect in the sense of abstaining from carrying out or tolerating any violation of the right in question by agents of the State. The obligation to protect obliges the State to prevent the violation of the right in question by other individuals and non-State actors. The obligation to fulfil enjoins upon the State the duty to provide the resources and services necessary for individuals to enjoy their rights. In effect, the obligation to fulfil implies the obligation to facilitate, provide and promote.

Steiner and Alston have extended this list to five obligations: "respect the rights of others", "create institutional machinery essential to realization of rights", "protect rights/prevent violations", "provide goods and services to satisfy rights", and "promote rights", through advocacy, education, etc.[23] Stephen Marks has categorized these obligations as perfect and imperfect obligations.[24] Perfect obligations can be enforced through judicial process, where "accountability takes the form of enforceable remedies", such as the obligation to respect, preventing the State agents "from denying a right and punishing them for acts of commission and omission", and the obligation to ensure or protect, "preventing others from violating a right and punishing them for prohibited acts and ensuring through regulatory mechanisms that domestic and multinational corporations

21 Quoted from the Third Report paragraph 25.

22 Eide has discussed the obligations of States to respect, protect and fulfil all rights in all human rights documents they have ratified (Asbjørn Eide, "Economic, social and cultural rights as human rights" in A. Eide, C. Krause, A. Rosas eds. *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff, pp. 1-40, 1995).

23 Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals*, 2nd ed. Oxford University Press 2000, pp. 182-184.

24 Stephen Marks, "The Human Rights Framework for Development; Five Approaches *Working Paper No. 6,* FXB Center for Health and Human Rights, Harvard School of Public Health 2000. p.13-14 Available at http://www.hsph.harvard.edu/fxbcenter/

do not engage in practices that contribute to the deprivation of rights". Imperfect obligations are "general commitments to pursue a certain policy or achieve certain results which are typically not justiciable, that is, immediate individual remedies through the courts are not normally provided, where the State falls short of its responsibilities with respect to these obligations, although they are still legal obligations". The State is required to take effective steps in the direction of progressive realization of the right. In this category falls the State's responsibility to promote and facilitate through education, information, training and research and to create an enabling environment, as well as the State's obligation to fulfil or provide, allocating resources and supplying goods and services, "when the normal functioning of the market and other institutions fail."

2.4 Designing and executing a development programme

If, as argued above, the right to development is understood as the right to a particular process of development, acceptance of this right would impose all of these obligations on the State because it entails the realization of all human rights. As all of the rights have to be realized together, this requires the design and implementation of a development programme, with policies and measures that promote, protect, facilitate, fulfil and provide for human rights.

There are two basic requirements for carrying out such a programme. First, it is necessary to identify appropriate indicators and benchmarks to monitor the status of realization of each of the rights, as well as a mechanism for evaluating the interaction among the indicators. Indicators and benchmarks for specific rights have to represent not only the quantitative advances in providing a particular service to a population but also the qualitative manner in which the service is provided. For example, an indicator for the right to food should not only reflect the access to or the availability of food, but also the way that food is made available, with regard to equity, non-discrimination and other human rights standards. Several attempts have been made at developing such indicators and it will be necessary to develop agreed procedures that can be adopted to construct such indicators.

It may not be necessary, however, to build up an overall indicator for the right to development. This is because to convert a vector comprising a number of distinct elements into an index would require a process of averaging or weighting the various elements, which would be open to fundamental objections. The

vector approach would make it possible to establish whether there has been an improvement in the realization of the right to development as a result of the policies pursued. It would not, however, allow comparisons to be made between the achievements of two or more countries, or even within the same country over time because that would involve between the rights and their trade-offs both at a point of time and over a period of time for which there is no objective standard of achievement. The only way to do this is to build a consensus through open public discussions about the relative importance of the different levels of achievement.

This, of course, would not prevent the formulation of a programme for development that takes into account the interlinkages between the objectives of realizing the various rights, as well as expansion of resources such as the GDP, technology and institutions. The difference between a rights-based approach to development programmes and approaches that emphasize growth of the GDP, or a balance of payments surplus to meet debt liabilities, or a stabilization programme that minimizes the rate of inflation is that the rights-based approach imposes additional constraints on the development process, such as maintaining transparency, accountability, equity and non-discrimination in all the programmes. In addition, as mentioned earlier, the programme must ensure overall development with equity, or transformation of the structure of production, which reduces interregional and interpersonal disparities and inequity.

The right to development is also very much a matter of modernization, as well as of technological and institutional transformation, which relaxes the constraints referred to above over time. It is dependent on increasing resources over time and making the most efficient use of the existing resources through proper fiscal, monetary, trade and competitive market practices, and through expanding the opportunities for trade. Achieving the right to development requires the same fiscal and monetary discipline, macroeconomic balance and competitive markets as any other form of prudent economic management. The basic difference is that prudent management in furtherance of achieving the right to development is expected to bring about a more equitable outcome of the economic activities that make possible an improved realization of all the components of that right.

Finally, one has to recognize while implementing the right to development another implication of the fact that all the rights cannot be realized at the same time. We cannot allow violation of any right because we cannot trade off the improvement of one right against the violation of another right as we have no

way to compare the rights or order them in accordance with any notion of priority. However, if there is a serious resource constraint or if there is some insurmountable technical consideration, there may be situations when realizing a particular goal (or improvement of a right) may require giving up some other desired goals (not achieving full realization of some rights). This would be obvious if the rights are represented by some indicators reflecting access to and the availability of some goods and services calling for the use of resources. There may be situations when the right of some individual or small groups may be violated as a result of measures adopted to benefit a larger number of people, especially poor people. An example of such a situation would be the construction of a dam, which is technologically sound. By improving irrigation and providing power it could benefit a large number of people realize the right to development of many poor people. But it may require uprooting and relocating some people that may seem to be violating their rights. Obviously, there would be no problem if there were measures by which the needs of that larger number of people, including the poor, could be met without violating the rights of any individual or small groups. This is, however, different from the legal issue of derogations or limitations on the exercise of rights, which respectively allow curbing of some rights in a public emergency, in the interest of public order and the general welfare[25] – a principle that has been used wrongly by some

25 International human rights law recognizes exceptional situations under which it is legitimate to restrict certain rights to achieve a broader public good. Both International Covenants include provisions addressing the limitations issue. Article 4 of the International Covenant on Economic, Social and Cultural Rights states: "The State Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". The Limburg Principles also address limitations on economic, social and cultural rights.

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) states, "1. In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary-General of the United

writers to ignore the violations of such rights. The issues of such violations are related to the technology of the project, not to the legal technicalities of limitation provisions and cannot be condoned without appropriate countermeasures.

The problems of such violations in a right to development programme have to be dealt with in terms of what may be called "compensated nominal violations". If a development project, such as constructing a dam, leads to the forced relocation of some people, that forced relocation constitutes a violation of their rights. If the project provides facilities that benefit many more people, it can be justified in the usual economic programmes if the total benefits exceed the cost that is if the net benefits are positive, even if the beneficiaries do not actually compensate the losers. But such logic only holds if benefits and costs are measured in terms of market or shadow prices. In human rights theory, that cannot be done because the benefits and costs in rights of different individuals cannot be aggregated. In that case, compensation has to be paid, in whatever form, in order that the losers or those affected can accept the "nominal violation" of their rights and consent to the relocation. It is nominal because after compensation there should be no "real" violation, so that those affected believe they have not actually lost and are at least "indifferent" between the pre-violation state and the post-violations with compensation situation. So, such projects/policies would be justifiable if those affected no longer feel violated once compensated.[26] The essential condition for that would be setting up a mechanism to adjudicate on the amount and method of compensation following the human rights standards.

Nations, of the provisions from which it has derogated and of the reason by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation." In addition, the ICCPR allows for limitations on the rights guaranteed in articles 12, 14, 18, 19, 21 and 22. Also see "The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights", (E/CN.4/1985/4, annex), which provide a framework for analysing government actions limiting rights.

26 The World Bank's Draft Operational Policies (OP4.10) is an example of how these issues could be approached.

3. International cooperation

The Charter of the United Nations recognizes the obligation of international cooperation, by virtue of which the international community of States and multinational organizations are expected to cooperate with nation-States to enable them to fulfil the human rights of all individuals. The International Covenants, the Declaration on the Right to Development and other international human rights instruments reaffirmed this obligation. The 1993 Vienna Declaration and Programme of Action,[27] which formally acknowledged the right to development as a human right, also called for such cooperation as an obligation of all States. Once the process of realizing the right to development is viewed as a method of implementing and designing a country's development programme, the importance of international cooperation becomes even more evident. In today's globalizing world, a State cannot act in isolation, that is, without considering the effects of its policies on other countries, or without taking into account the impact of the behaviour of other countries on its own policies. The impact of the policies and practices of the developed countries on those of the developing countries, and *vice versa,* was the basis on which the concept of international cooperation was built. Just as these impacts are reciprocal, so too are the obligations to respond to them, leading to international cooperation.

When human rights are to be realized as a part of a country's development programme, all the resource, technological and institutional constraints can be seen as dependent upon the extent and nature of international cooperation. The international community, which could supply foreign savings and investments, technology, access to markets and institutional support, can facilitate the realization of the rights. But it should be obvious that such international cooperation is not to be confined only to the supply of foreign savings and foreign investment, or the transfer of resources. Such transfer of resources is, of course, necessary. The poor countries are short of domestic resources, which need to be supplemented by flows of foreign savings. Any discourse on the right to development cannot, therefore, avoid reminding the international community of its pledge to reach a target of devoting 0.7 per cent of GNP to foreign aid, and that only a handful of countries have come anywhere near meeting that target. However, in the context of fulfilling the right to development, in addition

27 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/23).

to the transfer of resources, several other factors would form part of the international community's obligations, including: international cooperation for supplying technology; providing market access; adjusting the rules of operation of the existing trading and financial institutions and intellectual property protection; and creating new international mechanisms to meet the specific requirements of the developing countries.

Such international cooperation would usually have two, though not mutually exclusive, dimensions. First, cooperation measures should be conceived and executed internationally in a multilateral process in which all developed countries, multilateral agencies and international institutions could participate by providing facilities accessible to all qualifying developing countries. Secondly, bilateral facilities or country-specific arrangements would deal with problems requiring measures adapted to particular contexts. From this point of view it would be necessary to re-examine, for example, both the multilateral and the bilateral facilities dealing with the debt problems of developing countries, or a review that includes structural adjustment, concessional financing, the operations of the world trade organizations, the policies of industrialized countries regarding market access and the restructuring of the international financial system. These steps could radically transform international economic relations between the developed and developing countries, especially when they follow the human rights standards, on the basis of equity and partnership. One of the principal motivations of the human rights movement leading up to the formulation of the right to development as a human right was establishing equity and empowerment in international economic transactions between developed and developing countries. Much of the logic of the North-South conflict that was behind the demand for a New International Economic Order in the 1970s has now lost its relevance. However, the rationale for equitable treatment and participation in decision-making and access to the benefits of the process remains as strong today as ever. The human rights approach to the realization of the right to development provides scope for building up a cooperative relationship between the developed and developing countries on the basis of partnership rather than the confrontation of earlier years.

3.1 Human rights and development cooperation

Although the major industrial countries have had development cooperation policies, especially development assistance programmes, since the 1950s, they

have been reluctant, till very recently, to link them to the human rights standards. One of the main reasons was that human rights were seen mainly as civil and political rights, and development was associated with economic growth and the raising of the per capita GDP through technocratic policies. Invoking human rights concerns was not favoured either by the recipient developing countries or the donor industrial countries. The first group thought it would result in unnecessary interference in their political sovereignty. The latter felt:

(a) That it would unnecessarily alienate the recipient countries;
(b) That some of the recipient countries, which were known perpetrators of human rights violations, actually received the largest amounts of development assistance because they were allies of the major donor countries and such a policy would be difficult to justify if human rights standards were applied; and
(c) That development policies should be kept separate from the issues of human rights (which at best should be used to assess the compatibility of those policies and practices with human rights norms, but could not be the basis of development models. That would be too close to accepting the legitimacy of economic, social and cultural rights, which most of the major donors were not fully prepared to do).[28]

Gradually, the situation changed, in part thanks to increasing pressure from the human rights movements in the industrial countries, which pushed for human rights concerns to be reflected in development assistance policy. That led to the United States, under President Carter, invoking human rights violations as the reason for stopping assistance to specific countries, and to the European countries openly recognizing economic, social and cultural rights and pressing for their fulfilment. Indeed, as early as 1975 the development policy of the Government of the Netherlands recognized the full range of human rights. Further, Netherlands development assistance was aimed at improving the lot of the poor and included the idea of developing modalities to allow recipient

28 See Katerina Tomasevski, *Development Aid and Human Rights Revisited*, Pinter Publisher, 1989, and articles by Haan Thoolan, "From human rights projects to strategies: the search for coherence", Philip Alston, "What's in a name: does it really matter if development policies refer to goals, ideals or human rights?", and Clarence Dias, "Mainstreaming human rights in development assistance: moving from projects to strategies" in *Human Rights in Development Cooperation*, ed. Henny Helmich in collaboration with Elena Borghese, SIM Special No. 22, Netherlands Institute of Human Rights, Utrecht, 1998.

countries to have the right to a say in their own affairs.[29] Other European countries followed policies aimed at creating conditions for realizing human rights and pursued measures to promote specific economic, social and cultural rights.

For a long time, however, the human rights approach to development cooperation focused on assistance for specific projects and programmes "to address areas of chronic neglect, such as infant and child health and nutrition, education of the girl child, adult illiteracy, economic empowerment of woman etc.", as Clarence Dias put it.[30] The case was made for extending development assistance policies to, *inter alia*, help build and strengthen the capacity of institutions like the judiciary, national human rights commissions and NGOs, as well as to redress adverse human rights impacts on particular groups resulting from development projects. However, there was a reluctance to link general policies, even such as meeting basic needs or eliminating absolute poverty, to human rights. It was believed that such a linkage might have been construed as affecting the political neutrality of the multilateral agencies, such as the World Bank or the IMF, and so the preference was to use specific projects to promote specified human rights.

More recently, development cooperation policies started integrating a human rights approach into a country's development programme. This approach combines a set of projects with policies and social arrangements, using their interdependence and common overall objectives. These have been spelt out in detail in recent documents explaining the development cooperation policies of the Development Assistance Committee (DAC) of OECD and the bilateral donor agencies, such as the 1996 DAC study, *Shaping the 21st Century: The Contribution of Development Co-operation*; the 1997 study of the Swedish International Development Authority (SIDA), *Development Cooperation in the 21st Century*; the 1997 White Paper by the United Kingdom Secretary of State for International Development, *Eliminating World Poverty: A Challenge for the 21st Century*. Most of them have poverty eradication as the main objective of development and bring out the importance of applying the human rights approach, in terms of partnership and empowerment. Indeed, the earlier emphasis on poverty-reduction projects (ensuring increased purchasing power for

29 J.P. Pronk, *Human Rights and Development Aid: Review of International Commission of Jurists*, June 1977.

30 In Henny Helmich ed., *Human Rights in Development Cooperation*, *supra* note 28.

the poor or broader networks of concessional public distribution systems) has been gradually shifting to an approach based on programmes for overall development with an accelerated growth of the GDP and employment, which are considered to be essential for a sustainable reduction of poverty.

However, many of these programmes adopted what can be described as an instrumentalist approach to human rights, rather than giving human rights a prior value commitment. Fulfilling human rights was important as it would be conducive to the realization of specific developmental goals. Human rights policies as reflected in concerns about good governance, or ensuring transparency, accountability and non-discrimination and partnership leading to empowerment were regarded as important, if not essential, for the implementation of poverty-eradication programmes. But the legal standards of achievement attaching to human rights were not considered policy objectives. The 1997 World Bank report, *Assessing Aid*, very clearly spelt out the importance of participation and empowerment and the difficulties of enforcing conditionality in their absence, as well as the requirements of good governance for the effective use of foreign aid. But there was hardly any call for fulfilling human rights in these assessments.

The position of the Word Bank has changed since then and the language of human rights now appears more often in its policy objectives. Nevertheless, the tendency to avoid human rights standards remains, although the elements of what was described above as the human rights approach to development are now increasingly incorporated in its programmes. In its Comprehensive Development Framework which followed the launching of the 1998 Partnership for Development: Proposed Actions for the World Bank" the Bank took a holistic approach to development, formulating a long-term development framework with clearly defined priorities, balancing structural, physical and human requirements, based on participation, accountability and country ownership. In its *World Development Report 2000/2001*, the Bank discussed the problems of attacking poverty in terms of opportunity, empowerment and human security, all of which are foundations of the human rights approach. It is just a short step from that to a fully developed approach to the right to development, as elaborated in this paper. The same is true of the Poverty Reduction Strategy Papers (PRSPs) that the IMF and the World Bank promote together, or the policies enunciated in initiatives for the Highly Indebted Poor Countries (HIPC), which have all the ingredients of the human rights approach to development, without fully embrac-

ing the human rights standards incorporated in the international human rights instruments.

These developments have been accompanied by most of the major industrial countries taking a position on development cooperation in terms of realizing human rights, and the grounds are now prepared for adopting the approach to implement the right to development as we have spelt out. The difference in approach between the IMF/World Bank's Poverty Reduction Strategy and the Comprehensive Development Framework (CDF), as well as the approaches of the major bilateral donors, and the implementation of the right to development as a human right, is the explicit recognition of the obligations of the stakeholders, including those of the international community. There will hardly be any disagreement about accepting the goals of human and social development, within the human rights framework, as guiding development policies. But accepting those goals as rights or entitlements of all individuals in developing countries would entail accepting the obligations of all parties to carry out measures to make possible the realization of these rights. Even here, there would now be a general consensus about specifying the obligations of State authorities, as can be seen from the manner in which such obligations are fixed, in accordance with the human rights standards, in PRSPs, HIPC initiatives, CDF and other development programmes. This means they would be consistent with partnership and empowerment, transparency, accountability and non-discrimination. Regarding the realization of the right to development as a human right, they may need to be somewhat reformulated to establish culpability, specify the monitoring mechanism and enforce the commitments of the State authorities at different levels. But the building blocks for designing programmes and the specification of the responsibilities in adopting the human rights approach are already in place, especially with regard to programmes of national action.

However, mechanisms for establishing the international obligations and specifying the duties of the different agencies of the international community are still lacking. One lesson that has been learnt from the experience of international cooperation is that one-sided conditionality imposed on a party, even if in principle it is beneficial for the party, seldom works and is honoured more often in the breach than in the observance. The donor community has therefore moved towards ensuring partnership with and empowerment of the recipient countries, making them owners of the programmes that entail those conditionalities. However, if those conditionalities are not matched by the specification of obligations belonging to the donor countries and institutions, and the inter-

national community in general, the exercise falls short of the requirements of the human rights approach.

So, the programmes implementing the right to development have to be designed in such a manner that the conditionalities set as the developing countries' obligations are matched by reciprocal conditionalities, in terms of obligations that the international community will have to carry out. The programmes then not only fit into the human rights approach based on partnership and equity, but also improve the likelihood of those obligations being fulfilled and the programme itself being realized. To achieve this requires a clear specification of the obligations of the different parties, including the recipient State and its national authorities, as well as the international community, the donor States, international agencies and multinational companies, and a clear linkage to the progressive realization of the different indicators of the rights. To this has to be added mechanisms to decide on the burden-sharing of the obligations between the different agencies, and a mechanism to monitor, if not arbitrate and adjudicate on, the disputes that may arise and to recommend and enforce corrective measures. A successful programme is thus as much dependent upon the appropriate design of the programme, the detailed specification of responsibilities and a fixing of accountabilities, as on recognizing the mutuality of the obligations and the reciprocity of the conditionalities.

There is no unique model for implementing the right to development, and whatever model is chosen has to be selected through open international deliberation and agreement. In order to facilitate such deliberation, I had earlier proposed the adoption of development compacts in my first three reports to the Human Rights Commission. These ideas were derived from the original proposal of the Norwegian Minister Stoltenberg and further developed by others, including myself in the late 1980s, following the pioneering use of the Support Group mechanism by the IMF in resolving the problems of the arrears of defaulting countries.[31] This model is perfectly consistent with the PRSP and the HIPC

31 T. Stoltenberg: "Towards a world development strategy" in *One World or Several*, Louis Emmerij ed., (OECD, Paris, 1989). Stoltenberg talked about development contracts as comprehensive long-term commitments by industrial countries for development assistance to implement long-term development plans of the third world countries. This was taken up by others at the OECD Development Centre, when it was suggested that a development commission be formed to conduct continued dialogue between developing and industrial countries. The idea of a development compact is less ambitious and more linked to an understanding or an agreement between a developing country undertaking

strategies of the IMF and the World Bank and the principles enunciated by the approach to development assistance of the different members of the Development Assistance Committee (DAC) of OECD. In effect, it puts those strategies squarely in a human rights framework, basing them not only on the obligations of the State authorities but also on those of the international community.

3.2 Development Compacts

The following paragraphs describe in a systematic manner this approach to the development compact, so as to promote discussions aimed at having the international community reach agreement on adopting a model for implementing the right to development.

First, the international community, after agreeing to adopt a development programme as a process of development realizing all the human rights, may choose to realize a few rights, without any deterioration in other rights, as an immediate development objective. This choice would not imply any hierarchy among the rights but should only reflect a properly built up consensus in the developing country concerned. The reason for concentrating on a few rights to begin with is dictated entirely by reasons of practicability. I had suggested reducing poverty by half by 2015 and fulfilling universally the right to food, the right to primary education and the right to primary health care as objectives of the programmes for the right to development. This is not only in accordance with the principle of equity, which is the basis of all human rights and which is satisfied by dealing with the worst form of inequity in the developing countries, namely income poverty with capability poverty, it is also consistent with the principal objectives accepted by most bilateral donors and multilateral agencies in their development cooperation programmes, as well as the targets set at the Millennium Summit.

programmes of adjustment and reform and a group of industrial countries which would ensure the provision of necessary assistance to implement the programmes. The logic of reciprocal obligation was spelled out in the report of the IMF Group of 24, "The functioning and improvement of the international monetary system", *IMF Survey*, September 1985, and developed by Arjun Sengupta in "Multilateral compacts supporting economic reforms", part of the companion volume to *The Challenge to the South: The Report of the South Commission (1990)*, and in the UNDP *Human Development Report 1992*. See also the First Report.

Second, it would be desirable to establish a focal organization where members of the international community can meet and work with those developing countries willing to enter into development compacts. It should probably be centred at the DAC of OECD, which can effectively play the role of coordinating negotiations with the developing countries on behalf of the industrial countries.

Third, a developing country that is willing to implement the right to development through a development programme should write to the DAC and request a development compact. It should then design its development programme, in the manner we have discussed above, to secure the objectives already agreed upon, clearly bringing out the interdependence between the rights, the policies to be adopted nationally and internationally, the sequencing of policies and objectives, the obligations to be carried out by the different parties and the nature and extent of the support required from the international community. The developing country concerned must receive technical assistance in designing the programme, including the help of outside and independent experts, as well as the expertise of World Bank and IMF staff. But every attempt must be made to ensure that the country retains ownership of the programme.

Fourth, once a development programme has been fully drawn up by a developing country seeking a development compact, the DAC should organize a support group for that developing country. The support group should be convened by the DAC and, in addition to the DAC, it would be composed of other major donor countries who may have specific interests in that developing country, the regional development agency, representatives of the Office of the High Commissioner for Human Rights, FAO, UNICEF, WHO and other international agencies linked to the specific rights chosen for priority attention, plus representatives of IMF, the World Bank and the appropriate regional development bank. The support group will scrutinize, review and approve the targets and policies of the programme, examine the obligations specified and identify the respective responsibilities of its members in fulfilling those obligations.

Fifth, those developing countries that undertake to realize the right to development through a development compact should design development programmes in consultation with civil society. They must also take the first steps towards fulfilling their own international obligations by adopting legislation to incorporate in their domestic law the rights contained in international and regional human rights treaties, which they must ratify if they have not done so already.

Then they must appoint a national human rights commission and other authorities, which can adjudicate on complaints of human rights violations. They should also allow NGOs to operate freely and participate at all levels of the consultation and adjudication process.

Sixth, a development compact should be drawn up on the basis of the development programmes that specify the obligations of both the national authorities and the international community. It should identify the sequential steps and levels of realization of the targets and rights and the reciprocal obligations, and make it clear that if the developing country takes the measures specified in the programme, the international community would take corresponding measures to make the effective application of the developing countries' measures and the realization of the programme possible. The measures, the benchmarks and the performance criteria, that would trigger corresponding international actions would be reviewed and accepted by both the developing country and the support group. The support group, in turn, would decide, through discussion among its members, the precise burden-sharing.

Seventh, in the burden-sharing discussions, appropriate measures should be considered and assessed at both the multilateral and the bilateral levels. Issues relating to trade, debt, financial restructuring, intellectual property rights and creating appropriate investment environments mainly require action at the multilateral level. Issues relating to resource transfers and financial support will have to be considered at the bilateral level, with input from various donors and the international financial agencies.

The intent of all these exercises is to assure the developing countries that if they fulfil their part of the bargain and carry out their obligations, the programme will not be derailed because of the lack of international cooperation. In this respect, official finance or resource transfers from the industrial countries will play the most crucial role. If all the other elements of cooperation – trade and market access, debt rescheduling and financial restructuring that facilitates increased private flows, as well as technology transfer and transactions in intellectual property – are effective, a significant increase in the transfer of resources may not be necessary. But if they do not, the slack may have to be taken up by increased resource flows or development assistance.

It is important to note that international cooperation does not consist only of resource transfer or official development assistance. Indeed, if development

programmes are carried out properly with accountability and transparency, at the grass-roots level and with the participation of beneficiaries, the increased cost-effectiveness may mean that the impact of the development assistance will be greater and thus economize on the flow of financial aid. Nevertheless, most developing countries are short of capital and their level of development does not attract substantial private investments. For most of them, official development assistance is the only way to allow domestic investment to exceed their low levels of domestic savings. Further, most of the specific human development projects in the areas of food, health, sanitation, education and major infrastructure would require substantial public investment for quite some time. This would need to be supported by official development assistance, until public revenue and savings increase as the level of development increases. In addition, the development programmes for realizing the right to development would build on policies for sustaining and accelerating where possible the rate of economic growth and on raising the rate of investment. Therefore, the inflow of foreign savings would remain a central element of the programmes. So long as these foreign savings do not flow from the international capital markets to most poor countries they will have to come from increased official development assistance.

So one of the major functions of the support group would be to decide on how to ensure adequate official assistance to the countries that accept and request a development compact and carry out their obligations. There might be many different methods of assessing the requirements. One method would be to calculate the additional requirements of public investment or expenditure in implementing the programme for realizing the right to development and of the targets set. This would be over and above the baseline projection that is usually obtained by extrapolating the past flows for meeting the normal requirements. The international community may agree to share that additional requirements half-and-half with the country concerned, provided that country attempts to increase its domestic savings. In any case, this burden sharing between the developing country and the international community will have to be agreed upon in the support group deliberations and will form a part of the development compact. The developing country concerned must be sure that, if it fulfils its obligations, the financing obligations of the international community are guaranteed.

In order to carry out its mandate properly, the support group must have the power not only to monitor and adjudicate on the fulfilment of the obligations and conditionalities accepted by the developing countries, but also to decide

on the allocation of the burden among the industrial countries. It may be able to do so on its own, or may refer to the DAC to actually enforce the decisions, of course following the usual consultations, with the participation of all, including local and international NGOs. To help the support group operate it may be necessary to create a new financing facility called the Fund for Financing Development Compacts. The operation of that fund is sketched out in the following paragraphs.

The fund should be administered by the DAC, with contributions in the form of callable commitments from its various members. These commitments would only be called in when a developing country entered into a development compact that required additional financing from the international community.

The size of the fund would have to be decided through international consultations. Following the Millennium Summit, several estimates have been made of the financial requirements for meeting its targets. The Zedillo report, a technical report of the High Level Panel on Financing for Development (2001), summarized as approximately $50 billion a year the estimates that have been made by different agencies of the amount required to halve poverty by 2015 and provide the essential elements for meeting the rights to food, to primary health and to primary education. There is no hard and fast rule for making such estimates and the only method would be to decide upon an amount following international deliberations.

Once the size of the fund was agreed upon, it would not be difficult to agree upon the share of the different DAC members on the basis of some agreed principles. The contributions to the fund would be in the form of commitments to begin with, which might later be called upon by the DAC on the recommendation of the support group. Thus, the negotiations would only have to address the principles that would govern the fund.

It is here that the old official development assistance target of at least 0.7 per cent of GNP per year for all donors, following the recommendations of the 1969 Pearson Commission and the United Nations resolution endorsed by most, though not all, donors becomes useful. The logic of that burden sharing still remains valid, although the actual share of ODA to gross national product (GNP) for most of the DAC countries on average has rarely exceeded half that target. In 1999, at $56 billion, the ODA of the 22 members of DAC represented only 0.24 per cent of their GNP. Excluding the United States that average went

up to 0.33 per cent. Five countries, Denmark, Luxembourg, the Netherlands, Norway and Sweden, achieved the target most years. Even those countries which fell far short of the target did not quite disagree with the logic or dispute the target, especially since the amounts involved were very small fractions not only of their GNP but also of their public expenditure. Their arguments were concerned with the wasteful and inefficient use of these resources, the lack of absorption capacity of the public sectors and wrong policies in developing countries. If an appeal is made now to increase their contributions to fulfil the obligations of a human rights programme, it may not be difficult for those DAC countries to get approval from their electorate.

The table at the end of this article provides two models for burden sharing of an additional $50 billion in ODA from the DAC member countries (on the basis of 1998 figures). In model 1, the burden share represents the weight of each individual country multiplied by the target of $50 billion, where weights are the ratios of GNP of individual countries to the sum of DAC GNP. Since this is additional to their existing contributions, it will increase the total contribution of some of the countries to a level that is disproportionately higher than others as a percentage of GNP, even though the additional commitments may not be that significant. In model 2, the five like-minded countries which have performed far better than others have been spared completely and the additional burden of $50 billion is allocated to the other 17 countries, raising their contributions uniformly to 0.44 per cent of GNP, still far below the old 0.7 per cent target. These are illustrative examples, and are only provided to show that raising an additional $50 billion per year should not be that difficult for the DAC countries, provided they agreed to set up the Fund for Financing Development Compacts in accordance with their commitments to support the human rights standards.

The manner in which such a fund operates can, however, be quite different from what is described above. If the callable commitments of the various members are made according to an agreed methodology, the support group would have flexibility in deciding who should bear the burden of helping the different countries. The financing requirements of a particular development compact will be determined after taking into account the possible contributions of IMF, the World Bank and other regional agencies. Then those donors which may be especially interested in the country and have joined the support group may assume some of the burden, up to the limits of their commitments to the Fund for Financing Development Compacts. After that the support group may

request other members to commit funds voluntarily, but not exceed their total commitment. If these commitments do not cover the shortfall, the support group may recommend to the DAC that it call for the commitments of those countries that have a substantial gap between what they contribute and what they have committed. In all cases the guiding principle will be to build on a consensual procedure, through ongoing consultations.

The scheme elaborated above serves only to illustrate a mechanism for implementing the right to development as a human right. It is necessary to examine the details at the expert level and there is no doubt that alternative models can be suggested and possibly can be shown to be more workable. What is necessary is to start the discussion. It is time that the international community systematically takes up the task of implementing the right to development, which is the right to a process of development that realizes all the human rights and fundamental freedoms.

Two models for burden sharing of an additional $50 billion in ODA from the DAC member countries

	ODA Percentage of GNP 1988	ODA $US Mn. 1998	Weight[a]	Model 1 Burden share[b] $US Mn. 1998	Target ODA/GNP[c] Percentage	Model 2 Burden share[d] $US Mn. 1998
Australia	0.27	960	0.016	785	0.44	604
Austria	0.22	456	0.009	458	0.44	456
Belgium	0.35	883	0.011	557	0.44	227
Canada	0.3	1707	0.025	1256	0.44	797
Denmark	0.99	1704	0.008	380	0.99	0
Finland	0.32	396	0.005	273	0.44	149
France	0.4	5742	0.063	3170	0.44	574
Germany	0.26	5581	0.095	4739	0.44	3864
Greece	0.15	179	0.005	263	0.44	346
Ireland	0.3	199	0.003	146	0.44	93
Italy	0.2	2278	0.050	2515	0.44	2734
Japan	0.28	10640	0.168	8390	0.44	6080

	ODA Percentage of GNP 1988	ODA $US Mn. 1998	Weight[a]	Model 1 Burden share[b] $US Mn. 1998	Target ODA/GNP[c] Percentage	Model 2 Burden share[d] $US Mn. 1998
Luxembourg	0.65	112	0.001	38	0.65	0
Netherlands	0.8	3042	0.017	840	0.8	0
New Zealand	0.27	130	0.002	106	0.44	82
Norway	0.91	1321	0.006	321	0.91	0
Portugal	0.24	259	0.005	238	0.44	216
Spain	0.24	1376	0.025	1266	0.44	1147
Sweden	0.72	1573	0.010	482	0.72	0
Switzerland	0.32	898	0.012	620	0.44	337
United Kingdom	0.27	3864	0.063	3160	0.44	2433
United States	0.1	8786	0.388	19399	0.44	29872
Total DAC	0.23	2084	1.000	50000		50011

Source:

i) OECD, *Development Co-operation: Efforts and Policies of the Members of the Development Assistance Committee 1998 Report*, (France: OECD, 1999). Statistical annex A7-A8, Table 4.

ii) OECD, *Development Co-operation Annual Report 2000* at *www.oecd.org*.

iii) Study on the current state of progress in the implementation of the right to development submitted by Mr. Arjun K. Sengupta, independent expert (E/CN.4/1999/WG.18/2), July 1999.

[a] Weight represents the ratio of GNP of individual countries to the sum of DAC GNP.

[b] Burden share represents the weight of each individual country multiplied by the target of US$ 50,000-million.

[c] For Denmark, Luxembourg, the Netherlands, Norway and Sweden the target ODA contribution has been taken as their actual ODA/GNP percentage contribution for the year 1998. For all other DAC countries the target ODA/GNP percentage has been estimated at 0.44 per cent of GNP.

[d] Burden share has been calculated by subtracting the actual contribution in 1998 from the estimated contribution. The rates mentioned in the previous column have been used for arriving at the estimated contribution.

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16

THE RIGHT TO A HEALTHY ENVIRONMENT

Sueli Giorgetta

Introduction

> *"Environmental conditions help determine whether people are healthy or not, and how long they live. They can affect reproductive health and choices, and they can help determine prospects for social cohesion and economic growth, with further effects on health. Changes in the environment – pollution and degradation, climate change, extremes of weather – also change prospects for health and development."*
>
> United Nations Population Fund[1]

This observation made by the UNFPA clearly shows the reasons why definitions and approaches to development have changed. Economic development needs to be well balanced and needs to include environmental protection, in order to ensure that conditions of life for human beings are not impaired. As was also mentioned by the UNFPA report, "human activity has affected every part of the planet, choices and interventions have transformed the natural world, posing both great possibilities and extreme dangers for the quality and sustainability of our civilizations, and for the intricate balances of nature."[2] Environ-

1 Report State of World Population 2001: Footprints and Milestones: Populations and Environmental Change, United Nations Population Fund – UNFPA, 2001, available at www.unfpa.org.

2 *Ibid*

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 379-404.*

mental degradation is a threat to the complex structures that support human development and fundamental human rights.[3] Thus, the concept of development has to integrate environmental protection and the protection of human rights, establishing an interrelation among these three fields.[4]

Everywhere there are critical decisions to be made. Some are about how to protect and promote fundamental values such as the right to health and human dignity and how to combine these with the need for development, as the main tool for improving and promoting human dignity and worth.[5] Sustainable development was presented as a way of permitting the use of available natural resources, promoting economic development, and preserving the environment, for present and future generations, and providing the best way of using development for the promotion and improvement of fundamental human rights.

In this chapter the interrelationship between economic development, environmental protection and human rights is highlighted in an attempt to show that the concept of sustainable development ideally incorporates the three domains. The importance of fundamental human rights, dignity and worth of human beings and their relationship with environmental protection are considered in part 1. Part 2 deals with the emergence of a right to a healthy environment, as a way of coping with pressing development needs *vis-à-vis* human rights and environmental protection, where the latter is presented as a *condition sine qua non* for human survival. The link between the environment and the protection of human rights, which gave rise to claims for a right to a healthy environment within human rights mechanisms, is analyzed in part 3. Part 4 introduces the concept of sustainable development as an ideal solution able to cope with development needs and the preservation of the environment, and at the same time able to improve human rights protection. Part 5 considers the connection between some relevant principles of sustainable development and the right to a healthy environment, and part 6 deals with its recent binding nature.

1. Environment and Human Rights

The protection of the human race is a major objective of the United Nations Charter, which seeks "to save succeeding generations from the scourge of war (...) and reaffirm faith in fundamental human rights, in the dignity and worth

3 *Ibid.*
4 *Ibid.*
5 *Ibid.*

of the human person."[6] Through the Charter human rights are assimilated as representing higher international law, embracing universally recognized principles and norms. The 1993 World Conference on Human Rights confirmed that in the framework of the purposes and principles of the UN Charter, the promotion and protection of all human rights is a legitimate concern and in the international community's interest.[7] Considerations of human worth and dignity mandate compliance[8] with human rights norms, and their growing importance to the international community is reflected in their recognition as having the status of *erga omnes* norms.[9]

Some of the major goals of international human rights law are the achievement of freedom, justice and peace in the world. The means to achieving these goals begin with legal recognition of the equal and inalienable rights of all human beings and the inherent human dignity and worth.[10] "The protection and improvement of man's environment arise directly out of a vital need to protect human life, to assure its quality and condition, and to ensure the prerequisites indispensable to safeguarding human dignity and human worth and the development of the human personality."[11] Environmental degradation is in itself a serious threat to human survival, since it affects the living space needed for

6 Preamble of the United Nations Charter, paragraphs 1 and 2.

7 The concept for essentiality and importance of human rights for the international community and the existence for a commitment to the Preamble, Purposes and Principles of the UN Charter was expressed in the Preamble of the Vienna Declaration and Program of Action, *UN Doc.* A/CONF.157/23, 12 July 1993, p. 2.

8 Preamble, Articles 1, 55, 56, 62 and 68 of the UN Charter indicate principles and establish legal obligations for Member States. Moreover, the International Court of Justice in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) has determined that "(...) a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." ICJ Reports 1971, p. 57.

9 The ICJ expressed that the obligation to respect human rights is based on general international law, and indicated that the principles and rules of international law concerning the basic rights of the person engender obligation *erga omnes*. Barcelona Traction Case, ICJ Reports 1970, p. 32.

10 Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment,* 28 Stanford Journal of International Law, 1991, p. 107.

11 R. S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law* in Weiss, E. B. (ed.), *Environmental Change and International Law*, United Nations University Press, 1992, p. 209. Man in this context should be read as 'human'.

ensuring the quality of life and health.[12] Thus, respect for human rights is related to environmental protection, for human beings depend upon it to survive.[13] As one author has observed "humankind must be protected because human beings have become an endangered species."[14]

2. The Right to a Healthy Environment

The relationship between human rights and the right to a healthy environment is seen from different perspectives. According to Fitzmaurice[15] there are three main schools of thought. One that supports the view that there are no human rights without an environmental right,[16] another that sees the right, both as an already existing or as emerging one, as a highly questionable proposition,[17] and finally a school that admits the existence of a right to a healthy environment, deriving its existence from other human rights,[18] such as the right to life, right to health and the right to information.[19]

12 See ICJ Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports of Judgements, Advisory Opinions and Orders, 1996, Vol. 1, paragraph 29.

13 See for example Boyle, Alan E. and Michael R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1988, a collection of essays on the legal relationship between human rights and environmental protection. See also Cançado Trindade, A.A., *The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change*, in Weiss, Edith B.(ed.), *Environmental Change and International Law*, United Nations University Press, Tokyo, 1992, p. 244-312, and Separate Opinion of Vice-President Weeramantry in the Gabcíkovo-Nagymaros case, affirming that "Environmental Rights are human rights.", International Court of Justice, Case Concerning the Gabcíkovo-Nagymaros Project, reprinted 37 *I.L.M.* 162 (1998), p. 215.

14 W.Paul Gormely, *The Right to a Safe and Decent Environment,* 28 The Indiana Journal of International Law, 1988, 1-32.

15 Malgosia Fitzmaurice, *The Right of the Child to a Clean Environment*, 23 Southern Illinois University Law Journal (1999), p. 611-656.

16 *Ibid,*p. 612.

17 *Ibid.*

18 *Ibid,* p. 613

19 Shelton, loc. cit. 10, p. 105.

It was the United Nations Conference on the Human Environment[20] that first demonstrated the connection between environment and development, adopting a human rights approach to environmental protection, affirming that "[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world (...)."[21] Declaring that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself,"[22] the Conference recognized that economic development, the state of environment and the health of humanity are all intricately entwined. It was stressed that actions towards development should consider the eventual harm to the environment on which life and well being of human beings depend.[23] The protection and improvement of the human environment for present and future generations was deemed as an imperative goal for humankind, to be pursued in harmony with fundamentals goals of peace and economic and social development.[24]

The Stockholm Declaration was the first international instrument to expressly recognize the relationship between individual human rights and the quality of the environment. Principle 1 of the Stockholm Declaration states that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".[25] It does not proclaim a fundamental human right to a healthy environment, but implies that basic environmental health is necessary for the free enjoyment and exercise of recognized human rights.[26] Accordingly, environmental degradation may interfere with fundamental human rights to such an extent that those rights are violated.[27]

20 United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN doc. A/CONF.48/14 (Hereinafter Stockholm Conference).

21 *Ibid*, Stockholm Declaration, part I, paragraph 2.

22 *Ibid,* paragraph 1.

23 *Ibid,* paragraph 6.

24 *Ibid.*

25 Stockholm Declaration, part II (Principles), Principle 1.

26 Shelton, loc. cit. n. 10, at 112.

27 *Ibid*, according to Shelton "the human rights directly threatened by environmental deterioration include the right to life, the right to health, the right to privacy, the right to suitable working conditions, the right to an adequate standard of living, and rights to political participation and information."

Though a non-binding legal instrument, the Stockholm Declaration created an international awareness about the dimension of environmental degradation. There has been increasing recognition of the need to protect the global environment and to lay down new principles and rules on certain issues.[28] Progressively, rights and obligations were articulated so as to address the environmental impact of state activity and new concepts and principles have emerged. One positive evolution has been the emergence of the principle of sustainable development, a concept that focuses on human interests in the environment, connecting the idea of a people's right to development with the need to preserve the environment. Ever since its emergence the term sustainable development "has dominated international action in the field of environmental protection."[29]

In 1980 the International Union for the Conservation of Nature went further in developing the concept of sustainable development.[30] Another important set of principles was established in the World Charter for Nature,[31] which elaborated further the rights and duties resulting from the necessity to protect the environment. However, the concept of sustainable development only attracted international attention in 1987 when the World Commission on Environment and Development (WCED) adopted it in its famous report titled *Our Common Future.*[32] The WCED defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[33] Accordingly, the Expert Group on Environmental Law of the WCED suggested a list of legal principles, which included the right to a healthy environment as a fundamental human right.[34]

28 Patricia W. Birnie and Alan E. Boyle, *International Law & The Environment*, Oxford University Press, 1995, p. 10.

29 Alexandre Kiss and Dinah Shelton, *International Environmental Law*, Transnational Publisher Inc., New York, 2nd Edition, 2000, p. 248.

30 Birnie and Boyle, *loc. cit.* n. 28, p. 4.

31 World Charter for Nature, UN General Assembly Res. No. 37/7, adopted on 28 October 1982, Principle 1.

32 The World Commission on Environment and Development, *Our Common Future,* Oxford University Press, 1987.

33 Ibid, p. 43.

34 Proposed Legal Principles for Environmental Protection and Sustainable Development, adopted by the Expert Group on Environmental Law of the World Commission on Environmental and Development, in Environmental Protection and Sustainable Development – Legal Principles and Recommendations, M. Nijhoff Publ. Dordrecht, June 1987, p. 25-33. Article 1 – Fundamental human right, states that "All human beings have the fundamental right to an environment adequate for their health and well-being." (Hereinafter referred to as Legal Expert Group).

This was elaborated in the obligation to conserve the environment for present and future generations,[35] and stressed the need to maintain ecological processes, biological diversity and other aspects of human survival and sustainable development.[36]

In 1989 "the right to live in dignity in a viable global environment" was expressed in the Hague Declaration on the Environment.[37] One year later the General Assembly requested a report containing proposals and recommendations on possible ways and means to strengthen the capacity of the UN and "to define criteria for determining when environmental degradation undermines health, well being, development prospects and the very survival of life on the planet."[38]

In 1999 the Bizkaia Declaration expressly stated that "everyone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment ... [which] may be exercised before public bodies and private entities, whatever their legal status under national and international law"[39] Although non-binding, these instruments have been highly influential in initiating some action for the preservation and improvement of the human environment. Since then, a large number of international, regional and national instruments have been drawn up and enacted, which have added strength to the legal basis for environmental rights.

3. The Right to a Healthy Environment and International Human Rights Instruments

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain no explicit mention of a human

35 Ibid, Article 2 – Conservation for present and future generations establishes that "States shall ensure that the environment and natural resources are conserved and used for the benefit of present and future generations."

36 Ibid, Article 3 – Ecosystems, related ecological processes, biological diversity, and sustainability.

37 Hague Declaration on the Environment, The Hague, 11 March 1989, 28 *I.L.M.* 1308 (1989).

38 General Assembly Resolution 44/224, *UN Doc.* A/44/746/add 7, 1990, p. 2-3.

39 Bizkaia Declaration on the Right to Environment, issued at the International Seminar of Experts on the Right to the Environment, organized by UNESCO and the United Nations High Commissioner for Human Rights, UN Doc. 30C/INF.11, 24.09.1999.

right to a healthy environment. It is under the protection of some existing human rights such as the right to life, the right to health and the right to privacy that claims related to a right to a healthy environment were introduced at the universal and regional level.

At the universal level it occurred through the First Optional Protocol to the International Covenant on Civil and Political Rights. Cases involving the environment have been heard by the Human Right Committee under the individual complaints procedure established by the Optional Protocol. In the *Lubicon Case,* the UN Human Rights Committee resolved that the denial of the indigenous Lubicon Lake Band's right to dispose freely of its natural wealth and resources constituted a violation of Article 27 of the ICCPR. It also found that "historical inequities and certain more recent developments (...) were threatening the way of life and culture of the Lake Lubicon Band, and were thus violating minority rights (ICCPR Article 27)."[40] Another example is the *Port Hope, Ontario Case*,[41] where large-scale dumping of nuclear waste had taken place within a community. A member of this community filed a complaint on her own behalf and on behalf of present and future generations of Port Hope, Ontario, claiming that the nuclear dumping was threatening life and health of present and future generations of Port Hope. Even though the complaint was declared inadmissible,[42] "the Committee discussed the validity of the petitioner's environmental claims as a human rights concern and observed that the communication raised serious issues regarding the duty of States' parties to protect the right to life contained in the article 6(1) of the International Covenant on Civil and Political Rights."[43] So, *prima facie*, the case was found to concern rights protected by the Covenant, since the Committee analyzed the question of the exhaustion of local remedies after determining whether there is a violation of the Covenant.[44] "This case suggests that environmental wrongs are appropriately addressed in human rights forums, and that traditional notions of individual injury may warrant extension in cases of environmental harm."[45]

40 Fatma Zohra Ksentini, Progress Report Human Rights and the Environment, *UN Doc.* E/CN.4/Sub.2/1992/7, 2 July 1992, p. 28. (Hereinafter Ksentini Report).

41 Ibid, p. 25.

42 The communication itself was found not admissible before the Committee because the author had not exhausted domestic remedies. See Ksentini Report, loc.cit. n. 40, p. 25.

43 Ibid.

44 Ibid.

45 Ibid.

At the regional level, the African Charter on Human and People's Rights[46] was the first broadly ratified international human rights treaty that expressly stipulates the right to a healthy environment. Article 24 of the Charter states that "All peoples shall have the right to a general satisfactory environment favorable to their development." Despite the fact that the right is broadly expressed, and that there is no stipulation of correlative legal obligations of States' parties, legal obligations in the African Charter could be derived from general provisions.[47] However, this would depend on the manner in which contracting States apply essential postulates of international treaty law, such as good faith[48] and pacta sunt servanda,[49] for the African Charter has no concrete implementation measures.

In the Inter-American system of human rights the right to a healthy environment was included in the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador), but before its entry into force the Inter-American Court dealt with cases involving the right to a healthy environment. For instance, the *Yanomami Case*, has contributed to the recognition of the close link between the protection of human rights and the environment. The Inter-American Commission on Human Rights decided the case[50] and, having considered the negative environmental and social effects for the Yanomami which would result from the construction of a highway in their territory, resolved that several human rights recognized in the American Declaration of the Rights and Duties of Man had been violated, including the right to life and to the preservation of health and well-being.

On the other hand the Protocol of San Salvador[51] was adopted as a response to pressures demanding protection of some newly emerging human rights and freedoms.[52] The right to a healthy environment is specified as part of the right to life, in Article 11:

46 African Charter of Human and Peoples' Rights, 21 *I.L.M.* 59 (1981).

47 Article 26 of the Charter establishes that "States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

48 1969 Vienna Convention on the Law of Treaties, 8 *I.L.M.* 679 (1969), Article 31, paragraph 1.

49 Ibid, Article 26.

50 Ksentini Report, loc. cit. n. 40, p. 23.

51 Adopted in 1988, entry into force in November 1999.

52 Besides the right to a healthy environment, the Protocol of San Salvador, among other new or reformulated rights, presents the following rights: right to work, trade union rights, right to health, right to food.

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation and improvement of the environment.[53]

The provisions of this regional agreement are much more protective of environmental rights than Article 24 of the African Charter. Moreover, the system of both the Inter-American Court and Inter-American Commission is primarily geared to large-scale violations of human rights. The Commission has a unique position in comparison with other commissions functioning on other continents: it is authorized to undertake country studies and on-site investigations in cases of large-scale human rights violations, without having to wait for formal permission or individual petitions. This possibility makes the Inter-American mechanism quite efficient. Considering that violations of environmental rights usually take place on a large scale, causing major environmental crises, developing the practice of utilizing these mechanisms might be a way to crystallize the right to a healthy environment in the region.

At the European level, the European Convention of Human Rights (ECHR) contains no reference to a human right to environmental protection, but environmental concerns have found their way through the interpretation of existing human rights, such as the rights to privacy and inviolability of property. The European Court of Human Rights occasionally interpreted Article 8 of ECHR which provides that "everyone has the right to respect for his private and family life, his home and his correspondence" as a basis for entertaining claims for environmental damages. In 1994, in the landmark case of *Lopez-Ostra v. Spain*,[54] the Court interpreted Article 8 in broad terms, and opened the door for the protection of human rights against nearly all sources of environmental pollution. The claim was related to the inactivity of the Lorca municipal authorities in respect of a nuisance caused by a waste treatment plant, which violated the right to privacy, home and family, under Article 8 of the European Convention on Human Rights. The Court decided that there was indeed a breach of Article 8 of the Convention, stating that the article creates a positive duty of

53 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic Social, and Cultural Rights, (Protocol of San Salvador) Article 11, 28 *I.L.M.* (1989), 698.

54 European Court of Human Rights, 9 December 1994, López Ostra v. Spain, ECHR Ser. (1994), vol. 303-C.

regulation and protection on the part of the State, so that state tolerance of environmentally noxious activities may constitute a breach. Similarly, the Court decided in *Guerra v. Italy* that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely."[55] A violation of Article 8 was also alleged in the case of *Hatton and Others v. The United Kingdom,* where applicants complained of the increase in the level of noise caused at their homes by aircraft using Heathrow airport at night.[56] The European Court determined that overnight flights at airports violated resident's basic human rights, and that the United Kingdom "failed to strike a fair balance between [its] economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives."[57]

It would appear, therefore, that "although human rights and environmental protection represent separate social values, the overlapping relationship between them can be resolved in a manner which will further both sets of objectives."[58] Like human rights, environmental law touches upon various spheres of human activity. In this regard, human rights depend upon environmental protection, and environmental protection could be enhanced by exercising a right to a healthy environment within existing human rights.[59]

Moreover, the recognition that human rights have an environmental dimension was emphasized in a report by Fatma Zohra Ksentini, Special Rapporteur, *Human Rights and the Environment*, presented by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The Rapporteur pointed out that environmental damage has direct effects on the enjoyment of a series of human rights such as the right to life, to health, to a satisfactory standard of living, to food, etc.[60] The same report included an analysis of relevant national and international provisions and the decisions and comments of human rights bodies relating to human rights and the environment. It also reviewed developments with regard to the recognition and implementation of the environment as a human right on the basis of the standards and practices

55 *Guerra and Others v. Italy* (116/1996/735/932), 19 Feb 1998, quoted in P. Eleftheriadis, *The Future of Environmental Rights in the European Union,* in Alston, P. (ed.), *The EU and Human Rights*, Oxford University Press, 1999, p. 529-549

56 European Court of Human Rights, 2 October 2001, Hatton and Others v. The United Kingdom, available at http://hudoc.echr.coe.int.

57 *Ibid.*

58 Shelton, *loc. cit*. n. 10, p. 106.

59 *Ibid.*

60 Ksentini Report, Second Progress Report, E/CN.4/Sub.2/1993/7.

developed at the national, regional and universal levels. This report basically argues that a right to a healthy environment is part of existing international law and that it is able to be implementated immediately using existing human rights instruments and bodies. The report also contended that there is a growing trend to give environmental protection constitutional status in many national legal systems, either explicitly or by judicial interpretations or through other constitutional guarantees. It also mentions increasing trends in national legislation to develop a framework of laws and regulations so as to ensure a right to a healthy environment, including remedies to safeguard its effective enjoyment and guarantees for its implementation. Over 60 national constitutions[61] apparently contain specific provisions enshrining the protection of the environment. Some of them explicitly recognize the right to a healthy environment, entailing corresponding duties towards the State and its institutions and rights and/or obligations for individuals and organs of society. The Report clearly points to concrete trends and practices towards developing and strengthening the means to protect a right to a healthy environment. It is worth mentioning, by way of example, some cases where national courts have made some relevant judicial decisions related to it.

In the Colombian case *Fundepúblico v. Mayor of Bugalagrande and others*[62] a claim was presented seeking prevention of actual and imminent damage to the public interest as a result of the operation of an asphalt plant in the town of Bugalagrande. Colombian courts ruled in favour of granting protection to a healthy environment. In its conclusions the Constitutional Court stated that there was a threat to a fundamental right recognized by the national constitution.[63] "The constitutional doctrine laid down in this case is compulsory for the Colombian authorities in all similar situations in which there is a threat of contamination of the environment and environmental impact studies and/or operating permits are lacking as in this case."[64]

In the case of *Juan Antonio Oposa and others v. The Honorable Fulgencio S. Factoran and another*[65] petitioners, a group of Filipino minors, brought an action on their own behalf and on behalf of future generations. They claimed

61 For a review of the constitutional provisions see Ksentini Reports, *UN Doc.* E/CN.4/1990/12, E/CN.4/1991/8, E/CN.4/1992/7, E/CN.4/1993/7 and E/CN.4/1994/9.

62 Ksentini Report, loc. cit. n. 60, p. 16.

63 *Ibid.*

64 *Ibid.*

65 Minors Oposa v. Secretary of the Department of Environment and Natural Resources, 33 *I.L.M.* 173 (1994). (Hereinafter Oposa Case).

that the country's natural forest cover was being destroyed at such a rate that the country would be bereft of forest resources by the end of the decade if not sooner. The Supreme Court of the Philippines held that it is an inalienable right, natural as well as legal, of future generations to inherit a decent and healthy environment. The Supreme Court stated that "every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology,"[66] adding that "the minor's assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come."[67]

The Indian case of *Vellore Citizens Welfare Forum v. Union of India* was filed to prevent tanneries in the State of Tamil Nadu from discharging untreated wastewater into agricultural fields, waterways and open lands. The Supreme Court of India noted that "although the leather industry is a major foreign exchange earner for India and provides employment, it does not mean that this industry has the right to destroy the ecology, degrade the environment or create health hazards."[68] The Court ordered the Central Government to establish an authority to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. This authority was mandated, inter alia, to identify the individuals or families who had suffered damage because of the pollution, to determine the compensation to make up for such damage, and actually to compensate those who suffered from the pollution.[69]

It may be concluded that the right to a healthy environment lends itself to immediate implementation by various bodies, under existing mechanisms for enforcing and/or interpreting regional and international human rights instruments and national constitutional provisions. The practice being developed within those bodies is decisive and shall bring into sharper focus the content of the right, the ways and means of implementing it, and related procedural aspects.

66 *Ibid.*

67 *Ibid.*

68 Compendium of Summaries of Judicial Decisions in Environment and Related Cases, Published by the South Asia Co-operative Environment Programme, 1997, p. 25.

69 *Ibid.*

4. The Right to a Healthy Environment and Sustainable Development

According to Alexandre Kiss and Dinah Shelton,[70] sustainable development is one of those 'concepts on which international environmental law is based' and in the first place 'represents an integration of development and environmental protection'.

In 1992, the Rio Declaration[71] issued at the United Nations Conference on Environment and Development (UNCED) reaffirmed the principles of the Stockholm Conference. The Rio Declaration did not expressly state the right to a healthy environment, but gave further support to the concept of sustainable development, stating that "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[72]

The UNCED joins environmental protection and economic development in the concept of sustainable development and emphasizes that sustainable development is not an end in itself; on the contrary, it has a purpose to be achieved and sustained. While implementing strategies for sustainable development, human beings are at the center of concerns. This was also the line followed by the World Conference on Human Rights. The 1993 Vienna Declaration reaffirmed the right to development as an integral part of fundamental human rights and stressed that the human person is the central subject of development, recognizing that development facilitates the enjoyment of all human rights.[73]

It is submitted that the Rio Declaration did not take a backward step because it lacks an express determination for a right to a healthy environment. When evaluating the evolution of the concept of sustainable development it can be argued that it incorporates properly the notion of a right to a healthy environment. As stated by the Legal Expert Group, ecosystems and related ecological processes are essential for the functioning of the biosphere in all its diversity, in particular those important for food production, health and other aspects of human survival.[74] The Stockholm Declaration referred to the interrelation between environmental protection, economic development and human rights

70 Kiss and Shelton, *loc. cit*. n. 29, p. 71-72.

71 Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992, *UN Doc.* A/CONF.151/5/rev.1.

72 *Ibid,* Principle 1.

73 Vienna Declaration, loc. cit. n. 7, paragraph 10.

74 Legal Expert Group, loc. cit. n. 34, Article 3(a).

protection. Sustainable development as development that meets the needs of the present, without compromising future generations, encompasses the needs of the present generations, and these needs should be seen as including all fundamental human rights recognized by the international community.

Thus, a sustainable development process that meets these conditions is in accordance with these provisions. When sustainable development is not the rule, human rights may be impaired or not fully effective. Economic development, social development and environmental protection were seen as interdependent and mutually reinforcing components of sustainable development at the 1995 World Summit on Social Development.[75]

Similarly, the UN Commission on Human Rights reaffirmed Principle 1 of the Rio Declaration stating that "the promotion of an environmentally healthy world contributes to the protection of human rights, and that environmental damage has potentially negative effects on the enjoyment of life, health and a satisfactory standard of living."[76] Additionally, the Expert Group on Identification of Principles of International Law for Sustainable Development[77] stated that "the right to a healthy environment provides a focus to guide the integration of environment and development. Development is sustainable where it advances or realizes the right to a healthy environment."[78]

To sum up the Rio Declaration expresses an evolution of the concept of the right to a healthy environment, translated into the principle of sustainable development and the rights of future generations.

5. The Right to a Healthy Environment and Principles of Sustainable Development

When analyzing the principles and concepts of international law relating to sustainable development the Expert Group recognized that some principles

75 Report of the World Summit for social Development and Copenhagen Declaration, New York, Department of Economic and Social Affairs, United Nations, *UN Doc.* A/CONF.166/9.

76 Commission on Human Rights, Resolution 1995/14, *UN Doc.* E/CN.4/RES/1995/14, 24 February 1995, available at www.unhchr.ch.

77 Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September 1995. (Hereinafter Expert Group Report).

78 *Ibid*, paragraph 31.

appear in universal or regional binding legal instruments, while others only feature in soft-law instruments.

Thus, in its analysis it stressed that "the legal consequences of each principle linked to a particular activity or incident would have to be considered in relation to the facts and circumstances of each case, taking account of various factors (...) and the particular circumstances in which it occurs, including the actors and the geographic region."[79]

The Expert Group referred to Principle 1 of Rio Declaration as a principle that "reflects the fundamental human right to a life with dignity"[80] and considered that the principles of sustainable development which were analyzed in its report should be construed so as to give effect to Principle 1 of the Rio Declaration.[81]

The Expert Group regarded the principles of interrelationship and integration as the backbone of sustainable development.[82] It emphasized that "interrelationship as a principle contributing to the achievement of sustainable development depends on the respect of each legal domain for the scope and content of adjacent bodies of law"[83] and that "sustainable development will be enhanced if competing legal rules strive as a first step towards compatibility and as a second step towards mutual support."[84] Therefore, the proclamation of Principle 1 of the Rio Declaration, when considered together with Principles 3 and 4, and seen under the integrative perspective suggested by the Expert Group, includes a human rights approach to environmental protection. As stressed by the Expert Group "Interrelationship and integration reflect the interdependence of social, economic, environmental and human rights aspects of life that define sustainable development (...)."[85]

Principle 3 of the Rio Declaration proclaims that the right to development must be equitable to the developmental and environmental needs of present and future generations. Article 3 of the Framework Convention on Climate Change, in a similar tone, reads "the Parties should protect the climate system for the benefit of present and future generations of humankind..." The Convention on Biological Diversity, and the Agenda 21, which enumerates a set of

79 *Ibid*, paragraph 7.
80 *Ibid,* paragraph 12.
81 *Ibid.*
82 *Ibid*, paragraph 15.
83 *Ibid*, paragraph 13.
84 *Ibid*.
85 *Ibid*, paragraph 15.

actions to be given priority by states during the 21st century to make the world habitable, also explicitly stress the need for inter-generational equity, and the responsibility to protect environmental claims and interests of future generations. The Vienna Declaration, linking the environment to the right to development, stressed that the latter "should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations."[86] In 1995 the international community, through the Copenhagen Declaration, adopted at the World Summit for Social Development, also reminded itself of its "responsibility to ensure inter-generational environmental equity by sustainable use of environment."[87] The notion of preserving the environment for present and future generations, however, appeared long before. In the 1980's, following the Stockholm Declaration, the need for protecting the environment for present and future generations was re-stated several times in resolutions of the United Nations General Assembly.[88]

The importance of the concept of future generations for sustainable development was considered in the 1994 Human Development Report.[89] The report stated that sustainable development encompasses both intragenerational and intergenerational equity, enabling all generations, present and future, to make the best use of their potential capabilities. "In the final analysis, sustainable development is pro-people, pro-development, and pro-nature. [...]It accelerates economic growth and translates it into improvement in human lives, without destroying the natural capital needed to protect the opportunities of future generations. And sustainable development empowers people – enabling them to design and participate in the processes and events that shape their lives."[90]

The concept of sustainable development is premised on the idea of intergenerational equity.[91] Equity includes both intergenerational equity – relating to the rights of future generations – and intragenerational equity – relating to

86 Vienna Declaration, *loc. cit*. n. 7, part I, paragraph 11.

87 Copenhagen Declaration, *loc. cit*. n. 75, principle 26(b).

88 Historical responsibility of States for the preservation of nature for present and future generations (A/RES/35/8) and Resolutions A/RES/42/186, A/RES/43/53 and A/RES/44/207.

89 Human Development Report 1994, published for the United Nations Development Programme (UNDP), Oxford University Press, 1994.

90 *Ibid.*

91 Edith Brown Weiss, *Environmental Equity and International Law*, in UNEP's New Way Forward: Environmental Law and Sustainable Development, United Nations Environment Programme, Nairobi, 1995.

members of generations existing today.[92] The principle of equity provides that each generation has an obligation to conserve and protect natural resources and the environment for the use and benefit of present and future generations.[93]

The Expert Group referred to intergenerational equity as an important aspect of the concept of sustainable development and mentioned the recognition of the principle in international and domestic courts and in administrative bodies.[94] The Expert Group also mentioned Judge Weeramantry's position in a case before the International Court of Justice[95] noting that the "principle of intergenerational equity is an important and rapidly developing principle of contemporary environmental law (...) which must inevitably be a concern of this Court."

Other judicial decisions have stressed the need to protect the environment for present and future generations. In the *Oposa Case*, mentioned beforehand, the Supreme Court of the Philippines translated the twin concepts of inter-generational responsibility and inter-generational justice into a legally binding and judicially enforceable obligation. The Supreme Court not only conveys that it is an inalienable right of future generations to inherit a decent and healthy environment, but also stresses that states have a role to play in the protection of environmental interests of future generations, informing that development issues should not undermine the preservation of the environment for future generations.[96] In *Diego Cali & Figli Srl v. Servizi Ecologici Porto Di Genova SpA (SEPG),*[97] the European Court of Justice states that the prevention of pollution serves the interests of not only current, but also future generations, and remarkably makes reference to Principle 3 of the Rio Declaration and to the report of the WCED.[98]

The procedural aspect of the right to a healthy environment embodies the right to information, the right to participate and the right to effective remedies, which are comprised in the principles of good governance and participatory

92 Expert Group Report, paragraph 41.

93 See in general Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, United Nations University and Transnational, 1989.

94 Expert Group Report, paragraph 46 and 47.

95 The Nuclear Tests Case (New Zealand v. France), I.C.J. Reports 1995, Judge Weeramantry dissenting opinion.

96 Oposa Case, loc. cit. n. 65.

97 European Court of Justice (ECJ), Diego Cali & Figli Srl v. Servizi Ecologici Porto Di Genova SpA (SEPG), Case C-343/95, 5 C.M.L.R. 484 (1997).

98 *Ibid,* at 501.

democracy. These principles, according to the Expert Group, are indispensable to achieve sustainable development.[99] The link between public participation, access to information and access to remedial procedures was stressed by the Expert Group,[100] which affirmed that "International Institutions must also implement open and transparent decision-making procedures that are fully available to public participation."[101] As for the right of access to judicial and administrative proceedings, the Expert Group considered it as a principle, which consists of two elements. "The obligation to provide effective judicial and administrative proceedings, including redress and remedy, and the obligation to access to *any person* affected or to be affected by transboundary harm to judicial and administrative proceedings equal to that afforded to nationals or residents of the state wherefrom such harm originates."[102]

Expressed in the field of human rights law,[103] these principles convey the notions that citizens are entitled to participate. Thus, the practical means of exercising the right to a healthy environment require that citizens are informed of the state of the environment and of events which may threaten it. Participation in the decision-making process and available and effective means of redress are also essential.

Principle 10 of the Rio Declaration states that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[104] At times, this principle

99 Expert Group Report, paragraph 123-133.

100 *Ibid,* paragraph 129.

101 *Ibid*, paragraph 130.

102 *Ibid*, paragraph 149. (Emphasis added).

103 Right to participation (Universal Declaration, art. 21; ICCPR, art. 25; Protocol I to the ECHR, art.3; African Charter, art.13; American Convention, art. 23.); right to information (Universal Declaration, art.19; ICCPR, art.19; ECHR, art.10; African Charter, art.9; American Convention, art. 13); right to available and effective remedy (Universal Declaration, art.8; ICCPR, art.2(3); ECHR, art. 13; African Charter, art. 7; American Convention, art. 25).

104 Rio Declaration, loc. cit. n. 71.

was subject to some criticisms, for the expression "at the national level" could imply exclusion of foreigners from exercising the rights.

The interpretation by the Expert Group of Article 10 of the Rio Declaration, however, considers that there is no exclusion of foreigners, in that the opening sentence refers to the "participation of all concerned citizens,"[105] which is complemented by the statement of Agenda 21 that governments should provide access "to individuals, groups and organizations with a recognized legal interest."[106] For the Expert Group "Those in other States, be they potential or actual victims of transboundary harm, should not be discriminated against, they should have the same standing in these proceedings as nationals or residents of the State of origin of the harm."[107]

It is worth recalling here article 26 of the ICCPR, which entitles *all persons* to equality before the law as well as equal protection of the law, prohibiting *any discrimination* under the law.[108] In interpreting article 26, the Human Rights Committee affirmed that "article 26 provides that *all persons* are equal before the law and are *entitled to equal protection* of the law without discrimination(...). It *prohibits discrimination in law* or in fact *in any field regulated and protected by public authorities*. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.(...). In other words, *the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant*."[109] It should be noted that the interpretation of the Human Rights Committee not only supports the view of the Expert Group in relation to its understanding of Principle 10 of the Rio Declaration, but might also construct a broad range of possibilities for claims under the First Optional Protocol of the ICCPR.

As was noted, participation in decision-making processes is a central element underpinning a right to a healthy environment. Without an effective participation of all subjects concerned, efforts aimed at protecting the environment and

105 Expert Group Report, paragraph 150.

106 Agenda 21, paragraph 8.18, the United Nations Programme for Sustainable Development, New York, 1993. Available at www.un.org/esa/sustdev/agenda21.htm. Quoted in Expert Group Report, paragraph 150.

107 Expert Group Report, paragraph 151.

108 ICCPR, article 26. (Emphasis added).

109 Human Rights Committee, General Comment 18 *Non-Discrimination*, 37th Session, 1989. (Emphasis added).

improving living conditions for human beings remain ineffective. A complete enjoyment of human rights demands, as mentioned by UNDP, that individuals take an active role in the events that shape their life. Public access to adequate information is a pre-condition to the participation of everyone in the protection and improvement of the environment.[110] Additionally, the right to a healthy environment demands the possibility of recourse to judicial and administrative proceedings against those that violate their duties and cause environmental damage. Various basic human rights instruments affirm the importance of enforcement of human rights principles by providing explicitly for the right to legal remedies for violations of fundamental rights.[111] This principle provides individuals with the means to enforce the rights that their governments, notwithstanding their obligations, fail to protect.

6. Right to a healthy environment – an accomplishment in an international legally-binding instrument

In 1996 the United Nations Economic Commission for Europe (UNECE) expressing its comments about the report *Human Rights and the Environment*, emphasized that the recognition of a right to a healthy environment indicates that procedural rights are not ends in themselves, but are meaningful as means towards the end of protecting the individual's substantive right to live in a healthy environment.[112] Less than two years later the UNECE adopted the Aarhus Convention,[113] and little more than three years after its adoption, the Aarhus Convention entered into force on 30 October 2001.[114]

110 The right to seek, receive and impart information is enshrined in article 19 of the Universal Declaration.

111 See above note 103 on the right to available and effective remedy.

112 Human Rights and the Environment – Report of the Secretary-General, *UN Doc.* E/CN.4/1997/18.

113 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted in Aarhus, Denmark on 25 June 1998. Available at www.unece.org/env/pp; 38 *I.L.M.* 517 (1999)

114 The following states are parties to the Convention: Albania, Armenia, Azerbaijan, Belarus, Denmark, Estonia, Georgia, Germany, Hungary, Italy, Kazakhstan, Kyrgyzstan, Republic of Moldova, Romania, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan and Ukraine. The first meeting of the parties is expected to take place in autumn 2002.

The Aarhus Convention is been described as a new international law and as a landmark in environmental agreements.[115] The Convention links environmental protection to human rights norms, raises environmental rights to the level of other human rights and acknowledges the existence of an obligation to protect the environment to future generations.[116] It establishes that sustainable development can be achieved only through the involvement of all stakeholders, and links government accountability, transparency, and responsiveness to environmental protection. The Convention shapes a new process for public participation in the negotiation and implementation of international agreements.[117]

The United Nations Secretary-General expressed the view that despite the fact the Convention is regional in scope, its significance is global.[118] "It is by far the most impressive elaboration of Principle 10 of the Rio Declaration... As such it is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations."[119] In the occasion of the Convention's entry into force the UN Secretary-General has emphasized that the Aarhus Convention is a "step forward in the development of international law as it relates to participatory democracy and citizen's environmental rights,"[120] adding that: "[t]he active engagement of civil society... is a prerequisite for meaningful progress towards sustainable development."[121]

The Aarhus Convention is the first international legally-binding instrument that brings the pillars of good governance principles together.[122] The treaty recognizes citizens' rights to information, participation and justice. It allows

115 See The Aarhus Convention – An implementation Guide, UNECE, 2000 (Hereinafter Aarhus Implementation Guide) and Press Release ECE/ENV/01/15.

116 Aarhus Convention, Preamble paragraphs 1-2 and article 1.

117 Aarhus Implementation Guide, p. 1.

118 The Convention is regional in scope but it is open to accession by non-ECE countries, which are members of the United Nations. For the first time an environmental convention drawn up under the auspices of UN/ECE permits the inclusion of non-members.

119 Kofi Annan, *Foreword*, Aarhus Implementation Guide.

120 Kofi Annan's statement in *What people are saying about the Aarhus Convention* – Compendium of statements from Governments, Intergovernmental Organizations and Non-Governmental Organizations made upon the occasion of the Convention's entry into force 30.10.2001, available at www.unece.org/env/pp. (Hereinafter *What people are saying about the Aarhus Convention*).

121 *Ibid.*

122 As mentioned beforehand, the Expert Group has emphasized the essentiality of access to information, public participation and access to justice for the full achievement of sustainable development.

members of the public access to data held by public authorities and provides an opportunity for people to express their opinions and concerns on environmental matters. Furthermore, the Convention ensures that decision makers take due account of public's rights and provide the public with access to review procedures when their rights to information and participation have been breached, and, in some cases, to challenge more general violations of environmental law.

The Convention grants the public rights and imposes on parties and public authority duties regarding access to information and public participation. It spells out obligations that parties have to the public, whereas most multilateral environmental agreements cover obligations that parties have to each other. The Aarhus Convention's vanguard is expressed by clear obligations on parties and public authorities towards the public as far as access to information, public participation and access to justice are concerned. The Convention is a step forward in linking environmental protection with human rights and some of its special features demonstrate how international law is able to adapt itself to society's needs through the times.

The Convention is the clearest statement in international law to date of a fundamental right to a healthy environment. The Convention's objective is stated in article 1, where it refers to the right to a healthy environment as a concrete and accepted fact stating that "In order *to contribute to the protection of the right* of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."[123]

When granting those rights the Convention is innovative in various ways. Article 1 of the Convention recognizes the right to a healthy environment without considering a need for establishing an exact formulation or definition for it.[124] In adopting this position the Convention might suggest that different conceptual notions make it a difficult task to come to achieve a general definition of the right to a healthy environment. The desired quality of the environment is a value subjectively judged and difficult to codify in substantive legal

123 Aarhus Convention, article 1, loc. cit. n. 113. (Emphasis added).

124 One of the disputes about the right to environment relates to vagueness, uncertainty, and the impossibility to establish a substantive definition.

language.[125] The fact that a definition for a right is not clear or does not exist is not inconsistent with the concept of a right *per se*.[126] Even where a precise and comprehensive textual definition of a right may be agreed upon, moral choices will still lie in its interpretation, which will vary across cultures and communities.[127] Moreover, the lack of a definition, seen under a different perspective, makes it possible to consider and appreciate cultural diversity among human beings. The adequate environment is to be determined and established for each society and each people, according to their values and culture, and according to the necessity to respect freedom of choice and action. Besides , one has to accept that the courts can and may develop their own interpretation of what constitutes an adequate environment, as they have done for many human rights.[128]

The Convention does not limit itself to express the existence of the right to a healthy environment. It goes further and spells out the ways for its implementation, disregarding the eventual need for any further explanation about the content of the right and its definition. "The Aarhus Convention provides a set of minimum standards to Parties to guide them in how to protect the right to a healthy environment. The obligations of the Convention must be considered in this light... as valuable tools for contributing to the basic welfare of the people."[129]

The debate whether individuals, international organizations and other forms of associations are or not subjects of international law is also left aside. Furthermore, the Convention, said to be about "basic human rights – the rights of every person,"[130] when defining "public" and "public concerned," disregards the academic debate whether the right to a healthy environment is an individual or collective right, and appreciatively goes directly to the recognition of their rights, and to the establishment of implementation means. Therefore, it gives priority to more practical and necessary tools than to conceptual issues, what one may conclude is more than essential in international agreements.

125 Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview in* Boyle, A. and Anderson, M. (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1988, p. 10.

126 *Ibid.*

127 *Ibid.*

128 Alexandre Kiss and Dinah Shelton, *International Environmental Law*, Transnational Publishers, 1995, p. 10.

129 The Aarhus Convention – An Implementation Guide, p. 29.

130 *Ibid.*

The Aarhus Convention exhibits a number of other interesting characteristics expressed by such terms as *shall*, used to denote legal obligations, the inclusion of a prohibition of discrimination on the grounds of citizenship, nationality or domicile, in environmental matters, the clear establishment of time-limit for public authorities to provide the information requested, and the notion that a causal link between harm caused and the victim is not required.

As has been observed by the United Nations High Commissioner for Human Rights, the Aarhus Conventions is a "remarkable achievement not only in terms of the protection of the environment, but also in terms of the promotion and protection of human rights..."[131] And because of its innovative features it is a landmark in international law. While it creates ways for the implementation of the right to a healthy environment, it improves and strengthens human rights protection. It is to be hoped that it can inspire other fields of international law and that it can soon achieve the position of a global legally-binding instrument. This will critically depend on the willingness of states to "open their doors to democracy" as it was demonstrated on the occasion of the celebration of the entry into force of the Aarhus.

7. Concluding Remarks

The quality of human rights is conditioned by human's relationship with the surrounding ecology. There is hardly any doubt that one of the greatest threats to human existence comes from the deterioration of the human environment. Threats to the environment compromise human well being and the full enjoyment of fundamental human rights.

The contents of human rights must be open to enhance pre-existing human rights, to expand them to include new values and to cover new threats to human life, be they to its integrity or dignity. This is a way to recognize the worth of the human person. Therefore, the investment for the future must be directed to human well-being where development is achieved, and the interests of future generations are respected, with an adequate protection and respect for the human environment. When sustainable development is not properly and coherently addressed, no progress can be made to reconcile the interests of the environment, human rights and development.

131 Mary Robinson's statement in *What people are saying about the Aarhus Convention*, loc. cit. n. 115.

In implementing sustainable development the international community has to be open to accept changes in preconceived rules and to be willing to accept international obligations which were earlier avoided. Principle 10 of the Rio Declaration was considered one of the most difficult principles to be able to achieve substantive legal status, due to difficulties for states to accept the obligations implied in the principle. The recent entry into force of the Aarhus Convention is a good example that changes are possible to make and to implement if there is political will to do so. The UN Convention creates new perspectives for international law and opens the future for a more proactive attitude of the international community in the direction of adapting its legal system to the real needs of humanity.

17

THE RIGHT OF ACCESS TO FRESHWATER RESOURCES

Antoinette Hildering

1. Introduction

Water is a first necessity of all life on earth. The availability of water, a basic need, touches upon the existence of human beings and their inherent dignity. The basic need for water is estimated to be about 50 litres per day per person, the exact amount further depending on factors such as climate.[1] A right of access to water is already expressed in the 1977 Mar del Plata Action Plan, which states that 'all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.'[2] This Action Plan in 1981 led to the International Drinking Water Supply and Sanitation Decade.[3] Moreover, the year 2003 was proclaimed as the "International Year of Fresh-

1 Peter H. Gleick (2000), *The World's Water: The biennial report on freshwater resources 2000-2001*, Island Press: Washington, D.C., p. 11, recommends 50 litres as the basic water requirement for human domestic needs.

2 *Report of the United Nations Water Conference, Mar del Plata*, 14-25 March 1977, United Nations Publications: New York, E/77/II/A/12. Another example can be found in the 1999 Protocol on Water and Health to the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes. In Article 4 of the Protocol Parties are to take measures in order to, *e.g.*, ensure adequate supplies of wholesome drinking water and adequate sanitation.

3 See, *e.g.*, Agenda 21, Chapter 18, D. Drinking-water supply and sanitation, under 'Basis for action'.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 405-429.*

water" by the UN General Assembly.[4] Notwithstanding all efforts, however, there are still more than one billion people that do not have access to sufficient and clean drinking water and about three billion people have no access to adequate sanitation.[5]

The importance of water for sustainable development was fully recognised at the World Summit on Sustainable Development in Johannesburg.[6] One of the key commitments made at the Summit is to halve, by the year 2015, both the number of people without access to safe drinking water and the number of people who do not have access to basic sanitation.[7] Although the commitments emphasise the importance attached to access to water by states and, arguably, indicate an *opinio iuris* of states in favour of a right of people to water, the instrument in which it is incorporated is not binding under international law as such.[8] Nonetheless, documents resulting from world summits can carry considerable normative weight and/or embody a programme of action

4 *UN Doc.* A/RES/55/196, International Year of Freshwater, 2003.

5 See Gleick (2000), *supra* note 1, p. 1. Access to fresh water of sufficient quantity and quality varies considerably between countries and regions, see UNICEF (1996), *The State of World's Children 1996*, pp. 84-85, Table 3, percent of population with access to safe water 1990-1995.

6 World Summit on Sustainable Development, Johannesburg, 26 August-4 September 2002. For its documents see www.johannesburgsummit.org. Present status and recent developments in the field of international law on sustainable development are identified in International Law Association (ILA) Committee on Legal Aspects of Sustainable Development (2002), *Fifth Report: Searching for the contours of international law in the field of sustainable development*, New Delhi Conference 2002, including, *e.g.*, ILA Resolution 3/2002 on Sustainable Development containing the New Dehli Declaration of Principles of International Law Relating to Sustainable Development. For the ILA New Dehli Declaration, see also *UN Doc.* A/57/329 and Documents in *NILR* XLIX (2002), pp. 299-305, including an introduction by Schrijver.

7 The commitment to halve the proportion of people without access to safe drinking water is a reaffirmation of the Millennium Development Goal. Announcements made during the Johannesburg Summit on water and sanitation include that of the United States to invest 970 million dollars on water and sanitation projects over the next three years, the "Water for Life" initiative of the European Union that seeks to engage partners to meet goals for water and sanitation, primarily in Africa and Central Asia, a grant of 5 million dollar provided by the Asia Development Bank to UN Habitat and another 500 million dollar in fast-track credit for the Water for Asian Cities Programme, and 21 other water and sanitation initiatives with at least 20 million dollar in extra resources received by the UN. Other activities are to be expected, *e.g.*, related to the International Year of Freshwater 2003.

8 See Article 38 of the Statute of the International Court of Justice (ICJ) on the sources of international law. On the importance of other sources such as UNGA Resolutions

for the international community. This chapter aims to identify further instruments that international law offers to achieve basic access to water and that can contribute to the fulfilment of the aforementioned Johannesburg commitments.

First, access to water as part of the human rights system will be discussed. Secondly, the means provided by the principle of equitable and reasonable utilization of water resources will be dealt with. Both these instruments hold a strong position in international law. Thirdly, other key principles of international law will be discussed that are of specific relevance and conducive to creating the circumstances favourable to the achievement of access to water. Of these, the sovereignty of states and the duty to cooperate are well-established in international law, while concepts such as the common heritage and common concern of humankind and common but differentiated responsibilities of states are legally binding through treaties but do not (yet) appear to be part of international customary law.

2. Access to water as a human right

The concept of human rights has progressed significantly after World War II.[9] The 1948 Universal Declaration of Human Rights contains various rights and freedoms that are to be viewed as indivisible.[10] In 1966 the Declaration was

see, *e.g.*, the Nicaragua Case, *ICJ Reports* 1986 and the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *ICJ Reports* 1996.

9 Viewing access to fresh water as a fundamental right has its roots even before the coming into existence of human rights law. For example, a right of "thirst" is recognised in Islamic law for a long time already. According to D.A. Caponera (1992), *Principles of Water Law and Administration: National and international*, A.A. Balkema: Rotterdam, p. 141, it is universally recognized that individuals may take public water to quench their thirst and for certain limited domestic or household purposes.

10 Universal Declaration of Human Rights, adopted and proclaimed by UNGA resolution 217 A (III), 10 December 1948, *UN Doc.* A/810 (III). See on the indivisible nature of human rights, *e.g.*, the Proclamation of Teheran, by the International Conference on Human Rights at Teheran on 13 May 1968, paragraph 13: 'Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.' See also the 1993 Vienna Declaration, *UN Doc.* A/CONF.157/23, adopted on 25 June 1993, chapter I, paragraph 5: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious

codified and elaborated in two treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[11] That access to fresh water is in need of further protection within a human rights context can, for example, be illustrated by the differences of access to water between Israeli settlers and Palestinians in the occupied territories.[12] A right protected within the body of human rights law, provides an individual or people with a right not to be obstructed in gaining access to water or even to be provided for by their own state.[13] In this section, it is first discussed whether or not a separate right to water exists within this body of law. Furthermore, other human rights, for which access to water is of direct relevance, are elaborated upon, especially the right to life and the right to health, the right to an adequate standard of living, and the right to development.[14]

backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

11 International Covenant on Economic, Social and Cultural Rights, adopted by UNGA resolution 2200 A (XXI), New York, 16 December 1966, entered into force on 3 January 1976, status as of 9 December 2002: 146 parties and 7 remaining signatories. International Covenant on Civil and Political Rights, adopted by UNGA resolution 2200 A (XXI), New York, 16 December 1966, entered into force on 23 March 1976, status as of 9 December 2002: 149 parties and 8 remaining signatories.

12 According to Sandra Postel (1996), *Dividing the Waters: Food security, ecosystem health, and the new politics of scarcity*, World Watch Paper 132, p. 37, the Israeli settlers in the West Bank use about four times more water than Arabs in the same area, on a per capita basis. Israel has restricted the number of wells Arabs can drill in the territory, the amount of water Arabs are allowed to pump and the times at which they can draw irrigation water, see T.F. Homer-Dixon, J.H. Boutwell and G.W. Rathjens (1993), 'Environmental Change and Violent Conflict: Growing scarcities of renewable resources can contribute to social instability and civil strife', in *Scientific American*, February 1993, pp. 22-23. See also, *e.g.*, B.C.A. Toebes (1999), *The Right to Health as a Human Right in International law*, Intersentia: Antwerpen, pp. 335-336: 'An example of failure to ensure access to water and sanitation concerns the situation in the Gaza Strip and the West Bank. In these areas, the population faces serious problems of drinking water availability and quality.'

13 See on a human right to water, *e.g.*, Stephen C. McCaffrey (1992), 'A Human Right to Water: Domestic and international implications', in *Georgetown International Environmental Law Review*, 5 (1992) Rev. 1.

14 Gleick (2000), *supra* note 1, p. 8: 'At a minimum, therefore, the explicit right to life and the broader rights to health and well-being include the right to sufficient water, of appropriate quality, to sustain life.'

2.1 The right to water

A right to water is not explicitly acknowledged as a human right in the human rights instruments mentioned above. However, within the body of human rights law, reference is made to such a right and to access to water in various respects. Of great importance is the recent acknowledgement of a human right to water by the Committee on Economic, Social and Cultural Rights in its General Comment No. 15 of November 2002.[15] Due to the view of the Committee, states also have to deal with a right to water in the reporting procedures on economic, social and cultural rights. The Comment does not only determine a right to water, it furthermore elaborates upon, *e.g.*, its content, obligations incumbent on states to respect, protect and implement the right to water, and on obligations of non-state actors. In the first paragraph of the Comment it is stated that: 'Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.' According to the Comment (par. 2), everyone is entitled 'to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.' The interrelationship between a right to water and other human rights is identified, whereby the right to an adequate standard of living (Article 11 ICESCR) and the right to the highest attainable standard of health (Article 12 ICESCR) are specifically underlined. In the allocation of water, the Comment states that priority is to be given to the right to water for personal and domestic uses, as well as water resources required to prevent starvation and disease and water resources required to meet the core obligations of each of the rights of the ICESCR (para. 6). Another remarkable statement in the Comment can be found in paragraph 11: 'Water should be treated as a social and cultural good, and not primarily as an economic good.' This paragraph continues that: 'The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.' The need for international cooperation between states as well as non-state actors is underlined as well.

15 Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General comment No. 15 (2002), The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Economic and Social Council, *UN Doc*. E/C.12/2002/11 (20 January 2003).

A further example of a human right to water being part of the body of human rights law, is provided by the Sub-commission for the Promotion and Protection of Human Rights. This Commission has dealt with the right of access to drinking water as well. Of special interest is the working paper of its Special Rapporteur Mr. El Hadji Guissé on the right of access of everyone to drinking water and sanitation services, in which it is stated: 'Since drinking water is a vital resource for humanity, it is also one of the basic human rights.'[16] The special position of drinking water is underlined in humanitarian law as well, providing that supplies necessary for survival, like drinking water facilities, in principle are not to be attacked.[17]

International support for a separate human right to water, securing access to a certain amount and quality of fresh water, appears to be increasing.[18] Recognition of access to fresh water as a civil and political right for individuals would oblige states to provide their citizens with, or at least not to obstruct, such access.[19] A right of access to fresh water as an economic, social and

16 Working paper of the Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities (now called Sub-Commission for the Promotion and Protection of Human Rights), *UN Doc.* E/CN.4/Sub.2/1998/7, 10 June 1998, paragraph 3. The link between access to water and other human rights is also elaborated upon in the working paper.

17 Article 54(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, prohibits the attack, destruction, removal or rendering useless of objects indispensable to the survival of the civilian population such as drinking water installations and supplies and irrigation works.

18 In many sessions of the 2000 Second World Water Forum at The Hague, and again at the 2003 Third World Water Forum at Kyoto, it was argued that the right of access to fresh water constitutes a human right. See also Gleick (2000), *supra* note 1, Chapter one, p. 1-17, where he argues that access to a basic water requirement is a fundamental human right implicitly supported by international law, declarations and state practice and further stating that a transition is underway making a right to water explicit. According to David Hunter, James Salzman and Durwood Zaelke (2002) (2nd ed.), *International Environmental Law and Policy*, Foundation Press: New York, p. 826: 'Access to safe and affordable water for basic needs is increasingly being viewed as a human right.' In ACUNS, *Plan of Action for Johannesburg: The Development-Environment Nexus*, the human right to drinking water and the human right to water for all peoples are mentioned.

19 Hunter, Salzman and Zaelke (2002), *supra* note 18, p. 826: 'Such obligations are hard to enforce, but serve to highlight the importance of water to the poor and establish the use of water for direct human consumption and for food production as highest priority uses.' The dilemmas accompanying a human right of access to fresh water, such as reconciling it with its ecological role, are discussed as well.

cultural right for individuals would provide a strong legal ground to address governments as well, but the duty of a state to implement the right would be a gradual one that depends on the means available to that state. The third category, collective rights, could provide people with a right to water to be respected by their state. The right of self-determination, as expressed in Article 1 of both 1966 Covenants, grants peoples the right to freely dispose of their natural resources.[20] In the same Article it is stated that: 'In no case may a people be deprived of its own means of subsistence.'

If viewed a potentially new human right, caution can be understood since proliferation in this field holds the danger of undermining the authority of the existing human rights, but the option of new human rights is not to be entirely discarded.[21] Especially not since granting people a right to water has existed over a long time in various cultures and regions and appears to have received worldwide support. It could, therefore, even be argued that customary international law includes a right to water, or is at least evolving in that direction. The existence of a human right to water is, nevertheless, likely to remain debatable as long as states have not clearly expressed their position on the subject, preferably by means of a treaty or a codifying declaration by the UN General Assembly. The explicit acknowledgment by the international community of a universal and separate human right to water would increase clarity regarding its status in international law and underline its importance for human dignity.

2.2 The right to a healthy life

The right to life can be found in Article 6 of the ICCPR, where it is stated that every human being has the inherent right to life. It continues to state that this right is to be protected by law and no one is to be arbitrarily deprived of it.

20 See on the right of self-determination, *e.g.*, M.J. Bossuyt (1987), *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Nijhoff: Dordrecht, and N.J. Schrijver (1997), *Sovereignty over Natural Resources: Balancing rights and duties*, Cambridge University Press: Cambridge (1997), pp. 260-261.

21 Eleanor Roosevelt, in 1947: 'We will have to bear in mind that we are writing a Bill of Rights for the world, and that one of the most important rights is opportunity for development. As they grasp that opportunity, they can also demand new rights, if these are broadly defined.' Cited in Rajendra Kumar Nayak (1992), 'Evolving Right to Development as a Principle of Human Rights Law', in Subrata Roy Chowdhury, Erik M.G. Denters and Paul J.I.M. de Waart (eds) (1992), *The Right to Development in International Law*, Martinus Nijhoff Publishers: Dordrecht, p. 145.

The right to life is not to be derogated from, not even in time of public emergency (Article 4 ICCPR). It is notable that Indian Jurisprudence acknowledges that the right to life encompasses a right of access to water, expanding the right to life as expressed in Article 21 Fundamental Rights, to include the right to drinking water.[22]

According to Article 12 of the ICESCR, everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.[23] That a life in health requires a minimum of access to water is made explicit in Article 24 of the Convention on the Rights of the Child on the right of the child to the enjoyment of the highest attainable standard of health.[24] Under this Article, states are obligated to take appropriate measures to, *e.g.*, combat disease and malnutrition, including through the provision of clean drinking water.

Within the 'soft law' category, Principle 1 of the Rio Declaration affirms the right to life and the right to health in stating that: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'[25] Absence of access to drinking water and sanitation directly impairs the rights to life and to health. In developing countries the majority of the diseases are water-related.[26] Lack of access to clean drinking water and adequate sanitation causes thousands of

22 *Attakoya Thangal* v. *Union of India* 1990 (1) KLT 580, see A.E. Boyle and M.R. Anderson (1996), *Human Rights Approaches to Environmental Protection*, Clarendon Press: Oxford. pp.214-215.

23 Toebes (1999), *supra* note 12, p. 255, elaborates upon clean drinking water and adequate sanitation as underlying preconditions for health. At p. 270, it is further stated that: 'Access to clean drinking water and adequate sanitation, adequate nutritious foods, prevention of occupational diseases, and a healthy environment can be considered as elements of the scope of the right to health.'

24 Convention on the Rights of the Child (CRC), adopted by the General Assembly on 20 November 1989, Resolution 44/25, as of 9 December 2002: 191 parties and 2 remaining signatories. The CRC is ratified by all states except for the US and Somalia who only signed the Convention, see www.unicef.org/crc.

25 Rio Declaration on Environment and Development, Annex I to the Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, *UN Doc.* A/CONF.151/26 (Vol. I).

26 See, *e.g.*, WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation (JMP), Global Water Supply and Sanitation Assessment 2000 Report, at www.who.int/water_sanitation_health/.

people to die on a daily basis.[27] The direct link between a healthy life and access to water is expressed in the Plan of Implementation of the Johannesburg Summit: 'Increase of access to sanitation to improve human health and reduce infant and child mortality, prioritizing water and sanitation in national sustainable development strategies and poverty reduction strategies where they exist.'[28] It may be clear that a right of access to water poses a condition to the right to life and to health, which rights would otherwise lose an important part of their substance.

2.3 The right to an adequate standard of living

The right to an adequate living standard is expressed in Article 25 of the Universal Declaration of Human Rights.[29] According to Article 11 of the ICESCR: 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.'[30] Such an adequate standard of living cannot be reached without a mini-

27 Gleick (2000), *supra* note 1, p. 1: 'An estimated 14 to 30 thousand people, mostly young children and the elderly, die every day from water-related diseases.' See also Hunter, Salzman and Zaelke (2002), *supra* note 18, p. 826: 'Water-borne diseases continue to be among the leading causes of death in many developing countries.'

28 World Summit on Sustainable Development, Plan of Implementation, paragraph 6(m). The Plan of Implementation is included in Report of the World Summit on Sustainable Development, *UN Doc.* A/CONF.199/20.

29 Article 25.1 of the Universal Declaration of Human Rights: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'

30 Article 11 ICESCR: '1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed. (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such

mum access to water. It can be argued that 'food' implies water, although in practice water and food are often dealt with separately.[31] The right to adequate housing furthermore implies availability of housing with facilities such as sanitation and drinking water.[32]

Other instruments under international law also deal with the standard of living. In Article 14(2) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, water supply and sanitation are mentioned as part of adequate living conditions.[33] Moreover, the UN Charter, in its preamble, expresses the aim to promote social progress and better standards of life in larger freedom. Article 55 of the Charter, furthermore, states that the UN shall promote higher standards of living and conditions of economic and social progress and development. Under Principle 5 of the Rio Declaration, all states and people are to cooperate on eradication of poverty 'in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.' In the Plan of Implementation of the Johannesburg Summit, the right to an adequate standard of living is underlined by the emphasis on poverty eradication and, for example, its realisation is explicitly referred to within the context of food security and food safety.[34]

Similar to the right to life and the right to health, the right to an adequate standard of living is well established in international law and for its fulfilment people need to have access to sufficient water and adequate sanitation.

a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.'

31 Food: "any nutritious substance that people or animals eat or drink or that plants absorb in order to maintain life and growth", in Judy Pearsall (1999, ed.) (10th ed.), *The Concise Oxford Dictionary*, Oxford University Press Inc.: New York.

32 I. Westendorp (1994), 'Internationale Implementatie van het Recht op Behoorlijke Huisvesting', in Maastricht Centrum voor de Rechten van de Mens (1994), *De Toenemende Betekenis van Economische, Sociale en Culturele Mensenrechten*, Stichting NJCM-Boekerij: Leiden, p. 105, referring to the General Comment 4 on the right to adequate housing of the Committee on Economic, Social and Cultural Rights, E/C.12/1991/1, mentions drinking water as one of the facilities required for a house to fit 'adequate'.

33 Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, entry into force: 3 September 1981, status as of 9 December 2002: 170 parties and 3 remaining signatories.

34 World Summit on Sustainable Development, Plan of Implementation, paragraph 38(a), referring as well to the Millennium Declaration target to halve by the year 2015 the proportion of the world's people who suffer from hunger and Article 11 ICESCR.

2.4 The right to development

Although the human rights treaties applying worldwide do not contain an explicit right to development, it can be found in many other instruments. For example, the 1986 UNGA Declaration on the Right to Development (DRD) states that the right to development is an inalienable human right.[35] Article 8 of the DRD provides that: 'States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources.' In interpreting Article 8 of the DRD, the persistent conditions of underdevelopment of people without adequate access to essentials such as food, water, clothing, housing and medicine are referred to as mass violation of human rights.[36] The right to development can also be found in Article 22 of the African Charter on Human and Peoples' Rights.[37] The 1986 Seoul Declaration of the International Law Association presents another example, describing the right to development as follows: 'The right to development is a principle of public international law in general and of human rights law in particular, and is based on the right of self-determination of peoples'.[38] Principle 3 of the Rio Declaration states: 'The right to development must be fulfilled so as to equitably meet developmental and ecological needs of present and future generations.'

35 United Nations General Assembly (1986), Declaration on the Right to Development, A/RES/41/128.

36 *The United Nations and Human Rights 1945-1995*, United Nations Blue Book Series, Vol. II, Department of Public Information, United Nations Publications: New York, as cited in Gleick (2000), *supra* note 1, p. 9.

37 African Charter on Human and Peoples' Rights, adopted by the 18th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU), entry into force 21 October 1986, all 53 OAU Member States are state parties. Article 22 of the Charter states: '1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'

38 Principle 6, paragraph 1, 1986 ILA Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order, ILA Report of the sixty-second Conference, Seoul 1986, pp. 2-12. According to Nayak (1992), *supra* note 21, p. 146, the right to development is based on the metamorphosis of international law from a law of co-existence to a law of cooperation and the emergence of mankind as a proper subject of international law. He furthermore views the duty of states to cooperate for the advancement of world peace, progress, prosperity and solidarity the fundamental source of the right to development.

Access to water in the Plan of Implementation of the Johannesburg Summit is foremost dealt with under chapter II on poverty eradication and under chapter IV on the protection and management of the natural resource base of economic and social development, affirming the relationship between water availability and development.[39] As stated in Agenda 21, Chapter 18: 'The extent to which water resources development contributes to economic productivity and social well-being is not usually appreciated, although all social and economic activities rely heavily on the supply and quality of freshwater.'[40] The costs of providing people with access to water are, arguably, outweighed by the costs of not doing so, resulting in, *e.g.*, loss of productivity. The introduction of the Plan of Implementation of the Johannesburg Summit underlines that: 'Peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all.'[41] Despite its reaffirmation in the Plan, the status of the right to development appears to remain controversial and seems to be immobilised in an ideological discussion. Access to water not only constitutes a condition to the fulfilment of the right to development, the right to development in turn can be said to enable the realisation of all human rights.[42]

Apparently, apart from a (emerging) separate human right, access to water occupies a place within the body of human rights law as an implicit right contained in, or as a direct condition for the fulfilment of, other human rights.

39 See, *e.g.*, Gleick (2000), *supra* note 1, p. 1: 'Universal access to basic water services is one of the most fundamental conditions of human development.' Subrata Roy Chowdhury and Paul J.I.M. de Waart (1992), 'Significance of the Right to Development: An introductory view', in Chowdhury, Denters and De Waart (eds) (1992), *supra* note 21, p. 10, with reference to, *e.g.*, UNGA res. 41/128 of December 1986, preambular para. 2., mention the definition of development as 'a comprehensive process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.'

40 United Nations Conference on Environment and Development (1992), Agenda 21, Chapter 18, Protection of the Quality and Supply of Freshwater Resources: Application of integrated approaches to the development, management and use of water resources.

41 World Summit on Sustainable Development, Plan of Implementation, paragraph 5.

42 In the report by Mr. Arjun Sengupta, *Fourth report of the independent expert on the right to development*, UN Economic and Social Council, Commission on Human Rights, Working Group on the Right to Development, E/CN.4/2002/WG.18/2 of 20 December 2001, p. 3, paragraph 2, reference is made to the definition of the right to development as the right to a particular process of development in which all human rights and fundamental freedoms can be fully realized.

The position of such access to water in international law regulating allocation of water will be discussed next.

3. Equitable and reasonable utilization of freshwater resources

Although water seems to be abundant, only a small percentage of all water on earth consists of fresh water, namely about 2.5%. The usable portion of the principal sources for human use is even smaller: about 0.01%.[43] The gap between supply and demand of fresh water has grown during the past century and fresh water has become increasingly scarce.[44] The need for water for various uses can give rise to conflicts in case of scarcity of a certain quantity or quality of water. The biocomplexity of water, varying in different geographic regions, and the many interests involved, call for a dynamic principle to deal with allocation of freshwater resources, reflected in the principle of equitable and reasonable utilization. Equitable and reasonable utilization constitutes the main principle in international law on fresh water.[45] Depending on the relative weight given to basic access to water, this well-established principle could play an important part in securing the goals set at Johannesburg by obligating states to take access to water for people well into consideration when allocating freshwater resources.

The principle of equitable and reasonable utilization can be found in Article 5 of the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention).[46] The Watercourses

43 See Gleick (2000), *supra* note 1, pp. 21-22, where he further states that much of this last portion is located far from human populations. Groundwater forms the major part of the available freshwater resources.

44 According to the UN Commission on Sustainable Development, humans are using about half the readily available water, UNCSD, *Comprehensive Assessment of the Freshwater Resources of the World*, United Nations: New York, E/CN.17/1997/9. The Assessment also speaks of trends such as 'a steady increase in the number of regions of the world where human demands are outstripping local water supplies, and the resulting water stress is limiting development, especially of poor societies.'

45 See, *e.g.*, Stephen C. McCaffrey (2001), *The Law of International Watercourses: Non-navigational uses*, Oxford University Press: Oxford, p. 345: 'Equitable utilization is the fundamental rule governing the use of international watercourses.'

46 United Nations General Assembly (1997), Convention on the Law of the Non-Navigational Uses of International Watercourses, A/RES/51/229. The Watercourses Convention was adopted by the General Assembly on 21 May 1997 by 103 votes in favour to 3 against (Turkey, China, and Burundi) with 27 abstentions. The Convention can be found

Convention resulted from more than 20 years of work by the International Law Commission (ILC).[47] In drafting the Convention, the ILC has put on paper existing as well as developing principles of international law on non-navigational uses of freshwater resources. Although the Convention does not say which principles are well established and which are progressively developing, the inclusion of equitable and reasonable utilization can be viewed as codification of an established principle. In applying the principle when allocating freshwater resources in specific cases, all relevant factors and circumstances are to be considered together. Both sustainable development and equitable utilization, try to find a balance between various interests involved.[48] In the Gabcíkovo-Nagymaros case (Hungary/Slovakia), the International Court of Justice referred to equitable and reasonable sharing of the resources of an international watercourse as a basic right.[49] In the same Judgment the importance of sustainable development was underlined: 'This need to reconcile economic development with protection of the environment is aptly expressed in the concept of

at www.un.org and www.internationalwaterlaw.org. As of 15 August 2002, there were 12 parties and 16 signatories. Although not (yet) in force, this Convention is the only multilateral treaty in existence on fresh water potentially applying worldwide. According to Article 36 of the Convention, its entry into force requires 35 ratifications. For an elaborate discussion of the Convention, see Atilla Tanzi and Maurizio Arcari (2001), *The United Nations Convention on the Law of International Watercourses: A framework for sharing*, Kluwer Law International: London.

47 Based on Article 13.1(a) of the UN Charter, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification, in 1947 the General Assembly established the ILC as a permanent subsidiary organ. In 1971 the ILC started the study of the law of non-navigational uses of international watercourses with a view to the progressive development and codification of such law.

48 See for a thorough discussion of sustainable development and equitable utilization of watercourses Ximena Fuentes (1999), 'Sustainable Development and the Equitable Utilization of International Watercourses', in *The British Year Book of International Law 1998*, 69 (1999), Clarendon Press: Oxford, pp. 119-200.

49 Judgment of 25 September 1997 by the International Court of Justice in the Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia). The case concerns the construction and operation of a system of locks in the Danube. The Judgment and Opinions can be found on www.icj-cij.org. Paragraph 78 of the Judgment states: 'The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.' See also paragraph 85, stating that proportionality as required by international law was not respected in depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube.

sustainable development'.[50] Nevertheless, equitable and reasonable utilization came into existence as a means of dispute resolution between watercourse states and its outcomes might need adjustment by sustainable development, *e.g.*, to safeguard environmental interests of non-watercourse states.[51] Moreover, the other side of the coin of the flexibility provided by the requirement of equitable and reasonable utilization is that it causes uncertainty as to its outcome.[52] Another complication could be that not all factors found in practice are well reflected in theory, such as in statistics that might influence policy-making. For example, in many societies it is women who are dealing with water for domestic use and health by, among other things, providing drinking water and food, doing laundry, working in agriculture and taking care of the sick, children and elderly. Nevertheless, their experiences and interests tend to draw only little attention, partly because they quite often hold no formal ownership of land, and thereby water, and/or their (unpaid) work is not reflected in economic figures.[53]

The relationship between different kinds of uses of international watercourses is arranged for in Article 10 of the Watercourses Convention: '1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses. 2. In the event of a conflict between

50 Id., paragraph 140. Vice-President Weeramantry in his Separate Opinion expresses that he considers sustainable development 'more than a mere concept, but as a principle with normative value which is crucial to the determination of this case.'

51 See Fuentes (1999), *supra* note 48, p. 200.

52 See, *e.g.*, Tanzi and Arcari (2001), *supra* note 46, pp. 95-96: 'Although the status of the equitable utilisation principle as a 'cornerstone' of the general law of international watercourses is frequently postulated both in theory and in practice, some uncertainty remains as to its normative impact, if not its actual content.' Relevant factors and circumstances to be taken into consideration in obtaining reasonable and equitable utilization can be found in Article 6 of the Watercourses Convention, including the social and economic needs of the concerned watercourse states and the population dependent on the watercourse, the effect of the uses of a watercourse on other watercourse states, and the existing and the potential uses of a watercourse. The list of factors in Article 6 of the Watercourses Convention is not a limitative one. The no-harm principle is laid down in Article 7. Reconciliation of equitable utilization with the no-harm principle is increasingly viewed as very well possible. See, *e.g.*, McCaffrey (2001), *supra* note 45, p. 380: 'Far from being incompatible with equitable utilization, therefore, the no-harm obligation is a necessary and integral part of the equitable utilization process.'

53 World Summit on Sustainable Development, Plan of Implementation, paragraph 6(d), addresses the promotion of women's equal access to and full participation in decision-making at all levels, and improving their status through , *e.g.*, full and equal access to land.

uses of an international watercourse, it shall be resolved with references to articles 5 to 7, with special regard being given to the requirements of vital human needs.' Access to a certain amount and quality of fresh water clearly fits the vital human needs category. According to the Statement of Understanding attached to the Convention: 'in determining "vital human needs", special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation'.[54] Even though the paradox between both paragraphs – no inherent priority of vital human needs on the one hand but special regard on the other hand – renders the text somewhat ambiguous, it can be concluded that basic access to water is granted a special position.[55] In applying the principle of equitable and reasonable utilization, a state would therefore need strong arguments in favour of another use of water to override the interests involved in basic access to water.

4. Further key principles of international law

The efforts needed to implement the Johannesburg commitments are manifold. A right of access to water for individuals and people, and a duty of states to guarantee, protect, not restrict or merely take into account such right, is an important step forward. Nevertheless, establishing protection in theory does not in itself guarantee access to water in practice. For example, in South Africa

54 Watercourses Convention, Statements of Understanding, *I.L.M*, 36 (1997), at 719. See also Commentary to Article 10 of the Watercourses Convention, ILC Report on the work of its Forty-Sixth Session, Official Records of the General Assembly, Forty-Ninth Session, Supplement No. 10 (A/49/10), 1994, 2576. In ACUNS, *Plan of Action for Johannesburg: The Development-Environment Nexus*, clean drinking water for human consumption at adequate measures is maintained to have priority over water for agriculture and water for commercial and industrial use.

55 According to Ellen Hey (1998), 'The Watercourses Convention: To what extent does it provide a basis for regulating uses of international watercourses?', in *RECIEL* Volume 7 (1998) Issue 3, p. 294: '"Vital human needs" are to be included in the balancing of interests to which all uses are to be subjected, albeit with "special regard" but not with the objective of attaining a particular result that would ensure the protection of these needs.' Gleick (2000), *supra* note 1, p. 10, on the other hand, states that: 'In interpreting Article 10, priority allocation of water in the event of conflicting demands goes to water for fundamental human needs.' Tanzi and Arcari (2001), *supra* note 46, pp. 136-142, discuss both paragraphs of Article 10 and elaborate upon "custom" as well as upon the position and meaning of "vital human needs" and its link to a human right to water.

access to water is a constitutional right, but especially the financial position of the country will make it hard to actually provide such access.[56] International law principles can offer further assistance in promoting favourable circumstances. Sovereignty over natural resources, the duty to cooperate, common heritage of humankind, and common but differentiated responsibilities are identified here to be of specific importance in enabling states, and the world at large, to provide people with access to drinking water and sanitation. Sovereignty over natural resources grants states the right to decide upon the allocation of freshwater resources. Considering the transboundary nature of water, such allocation requires cooperation.[57] If considered a common heritage or a common concern of humankind, a further argument is provided in favour of involvement of all parties to at least reach a minimum access to water for all. Lastly, the principle of common but differentiated responsibilities is of relevance, considering the immense task of providing such access for all people. This will require the support of the international community, especially with regard to people in developing countries.

4.1 Sovereignty over natural resources

Principle 2 of the Rio Declaration reaffirms the sovereign right of a state to exploit their own resources 'pursuant to their own environmental and developmental policies', and that no harm is to be caused beyond their jurisdiction.[58] Sovereignty over freshwater resources is arguably implied in Article 5 of the Watercourses Convention, since watercourse states are entitled to utilize an international watercourse in their respective territories, albeit in an equitable and reasonable manner. Under Article 7 of the Convention, watercourse states need to take all appropriate measures to prevent the causing of significant harm to other watercourse states. The principle of limited territorial sovereignty and

56 1994 Bill of Rights of the new Constitution of South Africa, Section 27(1) 'Everyone has the right to have access to (…) b. sufficient food and water'. According to Gleick (2000), *supra* note 1, p. 9, water policies are being developed to implement this right.

57 The link between conditional sovereignty over natural resources and the importance of cooperation is emphasised by Franz Xaver Perrez (2000), *Cooperative sovereignty: From independence to interdependence in the structure of international environmental law*, Kluwer Law International: The Hague.

58 See for a thorough elaboration on sovereignty over natural resources Schrijver (1997), *supra* note 20.

limited territorial integrity over international watercourses seems to approach state practice closest.[59]

Sovereignty of states over natural resources is required if states are to implement the right of access to water. Nevertheless, state sovereignty over water resources does not in itself result in the provision of access to water for its people. As stated before, according to the right of self-determination, peoples have the right to freely dispose of their natural resources and a people may in no case be deprived of its own means of subsistence. That resources such as water are to be used in the interest of the people of a state is furthermore expressed in, for example, the first paragraph of the 1962 Declaration on Permanent Sovereignty over Natural Resources, in Article 7 of the 1974 Charter of Economic Rights and Duties and in Article 21 of the African Charter on Human and Peoples' Rights.[60] Such requirements qualify the exercise of state sovereignty over natural resources.

4.2 Duty to cooperate

International cooperation is required to implement the commitments to halve the number of people without access to safe water and adequate sanitation by 2015.[61] Cooperation is regarded as a crucial element of modern international law.[62] Cooperation beyond political borders is a necessity not only to provide access to water to all people, but in order to come to sustainable use of water

59 See McCaffrey (2001), *supra* note 45, p. 171.

60 UNGA Resolution 1803 (XVII), 14 December 1962, on Permanent Sovereignty over Natural Resources. Charter of Economic Rights and Duties, adopted by the UN General Assembly on 12 December 1974. See *supra* note 37 on the African Charter on Human and Peoples' Rights. See also Schrijver (1997), *supra* note 20, pp. 308-311.

61 In the Plan of Implementation of the World Summit on Sustainable Development, X. Institutional framework for sustainable development, paragraph 121(i), the following objective is formulated: 'Strengthening international cooperation aimed at reinforcing the implementation of Agenda 21 and the outcomes of the Summit.'

62 See, *e.g.*, Perrez (2000), *supra* note 57, pp. 330-331, for the need of cooperation in modern international law. See also, *e.g.*, UN General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States, 1970, UNGA Res. 2625 (XXV).

in general. Moreover, cooperation can facilitate the realisation of human rights, such as those safeguarding access to water.[63]

The duty to cooperate is well established in international law.[64] The obligation to cooperate is expressed in Article 8 of the Watercourses Convention, in which the establishment of joint mechanisms or commissions is suggested.[65] Furthermore, the importance of cooperation is emphasised in the preamble and various other provisions of the Watercourses Convention. According to Article 5 of the Watercourses Convention, watercourse states have the duty to cooperate in the protection and development of the watercourse. In applying equitable and reasonable utilization and the relevant factors, when needed, watercourse states have to enter into consultations in a spirit of cooperation (Article 6). Other references to cooperation in the Convention include Article 25 on the regulation of the flow of an international watercourse and Article 28 applying to emergency situations in which prompt notification of other potentially affected states and competent international organizations is required.

4.3 Common heritage of humankind

The principle of the common heritage of mankind can be found in the 1982 Law of the Sea Convention, applying to the deep seabed, as well as in the 1979

63 *Fourth report of the independent expert on the right to development, Mr. Arjun Sengupta, submitted in accordance with Commission resolution 2001/9*, UN Economic and Social Council, Commission on Human Rights, Working Group on the Right to Development, E/CN.4/2002/WG.18/2 of 20 December 2001, p. 15, paragraph 43: 'When human rights are to be realized as a part of a country's development programme, all the resource, technological and institutional constraints can be seen as dependent upon the extent and nature of international cooperation.'

64 See, *e.g.*, ILA Committee on Legal Aspects of Sustainable Development (2002), *supra* note 6, p. 7, discussing the duty to cooperate towards global sustainable development and protection of the global environment. See also Principles 18 and 19 Rio Declaration on respectively the obligation of states to notify other states in case of emergencies and the duty of notification and consultation of potentially affected states on activities that may have significant adverse transboundary environmental effect.

65 Following from the general obligation to cooperate, is the duty to exchange data and information (Article 9). This exchange of information is further identified for planned measures in Article 11 to Article 19 of the Watercourses Convention, mentioning consultation, negotiation and regulating notification. The obligation to exchange information, to enter into consultation and negotiation, and to establish and join a watercourse institution as obligations to cooperate in the context of international watercourses are discussed by Perrez (2000), *supra* note 57, pp. 304-317, regarding their effect.

Agreement Governing the Activities on the Moon and Other Celestial Bodies, concerning for example outer space.[66] The principle of the common heritage of mankind reflects the special position of global commons and requires management to take the global interests involved into account, through concepts such as non-appropriation.[67] At the regional level, the principle of the common heritage of mankind is referred to in the aforementioned Article 22 of the African Charter on Human and Peoples' Rights on the right to development.[68] Nowadays, "mankind" is often replaced by "humankind". The principle of the common heritage of humankind is not incorporated in more recent treaties, such as on biodiversity and climate change. A shift toward the principle of common concern of humankind can be distinguished.[69] The principle of common concern hands the international community less legal ground to intervene in domestic affairs of countries, such as their implementation of the right of access to water.

On the one hand, water seems well suitable to being considered a common heritage of humankind.[70] Bringing allocation of freshwater resources in line

66 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, entry into force: 16 November 1994, status as of 9 April 2003: 142 parties and 157 signatories. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, adopted by the UN General Assembly in 1979 in resolution 34/68, entry into force: 11 July 1984, status as of 9 April 2003: 10 parties and 11 signatories.

67 According to Edith Brown Weiss (1989), *In Fairness to Future Generations: International law, common patrimony, and intergenerational equity*, The United Nations University: Tokyo, p. 48, the doctrine of common heritage anticipates the need for planetary obligations. At pp. 48-49 (referring to Amb. Pardo of Malta) non-ownership of the heritage, shared management, shared benefits, use exclusively for peaceful purposes, and conservation for mankind are mentioned as the five principal elements of common heritage. For further elaboration of the intergenerational perspective of global commons, see Brown Weiss (1989), pp. 289-291.

68 See *supra* note 37 on the African Charter on Human and Peoples' Rights.

69 According to the Rapporteur of the ILA Committee on Legal Aspects of Sustainable Development (2002), *supra* note 6, p. 10, common concern of humankind 'is a somewhat vaguer notion than the common heritage principle, obviously not implying non-appropriation and an international regime, but it still carries the connotations of global interest in preserving the environment and needs of future generations.'

70 See also, *e.g.*, Brown Weiss (1989), *supra* note 67, pp. 246-247, according to whom 'reasonable access and use of the natural resources of our common patrimony' constitute planetary rights of communities.

with sustainable development poses a complex task.[71] Besides passing through countries by means of international rivers, water travels across borders through a hydrological cycle that includes lakes and groundwater as well. This causes sustainable use of water to be a global issue that in many of its aspects cannot be managed by single states.[72] The importance to development of such an approach could lie in the sharing of the burdens and the benefits.[73] Awareness of the common interest in water, as expressed through the principle of the common heritage of humankind, could moreover further stimulate the involvement of the international community in its efforts to provide all people with access to water.

On the other hand, viewing freshwater resources as a common heritage within international law could be blocked by the notions of sovereignty and territoriality. It might furthermore lead to inequality of access to natural resources. It could create an obligation for developing countries with enough water to share those resources, while they have no access to other natural resources abundantly in other countries.

Considering the uncertainties inherent in the concept of the "common heritage" especially when applied to water allocation, combined with the present tendency away from that concept, it seems not yet feasible for the international community to join forces to an extent that addresses water resources as a common heritage of humankind. Water as such is not at present often specifically classified as one of the issues the concept of the common heritage could be extended to. This might diminish the chances that it will be viewed as such in the near future.[74] In due course, increased urgency to deal with water in

71 See, *e.g.*, Chapter 18 of Agenda 21. Sustainable use of fresh water implies, for example, that exploitation of water remains within recharge rates. Therefore, no mining of ground water aquifers should take place and their recharge areas are to be protected, see Brown Weiss (1989), *supra* note 67, p. 127. The importance of water resources for later generations is underlined by Brown Weiss (1989), pp. 232-247.

72 Degradation of international waters is defined as one of the critical threats to the global environment addressed by the Global Environment Facility (GEF), established in 1991, see www.gefweb.org.

73 Manimuthu Gandhi (1992), 'Right to Development as a Right to Equal Resources', in Chowdhury, Denters and De Waart (eds) (1992), *supra* note 21, p. 140: 'The exploitation of natural resources found in the common heritage of mankind is meant for the development of all countries in general.'

74 The Rapporteur of the ILA Committee on Legal Aspects of Sustainable Development (2002), *supra* note 6, p. 10, mentions as examples of such fields 'tropical rain forests, wetlands of international importance or the environment and what belongs to all of us, such as major ecological systems of our planet.' Mainly through wetlands and the last

a sustainable manner and other causes, such as increased international cooperation due to globalisation, might stimulate the willingness of the international community to view (part of) the global hydrological cycle as a common heritage of humankind.

At the moment, firmer establishment of the concept of common concern of humankind within international law probably best serves the recognition of water as a global good and increases the responsibility of the international community as a whole in providing access to water for all. Such reinforcement of common concern would underline the actuality of underlying concepts of law such as solidarity and justice. It would, furthermore, reflect the impact of increasing global dependence. For example, serious drought in one country can lead to increasing numbers of refugees and immigrants in other states. Moreover, in balancing rights and duties, it could balance rights accompanying concepts such as free trade with duties such as conservation of the earth's life support systems, creating a more sustainable global market that might even result in a growing number of potential consumers in case of poverty reduction.

4.4 Common but differentiated responsibilities of states

The principle of common but differentiated responsibilities[75] can be found in the UNCED documents as well as in instruments pre-dating UNCED, for example the GATT.[76] Principle 7 of the Rio Declaration formulates the prin-

category, water resources are, however, included. Harald Hohmann (1992), 'Environmental Implications of the Principle of Sustainable Development and their Realization in International Law', in Chowdhury, Denters and De Waart (eds) (1992), *supra* note 21, p. 279, argues that common heritage to a certain degree also has to be respected with regard to wetlands of international importance (Ramsar Convention). Water is also mentioned within the context of common patrimony by Brown Weiss (1989), *supra* note 67, pp. 289-291.

75 See on common but differentiated responsibilities, *e.g.*, Y. Matsui (2002), 'Some Aspects of the Principle of "Common but Differentiated Responsibilities"', in *International Environmental Agreements: Politics, Law and Economics*, 2 (2002) no. 2, pp. 151-171.

76 The granting of differential and more favourable treatment of developing countries is allowed under the General Agreement on Tariffs and Trade (GATT) by means of the Enabling Clause adopted at Tokyo, 1979 (Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, BISD 26S/203), and a number of other provisions, in particular Article XVIII and Part IV of the GATT. See Philippe Sands (1995), 'International Law in the Field of Sustainable Development', in *The British Year Book of International Law 1994*, 65 (1995), p. 344, on which page

ciple as follows: 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.' On the one hand, common but differentiated responsibility provides developing states with an instrument to put development of their population to the forefront, including their access to water in case of allocating water. On the other hand, development of countries does not necessarily coincide with the right to development of peoples. A government could actually use the priority for the development of the state as an argument against the particular interest of a people.

The Johannesburg Plan of Implementation more than once refers to the principle of common but differentiated responsibilities as set out in principle 7 of the Rio Declaration.[77] It is emphasised in the Plan that, notwithstanding the primary responsibility of each country for its own sustainable development and poverty eradication, concerted and concrete measures are required at all levels to enable developing countries to achieve their sustainable development goals.[78] Therefore, required measures include measures to achieve the key commitments to decrease the proportion of people without access to safe drinking water and basic sanitation.

he also states that the principle entails two elements: 'the common responsibility of all States for certain international issues, and differences in the extent of their international obligations to respond to those issues.' According to the Rapporteur of the ILA Committee on Legal Aspects of Sustainable Development (2002), *supra* note 6, p. 9, the principle 'has a firm status in various fields of international law, including human rights law, international trade law and international environmental law.'

77 For example, within the context of changing unsustainable patterns of consumption and production in which developed countries are to take the lead, World Summit on Sustainable Development, Plan of Implementation, paragraph 13.

78 World Summit on Sustainable Development, Plan of Implementation, paragraph 6. In the 1992 UN Framework Convention on Climate Change, New York, 9 May 1992, entered into force 21 March 1994, common but differentiated responsibilities forms an important principle, stating, *e.g.*, in Article 3(1): 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.'

5. Conclusion

It can be concluded that basic access to fresh water is protected by the body of human rights law, at least as a condition for the fulfilment of other human rights and, arguably, as a separate human right to water. The explicit declaration of such a right by the Committee on Economic, Social and Cultural Rights is an enormous step forward. Further affirmation of a human right to water by states, preferably by means of a multilateral treaty or through a UNGA Resolution, would strengthen the contribution international law can make to securing access to water even more. A human right provides a pressing argument to render priority to basic access to water in its allocation, as formulated by the Committee. Priority rendered to certain uses by means of agreement – the ICESCR – or custom, is accepted by the Watercourses Convention Article 10(1). Besides, the special regard for vital human needs within the Watercourses Convention acknowledges the importance of basic access to fresh water.

Sovereignty over natural water resources enables a state to implement a right of access to water in its territory. The control of a state over its natural resources does not in itself guarantee its allocation in favour of basic access to water. The obligation of states to use their resources for the benefit of their people does, however, limit state sovereignty. A human right to water would further qualify the exercise of sovereignty over natural water resources by states. At the international plane, and considering the special position of basic uses within the allocation of water, the application of the principle of equitable and reasonable utilization can cause interests of vital human needs of one state to override full exercise of sovereignty over part of the resource by another state.

Apart from the efforts to be made by states, international cooperation is required to reach the goal of access to water for all. Cooperation in managing freshwater resources does not only serve solidarity but reflects that sustainable water management is a global issue involving all parties. Recognising the global hydrological cycle as a common heritage of humankind, or at least a common concern of humankind, would further underline the interrelationship between water resources. The common interest in water resources is not to say that all parties are to make the same contribution to its management. Application of the principle of common but differentiated responsibilities could facilitate the international support for developing countries needed to implement the right of access to clean water and adequate sanitation.

The immense task of securing a basic access to water for all people requires an integrated approach that merges several fields of international law: access to water can be guaranteed through human rights and peoples' rights of which

the actual implementation requires cooperation, acknowledging the sovereign rights of states but qualified by duties.

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NATURAL RESOURCES AND WASTE MANAGEMENT

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18

OUR AGRICULTURAL HERITAGE: SUSTAINABILITY, COMMON HERITAGE AND INTERGENERATIONAL EQUITY

Mary E. Footer

Introduction

Agriculture is probably one of the oldest forms of globalisation. Since the dawn of agriculture some 12, 000 years ago humans have developed crop cultivation and livestock domestication from just eight to ten centres of origin and crop diversity to cover almost the entire globe.[1] Ancient civilisations[2] recorded agricultural settlements that used a variety of plants and livestock in order to provide food and sustenance. By means of careful selection and breeding, humans have achieved a huge diversity of genetic resources, varieties, breeds and sub-species of the relatively few plants and animals that support agricultural biodiversity (or 'agrobiodiversity'). It is also the basis for the diversity of species that support agricultural production, such as soil biota, pollinators, predators and those species in the wider environment that support diverse agricultural ecosystems, be they agricultural, pastoral, forestial or aquatic.[3]

1 Jared Diamond, *Guns, Germs and Steel: The Fates of Human Societies* (London: Jonathan Cape, 1997), Part Two: 'The Rise and Spread of Food Production' chapters 4-10 and Genetic Resources Action International (GRAIN), 'Biodiversity in agriculture: some policy issues'.

2 The world's staple food and forage crops were developed in Asia Minor, the Mediterranean and Ethiopia (wheat and barley), China (rice and soybean) and in the Andes (corn and potato).

3 Kerry ten Kate and Sarah A. Laird, *The Commercial Use of Biodiversity*: *Access to Genetic Resources and Benefit-Sharing*, (London: Earthscan Publications Ltd., 1999;

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 433-466.*

Agrobiodiversity is thus the key to the survival and livelihood of humankind; it is the first link in the food chain, developed and safeguarded by farmers, livestock keepers and fisher folk over centuries for the survival of humankind and forms part of our collective agricultural heritage.[4]

Even so that heritage is under threat from the trend towards intensive agricultural practices, including the turn towards monoculture, the spread of genetically modified organisms (GMOs) possibly resulting in genetic pollution, the widespread development of genetic use restriction technologies (GURTs) and the influence of big business on methods of agricultural production, including the resort to proprietary technologies[5] (in short the spread of the Life Sciences Industry). Such practices contribute to the erosion of the biodiversity that is found in the form of genetic resources, livestock, insects and soil organisms.[6] However, a return to sustainable farming practices and changes in agricultural policies and institutions could reverse this trend but it must be accom-

NGO/CSO FORUM – *World Food Summit/five years later*, Access to Genetic Resources paper (version 4) on 'Sustaining Agricultural Biodiversity and the free flow of Genetic Resources for Food and Agriculture', at 3; and Lori Ann Thrupp 'Linking agricultural biodiversity and food security: the valuable role of agrobiodiversity for sustainable development' vol. 76:2 *International Affairs* (2000) 265-281.

4 In the English language the word agriculture embodies the concept of 'culture'. Etymologically speaking the roots of the word 'culture' are found in rural labour and husbandry, in relation to the active tending of natural growth; historically culture has been used to describe the transfiguration of nature. According to the *Oxford Dictionary of Current English*, the word 'culture' derives from 'coulter', or the Old English word 'culter', meaning the vertical iron cutting blade of a ploughshare and signifying an instrument used in the human activity of agricultural labour. The Latin root of the word 'culture' is *colere* which has a variety of meanings, including to cultivate, tend, inhabit, honour and worship; it has given rise to both the words 'colonisation' and 'cult'.

5 For example, patents and other intellectual property rights such as plant breeders' rights (or PBR's) and various forms of restrictive licensing.

6 It has been estimated that some 1-2% of all plant genetic resources for food and agriculture (PGRFA) are lost annually: see Hope Shand, *Agricultural Biodiversity and Farm-Based Food Security* (1997) at 1. See also FAO, *Report on the State of the World's Plant Genetic Resources for Food and Agriculture* (Prepared for the Fourth International Technical Conference on Plant Genetic Resources, Leipzig, Germany, 17-23 June 1996) 9-15 (1997) [hereinafter the 'Leipzig Report'], which was formally adopted by 150 States through the *Leipzig Declaration*. The Leipzig Report, in the section on 'The State of Diversity', makes specific reference to modern, commercial agriculture as the chief cause of loss of genetic diversity, *ibid.,* at 13.

panied by the development of long-term strategies to guarantee world food security.[7]

This contribution focuses on one specific development that moves in this direction. In November 2001, after seven years of negotiation, a new legal and policy framework for the sustainable management of plant genetic resources for food and agriculture (PGRFA) was established, which included an access and benefit-sharing mechanism for PGRFA similar to the one envisaged under the Convention on Biodiversity (CBD) for genetic resources.[8] The framework in question is the one established by the Food and Agriculture Organisation (FAO) Conference in the form of an International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA or 'Seed Treaty'),[9] adopted under Article XIV FAO Convention,[10] in order to replace the non-binding International Undertaking on Plant Genetic Resources (International Undertaking or IU). Once it comes into force on 29 June 2004[11] the Seed Treaty will super-

7 The Bruntland Commission noted that it was not a lack of resources but a lack of policies that was hindering sustainable food security; see World Commission on Environment and Development, *Our Common Future* (Oxford and New York: Oxford University Press, 1987), chapter 5 on 'Food Security' at 118 and 130-144.

8 Convention on Biological Diversity (CBD), 5 June 1992, Article 2, (1992) 31 ILM 818 (entered into force 29 December 1993), see Articles 15 and 16 CBD and also Article 8(j) CBD.

9 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), adopted on 3 November 2001 by Res. 3/01, FAO Conference, 31st Sess., (ITPGRFA, or Seed Treaty); for the Treaty text see the FAO web-site at www.fao.org/waicent/faoinfo/agricult/cgrfa/IU.html.

10 See FAO Constitution, Article XIV entitled 'Conventions and Agreements', available at www.fao.org/Legal/default.htm. For an explanation of the workings of the FAO, in respect of such instruments, see Jean Pierre Dobbert, chapter on 'Food and Agriculture', in Oscar Schachter and Christopher C. Joyner, (eds.) *United Nations Legal Order* (Oxford: Oxford University Press, 1995) 907-992, at 930 and note 63 (1995).

11 In accordance with Article 28.1 of the ITPGRFA, the Treaty will enter into force 90 days after deposit of the 40th instrument of ratification, acceptance, approval or accession, provided at least 20 instruments of ratification, acceptance, approval or accession have been deposited by FAO Members. This has recently been achieved and thus the ITPGRFA will enter into force for those 54 countries and the European Community that have ratified, accepted, approved or otherwise acceded to the Treaty, on 29 June 2004. The *Report on the Status of Signatures and Ratifications of the International Treaty on Plant Genetic Resources for Food and Agriculture*, First Meeting of FAO Commission on Genetic Resources for Food and Agriculture acting as Interim Committee of the International Treaty on Plant Genetic Resources for Food and Agriculture, Rome 9-11 October 2002, CGRFA/MIC-1/02/10 has subsequently been updated via the FAO web-site at http://www.fao.org/Legal/TREATIES/033s-e.htm (visited 02.04.04).

sede the International Undertaking and become the primary international instrument dealing with the conservation and sustainable use of PGRFA at the multilateral level.

My intention is to address the question of what the new Seed Treaty means in terms of our agricultural heritage. Through three separate, but interlinking, propositions, which I believe are to be found in the Seed Treaty and underpin the new treaty régime. First, the Seed Treaty seeks to promote agricultural sustainability within a global system that recognises the permanent sovereignty and exclusive control of States over PGRFA within their own jurisdiction. Second, it abandons the notion that PGRFA are still part of the common heritage of mankind[12] in favour of an approach found in the field of general international environmental law, namely that PGRFA are a 'common concern of humankind'. Even so, the Seed Treaty retains the common heritage principle in favour of some of the *ex situ* collections of plant genetic resources that are held by a select group of international agricultural research centres (IARCs) around the world. Third, it attempts to lay the foundations for the establishment of an equitable food and agricultural system for future generations, through a broader-based multilateral system of facilitated access and benefit sharing of PGRFA, open to and including various different stakeholders. However, this new multilateral system is a fragile one; it could easily fall victim to the concept of segmented markets in PGRFA and might even promote that concept.

Aside from the issues pertaining to our agricultural heritage, it should also be noted that the Seed Treaty is an ambitious attempt to address a variety of asymmetries in plant genetic resources and bargaining power between the gene rich South and the gene poor North. It is hardly surprising therefore that it epitomises an asymmetry of results. My intention is to analyse some of those asymmetries in the light of the three propositions already pertaining to the Seed Treaty and our agricultural heritage.

12 Under the common heritage of humankind principle the resources in question are considered to be under the common patrimony of all humanity, to the exclusion of their appropriation by any sovereign state. States share in the management of those resources and any benefits arising therefrom. It is intended that they be used exclusively for peaceful purposes and conservation of humankind, including future generations; see Edith Brown Weiss, *In Fairness to Future Generations* (Tokyo: UN University Press, 1998) at 48.

1. The failure of the international system to make plant genetic resources a global common

The Seed Treaty is the successor to the International Undertaking, a non-binding international instrument dating from 1983, that was adopted as part of a Resolution of the FAO Conference.[13] The International Undertaking held out for a radical exception to the principle that states have permanent sovereignty over their natural resources because the sub-species of genetic resources, by their very nature form part of the common heritage of [hu]mankind and should be freely accessible. The International Undertaking recognised that plant genetic resources are public goods of economic and/or social interest, particularly for agriculture, which should be 'explored, preserved, evaluated and made available for plant breeding and scientific purposes'. More specifically it recognised 'the universally accepted principle that plant genetic resources are a heritage of mankind and consequently should be available without restriction',[14] i.e. they formed part of humanity's collective 'genetic estate'.

The International Undertaking called for the conservation of plant genetic resources in both *in situ* and *ex situ* collections[15] and exhorted governments to adhere to the paradigm of free accessibility and exchange of plant germplasm within their jurisdictions for the 'purposes of scientific research, plant breeding or genetic resource conservation' on a free of charge basis[16] or on mutually agreed terms. Almost immediately it came under attack. The definition and scope of plant genetic resources in the International Undertaking gave rise to controversy because it included farmers' landraces (or primitive cultivars), other

13 The International Undertaking on Plant Genetic Resources (International Undertaking, or IU) was adopted by Res. 8/83, FAO Conference, 22nd Sess.; see Mary E. Footer, 'Intellectual Property and Agrobiodiversity: Towards Private Ownership of the Genetic Commons' vol. 10 (1999) *Yearbook of International Environmental Law* (Oxford: Oxford University Press, 2000) 48-81, at 62-68 for a preliminary overview.

14 Article 1 of the International Undertaking, *ibid*. For a brief analysis of management régimes that embody the common heritage principle (or the 'common concern of humankind' principle), see Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) 75-79. Although he does not discuss plant genetic resources at all Franck does review issues relating to equitable access and benefit sharing of biological resources under the CBD, in relation to environmental management and conservation, as fairness claims, which in turn form part of the 'global fairness discourse', *ibid* at 405-406. The same point could be made for PGRFA under the International Undertaking and in relation to subsequent developments in the field.

15 Articles 4:1 and 4:3 respectively of the International Undertaking, *ibid*.

16 Article 5, *ibid*.

traditional varieties, and wild varieties, which were freely available, as well as cultivated varieties in current use and newly developed varieties that were often the products of formal breeding and subject to plant breeders' rights.[17]

Industrialised countries disliked its lack of an explicit reference to plant breeders' rights as provided for under the majority of States' national legislation, conform one of the acts of the Union internationale pour la protection des obtentions végétales (UPOV)/International Union for the Protection of New Varieties of Plants.[18] Developing countries were cautious because they felt the scope of the International Undertaking failed to recognise that many plant varieties originate in landraces, which have been genetically improved by farmers located mostly but not exclusively in developing countries and effectively preserved for future generations. On the one hand, developing countries were keen to see some recognition of the right of farmers to save, use, exchange and sell seed, irrespective of their origin. It even led some of them to claim proprietary rights over plant genetic resources (and their improvements) within national jurisdictions. On the other hand, there was a steady increase in the number of individuals from industrialised countries who had acquired access to those plant genetic resources, without providing any form of compensation to indigenous and local farmers. In some cases, indigenous and local farmers contested such takings and sought the right to be considered as the contributing force behind the conservation and improvement of indigenous and local PGRFA.[19]

The International Undertaking was subsequently 'amended' by means of three 'agreed interpretations', at successive FAO Conferences in 1989 and 1991, and annexed to the original text in order to broaden its acceptance. The first

17 Article 2:1(a), *ibid*. Essentially, the International Undertaking put all plant genetic resources on an equal footing, thereby implying free access to all plant genetic material, or germplasm; see John Ntambirweki, 'Biotechnology and International Law within the North-South Context' vol. 14 *The Transnational Lawyer* (2001) 103-128 at 111.

18 Union internationale pour la protection des obtentions végétales (UPOV) or International Union for the Protection of New Plant Varieties was established by the International Convention for the Protection of New Varieties of Plants of 2 December 1961, 815 *UNTS* 11609 (1972), the so-called 1961 Act of the UPOV Convention entered into force 10 August 1968. UPOV was subsequently revised by Additional Act of 10 November 1972. A more far-reaching amendment took place on 23 October 1978; the 1978 Act of the UPOV Convention entered into force on 8 November 1981. Then on 19 March 1991 a further amendment was made resulting in the 1991 Act of the UPOV Convention, which entered into force on 24 April 1998. Currently, most States are parties either to the 1978 Act or the 1991 Act.

19 *Ibid*, at 112.

interpretation acknowledged that plant breeders' rights (as provided for under one of the Acts of UPOV) were not incompatible with the International Undertaking.[20] However, it meant that States could restrict the free access to and exchange of genetic material, or germplasm, in order to comply with their international obligations and national implementing legislation, thereby dealing a blow to the free exchange paradigm. It also introduced the idea that the term 'free access' did not necessarily mean 'free of charge'.[21]

The second interpretation characterised farmers' rights as 'rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity'.[22] It was also determined that 'these rights are vested in the International Community, as trustee for present and future generations of farmers', thereby introducing a form of international trusteeship, with explicit reference to the notion of intergenerational equity.

The third interpretative text is inherently contradictory. The 1991 resolution recognised that 'the concept of the common heritage of mankind, as applied in the *International Undertaking on Plant Genetic Resources*, is subject to the sovereignty of states over their plant genetic resources' (conform the CBD). It implicitly limited the scope of the free access provision, such that breeders' lines and farmer' breeding materials could be excluded from it.[23] The International Undertaking had started out with the bold intention of recognising a global common in plant genetic resources but, by means of these successive interpretations of its key provisions, had laid itself open to competing claims over those resources from national governments. The driving force behind this later development was undoubtedly the entry into force of the CBD in 1993.

Successive interpretations to the International Undertaking are a reminder of the wider failure of the international community, under the auspices of the FAO, to provide adequate guardianship of a global common in plant genetic

20 Adopted in 1989, the *Agreed Interpretation of the International Undertaking*, Res. C 4/89, FAO Conference, 25th Sess. (the 'first interpretation') recognised plant breeders' rights in paragraph 2; available at ftp://extftp.fao.org/waicent/pub/cgrfa8/Res/C4-89E.pdf.

21 Paragraph 5(a) of Res. C 4/89*, ibid.*

22 Paragraph 3 of Res. C 4/89 already recognised the contribution of farmers to the conservation and development of plant genetic resources but another text of even date, the *Agreed Interpretation of the International Undertaking*, *Farmers Rights*, adopted in Res. C 5/89, FAO Conference, 25th Sess. (the 'second interpretation') explicitly recognised 'farmers' rights'.

23 Adopted in 1991, the third interpretation is contained in Res. C 3/91, FAO Conference, 26th Sess., ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/Res/C3-91E.pdf.

resources. Aside from its political and institutional failings, the FAO Global System for the Conservation and Utilisation of Plant Genetic Resources for Food and Agriculture (the FAO Global System) originally established in 1983,[24] of which the International Undertaking forms part, failed to receive adequate financial support. Due to the unwillingness of some of its Members, the FAO also failed to develop its own gene bank network for the collection of crop germplasm at a critical point in the late 1970s. Other actors – most notably public and private genebanks and networks, such as the Consultative Group on International Agricultural Research (CGIAR), which was formed in 1971[25] – stepped into the breach. The FAO was left to establish an institutional framework in order to co-ordinate, oversee and monitor the International Undertaking and to act as the focal point for the FAO Global System.

In 1992, Agenda 21 called for the strengthening of the FAO Global System and its harmonisation with the CBD. It was also recognised that there would be a need to address the issue of access to and benefit-sharing of PGRFA on mutually agreed terms, including *ex situ* collections not acquired in accordance with the CBD. Something would also have to be done about farmers' rights,[26] originally referred to in the second interpretation of the International Undertaking. Not surprisingly, since the entry into force of the CBD in 1993, negotiations have been underway (commencing in 1994) to revise the International Undertaking and to harmonise it with the CBD.

24 Established by Res. C 9/83, FAO Conference, 22nd Sess., the *FAO Global System for the Conservation and Utilization of Plant Genetic Resources* [hereinafter *FAO Global System*] was intended to be an intergovernmental framework for the safe conservation, promotion of unrestricted availability and sustainable utilisation of PGRFA for present and future generations.

25 See Footer, above note 13, at 56-57, for full details on the Consultative Group on International Agricultural Research (CGIAR), which comprises an informal association of 57 public and private sector members, drawn from developed and developing countries, private foundations and development banks.

26 Res. 3 of the Nairobi *Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity – The Interrelationship between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture*, adopted 22 May 1992, 31 *ILM* 846 (1992) and the follow up to this resolution at the FAO in Res. C 7/93, FAO Conference, 22nd Sess. See generally Kerry ten Kate and Carolina Lasén Diaz, 'The Undertaking Revisited: A Commentary on the Revision of the International Undertaking on Plant Genetic Resources for Food and Agriculture' 6:3 *RECIEL* (1997) 284-292. For coverage of farmers' rights see Martin A. Girsberger, *Biodiversity and the Concept of Farmers' Rights in International Law: Factual Background and Legal Analysis* (Bern, Berlin, Bruxelles, Frankfurt am Main, New York, Wien: Peter Lang AG, 1999).

2. The seed treaty and agricultural sustainability

A quick glance at the preambular text of the new Seed Treaty reveals the ambitious nature of this international convention. It seeks to regulate 'the conservation and sustainable use of plant genetic resources for food and agriculture and equitable sharing of the benefits arising out of their use', in harmony with the CBD, and to provide a basis for 'sustainable agriculture and food security'.[27] PGRFA, in the form of basic crop germplasm, have a distinctive character. They form the raw material that is indispensable for crop genetic improvement. They form part of our agricultural heritage, or agricultural patrimony, and their proper management calls for synergies between agriculture, the environment and commerce.[28]

The Seed Treaty takes its cue from the CBD. The latter Convention recognises the fundamental premise of permanent sovereignty over biological resources and the same principle is taken up in the Seed Treaty with respect to PGRFA.[29] According to the CBD, an attribute of such sovereignty is the freedom of states, parties to the Convention, to prescribe through legislation the terms and conditions of access and benefit sharing of those genetic resources.[30] However, this freedom may be limited by the obligation to 'create conditions to facilitate access to genetic resources for environmentally sound purposes and not to impose restrictions that run counter to the objectives of the Convention'.[31]

The Seed Treaty similarly speaks of the mutual benefit that States may derive from 'the creation of an effective multilateral system for facilitated access to a negotiated selection of these resources [PGRFA] and for the fair and

27 Article 1 Seed Treaty, above note 9; it is underpinned by similar language in the preambular text to the Treaty (fourth recital).

28 Seed Treaty, Preamble, above note 9.

29 State parties to the CBD can claim sovereignty over their biological resources, including their genetic resources, in accordance with Article 3, CBD, above note 8; see Seed Treaty, Preamble (fourteenth recital), above note 9.

30 Article 15.1 CBD, above note 8.

31 Article 15:2 CBD, above note 8. The remaining sections of Article 15 CBD make it clear that (i) the access provisions apply to both countries of origin, i.e. countries possessing genetic resources *in situ*, and countries that have acquired genetic resources in accordance with the CBD; (ii) such access 'shall be on mutually agreed terms' and 'subject to prior informed consent'; (iii) there shall be provision for participation in scientific research and the sharing of the results of that research; and (iv) the benefits of its utilisation shall accrue to those countries that have provided the genetic resources.

equitable sharing of the benefits arising from their use'.[32] While it may have taken the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA)[33] seven years to arrive at a multilateral system of access and benefit-sharing, a review of the access and benefit-sharing of genetic resources under the CBD and their potential articulation by national governments, in the form of Guidelines, has also got off to a slow start.[34] It is only now beginning to gain some impetus after adoption of the Bonn Guidelines on Access to Genetic Resources and Benefit-Sharing[35] at the sixth meeting of the Conference of the Parties (COP-6) of the CBD in April 2002.[36]

The General Provisions in Part II of the Seed Treaty endorse the paradigm of sovereignty over PGRFA but at the same time promote international co-operation. Thus, Article 5 of the Treaty calls upon the parties, subject to national legislation, to co-operate in the matter of conservation, exploration, collection, characterisation, evaluation and documentation of PGRFA, including the promotion of *in situ* conservation of wild crop relatives and wild plants for food

32 See Seed Treaty, Preamble (fourteenth recital), above note 9.

33 The mandate of the former Commission on Plant Genetic Resources (CPGR) was broadened in 1995 to cover all components of biodiversity for food and agriculture, thereby including animal, forest and marine-based resources, see Res. C 3/95, FAO Conference, 28th Sess., paragraphs 1 and 2.

34 At its fifth meeting in May 2000 the Conference of the Parties (5th Meeting of COP of the CBD (COP-5)) reconvened the multistakeholder Panel of Experts of Access and Benefit-sharing, which had been set up to explore options for Access to Genetic Resources and Benefit-Sharing mechanisms under the CBD., Decision V/26 – *Access to Genetic Resources*. The study by the Panel of Experts is available as doc. UNEP/CBD/COP/5/8. For reports of the first and second meetings of the Panel of Experts, see www.biodiv.org/ISOC/index.html.

35 At that same meeting, the COP also decided to establish an *Ad Hoc* Open-ended Working Group with the mandate to develop guidelines and other approaches on access to genetic resources and benefit-sharing, for submission to the sixth meeting of the COP (COP-6) and to assist Parties and stakeholders in addressing various elements such as prior informed consent, relevant aspects of *in situ* and *ex situ* conservation, mechanisms for benefit-sharing, etc. The meeting of the Access and Benefit-sharing Working Group, at which the Guidelines on Access to Genetic Resources and Benefit Sharing were formulated, was held in Bonn, Germany from 22-26 October 2001; UNEP/CBD/WG/AB/1/3 [hereinafter the Bonn Guidelines].

36 The Report of the Ad Hoc Open-ended Working Group (UNEP/CBD/COP/6/6) was presented to COP-6, held in The Hague, in April 2002 (6th Meeting of COP of the CBD (COP-6)). COP-6 adopted the Bonn Guidelines, as part of Decision VI/24 – *Access and Benefit-sharing as related to genetic resources*. COP-6 also endorsed Decision VI/6, which recognizes the adoption by the FAO of the *International Treaty on Plant Genetic Resources for Food and Agriculture*.

production and to support indigenous and local communities in their efforts to achieve this.[37] Likewise, States parties to the Seed Treaty are asked to promote the development of 'an efficient and sustainable system of *ex situ* conservation', including the transfer of technology for this purpose, so as to improve the sustainable use of PGRFA.[38] Article 6 is directed to the parties to 'develop and maintain appropriate policy and legal measures' that promote the sustainable use of PGRFA. Such measures may include *inter alia* fair agricultural policies that enhance the sustainable use of agrobiodiversity and other natural resources, scientific research that enhances and conserves farm biological diversity through the maximization of plant varieties for the benefit of farmers, plant breeding efforts that involve the participation of local farmers, especially in developing countries, a broadening of the genetic crop-base and an increase in the range of genetic diversity available to farmers, and the promotion of local crops and so on.[39]

The Treaty calls for a symbiosis between national authorities and international institutions under the Seed Treaty, in the spirit of co-operation. On the one hand parties must seek to integrate the activities contained in Articles 5 and 6, on conservation and sustainable use of PGRFA into their own domestic agricultural and rural development policies and programmes.[40] On the other hand they must share the responsibility, either directly with one another, or through the FAO and other relevant organisations, for *inter alia* the establishment, or strengthening, of the capacity of developing countries in the conservation and sustainable use of PGRFA, including activities related to the enhancement of the genetic diversity of food crops and forages, and the provision of access to and exchange of PGRFA in accordance with the Treaty.[41]

These general provisions, which call upon States to act in unison in order to achieve conservation measures and to develop sustainable practices for the use of PGRFA, may be drafted in the language of obligation but they have been softened by phrases like 'where appropriate' and 'as appropriate' thereby reducing their potential effectiveness. The extent to which they redress the asymmetry in resources and bargaining power between developed and developing countries, the local and the global, the periphery and the centre must be

37 Article 5.1(d) Seed Treaty, above note 9.

38 Article 5.1(e) Seed Treaty, above note 9.

39 Article 6.2(a), (b), (c) and (d) Seed Treaty, above note 9, for examples of such measures; the list is not exhaustive.

40 Article 7.1 Seed Treaty, above note 9.

41 Article 7 Seed Treaty, paragraphs 1 and 2, above note 9.

measured against the inclusion of a stand-alone provision on 'Farmers' Rights' in Article 9 of the Treaty, which has been of particular concern to developing countries over the years.[42] Despite its audacious heading, the provision loses much of its significance when one realises that there is no definition of 'Farmers' Rights' and thus there can be no content to those rights. Instead, the language of compromise has been applied. The 'scope' of Farmers' Rights is limited to a declaratory statement, which recognises 'the enormous contribution that the local and indigenous communities and farmers [...], particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources', and is not unlike similar language that was initially taken up in the International Undertaking.[43]

Even so, the Seed Treaty text speaks of a responsibility for national governments to realise Farmers' Rights in relation to PGRFA. There is a duty incumbent upon those governments to protect and promote Farmers' Rights, including the protection of traditional knowledge related to PGRFA, the right of farmers to equitably share in benefits arising from the utilisation of PGRFA and the right to participate in decision making at the national level related to the conservation and sustainable use of PGRFA.[44] Moreover, there is an explicit recognition of the right of farmers to 'save, use, exchange and sell farm-saved seed/propagating material' although subject to national law where appropriate.[45] Indeed, it is this latter characteristic of Farmers' Rights that appears to be in current usage.

3. Access and benefit-sharing of PGRFA under the multilateral system: The common heritage principle forsaken?

The most significant part of the Seed Treaty is the inclusion for the first time in the history of plant genetic resources of a 'Multilateral System of Access and Benefit-Sharing' (the Multilateral System).[46] While the Treaty is intended

42 See the third interpretation to the International Undertaking, above note 23, and Girsberger, above note 26.

43 Article 9.1, Seed Treaty, above note 9 together with the second interpretation of the International Undertaking, above note 22.

44 Article 9.2 *in extenso* of the Seed Treaty, above note 9.

45 Article 9.3 Seed Treaty, above note 9.

46 Article 1 Seed Treaty, above note 9.

to cover all genetic material for food and agriculture,[47] States that become parties to it undertake to guarantee access to the genetic material of 35 basic food crops and 29 forages (listed in Annex I to the Treaty) that are in the public domain and are considered essential for global food security and interdependence.[48] The Multilateral System also includes PGRFA listed in Annex I, which is held in the *ex situ* collections of the international agricultural research centres (IARCs) that are members of the CGIAR, as well as in the gene bank collections of other international institutions.[49] These *ex situ* collections alone cover some 660, 000 accessions of crop germplasm.

3.1 Appraisal of the Access and Benefit-Sharing Provisions under the Multilateral System

Under the terms of the Seed Treaty those States that become parties must grant access to one another (and provide for similar access by legal and natural persons under their jurisdiction[50]) in accordance with Article 12.3 of the Treaty. The terms of access are aligned with public research and development needs, i.e. access is intended primarily to be for use and conservation purposes in connection with research, breeding and training for food and agriculture.[51] Access must be granted expeditiously, free of charge (or at minimal cost), with available 'passport' data, without the recipient claiming any intellectual property, or other rights over the PGRFA, or their genetic parts or components, with discretionary access for PGRFA being developed by farmers and with full

47 Article 3 Seed Treaty on 'scope', above note 9.

48 Article 11, paragraphs 1 and 2 of the Seed Treaty make reference to Annex I, which contains a list of 35 food crops and 29 forages (accounting for 85% of global human nutrition). While there are some 170 food crops and forages that are considered to be essential, the Annex currently contains all of the major staples such as wheat, barley, corn (maize), rye, potato, rice and sorghum. However, there are some notable exceptions, perhaps the most important of which is the soybean that China managed to successfully keep out of the list. Also missing are crops such as groundnut, peanut, palm oil and sugarcane that are important to many developing countries; see the relevant provisions in the Seed Treaty, above note 9.

49 Article 11.5 *juncto* Article 15.1(a) Seed Treaty, above note 9.

50 Article 12.2 Seed Treaty, above note 9.

51 Article 12.3(a) Seed Treaty, above note 9, specifically states that this should not include 'chemical, pharmaceutical and/or other non-food/feed industrial uses'.

recognition of any existing intellectual and other property rights on accessed PGRFA, where the latter applies.[52]

One of the more contentious points during negotiations was whether language contained in Article 12.3(d) of the Treaty, which otherwise forbids the grant of any intellectual property right (IPR) over the accessed PGRFA, nevertheless paves the way for patenting of that germplasm when it concerns their 'genetic parts, or components, in the form received from the Multilateral System'.[53] Ultimately, the issue was side-stepped in the final text of the Seed Treaty by adopting language that reflects a compromise, i.e. the contentious wording was retained alongside the prohibition on IPR's. However, the retention of this language could be subject to varying interpretations in the future. This is even more likely given that the principal means of regulating access will be through the use of a standard material transfer agreement (or MTA), and it is intended that such an MTA will also be applied to transfers to third parties and all subsequent transfers.[54]

For the States that become parties to the Seed Treaty and for the crops that are covered under the Multilateral System, the Treaty to some extent re-estab-

52 Article 12.3(a) through (f) Seed Treaty, above note 9.

53 The point here is that in those jurisdictions (mostly developed countries) where the patenting is permitted of DNA sequences and chemical substances, which have been isolated from the germplasm without any structural modification, the patent holder could, subject to possible research exemptions, restrict the use of the protected sequences or compounds by others, or even access thereto in the event that the patent covers the method of isolation.

54 The form of the standard material transfer agreement (or MTA) has yet to be adopted by the Governing Body, viz. Article 12.4, Seed Treaty, above note 9. For a survey of MTA's used by the IARCs in the CGIAR, including model clauses, see John H. Barton and Wolfgang E. Siebeck, *Material Transfer A*greements *in Genetic Resources Exchanges – the Case of the International Agricultural Research Centres*, Issues in Genetic Resources No. 1 (1994). Further, Daniel M. Putterman, 'Model Material Transfer Agreements for Equitable Biodiversity Prospecting' in John Mugabe et al. (eds.) *Access to Genetic Resources: Strategies for Sharing Benefits* (African Centre for Technical Studies, Environmental Policy Series No. 8: 1997). Reference to an extensive collection of documentation on various contractual arrangements for access and benefit sharing of biological resource where intellectual property rights may also be claimed, can be found in *Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing*, a report from WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Second Session, Geneva, December 10 to 14, 2001, WIPO/GRTKF/IC/2/3, September 10, 2001, available at www.wipo.int/globalissues/igc/index.html.

lishes the idea that PGRFA are public goods, freely accessible and exchangeable for conservation and use by all. This is in stark contrast to the gradual evolution of a system whereby PGRFA increasingly have been thought of as private goods that could be bargained for because they were subject to claims and entitlements, which are protected by national intellectual property regimes.[55] Indeed one of the most controversial points throughout the seven years of negotiation was the issue of plant genetic information and technology that was protected by intellectual property rights and confidentiality clauses, i.e. proprietary technologies.

It was one reason for the United States to abstain from adoption of the final text of the Seed Treaty and to initially declare that it was unable to become bound by its terms; subsequently it signed the Treaty in the latter part of 2002.[56] Canada and Japan, representing a signatory State and an abstaining State respectively, were also troubled as to whether the intellectual property provisions in the Seed Treaty would be compatible with existing intellectual property regimes; Canada[57] but not Japan has subsequently signed. At the time of adoption of the final text both States questioned the compatibility of Article 12.3(d) of the Seed Treaty with the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs), in particular Article 27.3(b) TRIPs, that requires WTO Members to grant patents on micro-organisms and non biological and microbiological processes, and to establish some kind of intellectual property rights protection for plant varieties.[58] The issue is not helped by the 'savings clause' in the Preamble to the Seed Treaty which states that 'nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements'.[59]

55 See Footer, note 13, at section II, 50-54 for a description and evaluation of agrobiodiversity and the commodification of PGRFA.

56 On 1 November 2002 the United States informed the FAO Council that it had signed the Seed Treaty; for details see http://www.fao.org/Legal/TREATIES/033s-e.htm.

57 Canada ratified the Seed Treaty on 10 June 2002; see *Report on the Status of Signatures and Ratifications of the International Treaty on Plant Genetic Resources for Food and Agriculture*, CGFRA/MIC-1/02/10, above note 11.

58 See *BRIDGES Trade BioRes* vol. 1, No. 1 (Geneva: November 2001).

59 See Seed Treaty, Preamble (tenth recital), above note 9. This type of language in a treaty is called a 'savings clause' because if at the time of adoption of the treaty there exists an agreement which contradicts the later in time one then the earlier agreement will take priority and its rights and obligations will prevail. Thus, earlier agreements are effectively 'saved'. This has been done with respect to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 39 *ILM* (2000) 1027, in force, 11 September 2003 [hereinafter Biosafety Protocol]. The tenth recital to the Biosafety

If, as seems increasingly likely, at least for many developing countries, Members were to adopt *sui generis* legislation in order to fulfil their obligations under Article 27.3(b) TRIPs then this could be a way of resolving potential conflicts with their obligations under the Seed Treaty. Some States have already moved closer to implementing Article 27.3(b) TRIPs, with the adoption of *sui generis* legislation but in the process may not have taken the Seed Treaty into account.[60]

The benefit-sharing provisions contained in Article 13 of the Seed Treaty are extensive and have been developed in advance of similar provisions on access and benefit-sharing of genetic resources under the CBD. As mentioned already, the *Ad Hoc* Open-ended Working Group under the CBD has now produced a set of international guidelines and other approaches on access and benefit-sharing (the Bonn Guidelines) that were submitted to COP-6 for adoption.[61]

As a starting point, the Seed Treaty takes the approach that all benefits arising from use, including commercial use, of PGRFA in the Multilateral System are to be shared equitably through one of four mechanisms: (i) exchange of information; (ii) access to and transfer of technology, (iii) capacity-building; and (iv) sharing of benefits where these arise from commercialisation.[62] Whatever mechanism is chosen it must take into account the priority activity areas in the FAO's rolling Global Plan of Action,[63] which will depend on the ef-

Protocol contains such language, thereby ensuring the supremacy of WTO rules over the Protocol's standards. See David R. Downes, *Integrating Implementation of the Convention on Biological Diversity and the Rules of the World Trade Organization* (Gland, Switzerland and Cambridge, UK: IUCN, 1999), 28.

60 This appears to be the case with India. On 11 December 2002, the Indian Upper House of Parliament (Rajya Sabha) passed the Biological Diversity Bill 2000. It seeks to check biopiracy, protect biological diversity and local growers through a three-tier structure of national and state boards and local committees, which will oversee the access to and benefit sharing of plant and animal genetic resources. See Chandrika Mago, 'Rajya Sabha okays Biodiversity Bill', reported in *Times of India,* 12 December 2002. Even before its adoption, the proposed new law came under fire from critics; see Vandana Shiva and others from *One World South Asia*, 9 December 2002. Both reports were carried in *GRAIN Los Banos BIO-IPR docserver*, 12-12-02, available at http://www.grain.org.

61 For details of developments under the CBD and the Bonn Guidelines, see above notes, 8 and 35.

62 Article 13.2, Seed Treaty, above note 9.

63 In other words, the FAO's Global Plan of Action for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture, referred to in Article 14 of the Seed Treaty, which was set up as far back as 1983 as one of the 'Global Instruments' in the overall *FAO Global System*, previously referred to above, note 24. Its primary

fective implementation of the benefit-sharing provisions in the Seed Treaty, and the funding strategy to be set up for the implementation of the Treaty under Article 18. It is intended that the latter will eventually include a Trust Account 'for receiving and utilizing financial resources that will accrue to it [i.e. the Multilateral System]' under the Treaty.[64]

This operative section of the Seed Treaty seeks to redress some of the more obvious asymmetries between gene rich developing countries of the South and the gene hungry countries of the North with its inclusion of provisions relating to the sharing of monetary and other benefits arising from commercialisation.[65] The means of achieving this are to be through 'the involvement of the private and public sectors' and 'through partnerships and collaborations, including with the private sector in developing countries […] in research and technology development'.[66] Additionally, the standard MTA for all transfer of germplasm under the Multilateral System will include a requirement that any recipient who commercialises a product, which is a PGRFA *and* incorporates material accessed from the Multilateral System, must pay an equitable share of the benefits arising from commercialisation of that product into the funding mechanism under the Treaty (i.e. the Trust Account).[67]

The access and benefit-sharing regime envisaged under the Seed Treaty foresees the development of funding strategies, details of which are set out more fully in Article 18. It includes funding through bilateral, regional and multilateral channels with funds from such sources being paid into the Trust Account.[68] The Treaty also specifically recognises that the monetary benefits from commercialisation can form part of the funding strategy.[69] When it comes to multilateral funding strategies, it will be recalled that one of the aspects of the 1983 FAO Global System, under which the International Understanding operated, was that an International Fund for Plant Genetic Resources should be set up. It was duly established in 1989 but never became operational. How-

task is to provide a periodic reporting system (by FAO Member governments) in order to keep track of the state of the world's plant genetic resources. See the Leipzig Report, above note 6, which is a product of that process.

64 Articles 18.4 (d)(ii) juncto Article 19.3(f) Seed Treaty, above note 9.

65 Article 13.2(d) Seed Treaty, above note 9.

66 *Ibid.*, at section (i).

67 *Ibid*., at section (ii).

68 Article 18.4(c) *juncto* Article 19.3(f) Seed Treaty, above note 9.

69 Article 18.4(e) *juncto* Article 13.2(d) Seed Treaty, above note 9.

ever, the decision to consider a variety of funding mechanisms could make the difference.[70]

Indeed, the potential success or failure of the future of the Seed Treaty may hinge on the first meeting of the Governing Body under the Treaty, which has yet to take place. This could prove to be highly contentious; one of its tasks will be to set the level, form and manner of payment under the commercialisation provisions of Article13.2(d) of the Seed Treaty, in line with commercial practice. This could include the possibility of setting different levels of payment for various categories of recipients who commercialise PGRFA products but of exempting others such as small farmers in developing countries.[71] Were the Governing Body to do this, it could lead to the creation of different levels of payment and the unfair practice of split pricing with the consequent asymmetry of result in respect of benefit-sharing among the various categories of recipients. Instead, one possibility might be for the Governing Body to consider a system of direct subsidisation to the beneficiaries of the resulting commercialisation.[72] However, this may prove unlikely since some of the signatories to the Treaty (e.g. Argentina, Australia, Brazil, Canada and Uruguay) have been engaged in multilateral efforts in other *fora* to roll back subsidies in sensitive sectors like agricultural trade.[73] Should States fail to reach agreement on the

70 One such initiative is the Global Conservation Trust, a public-private partnership (FAO/CGIAR and Syngenta/Glaxo), which has been established as an endowment fund for the permanent funding of *ex situ* conservation of PGRFA germplasm in genebank collections. Launched in June 2001, the plan was presented at the World Food Summit, held under the auspices of the FAO held in Rome, June 2002 and elaborated upon at the World Summit on Sustainable Development held in Johannesburg, August, 2002. It currently stands as one of the partnership initiatives in the field of agriculture, food security and rural development under the *Sustainable Development in Action Plan*, the follow-up programme of action to the Johannesburg Summit. See further Bonwoo Koo, Philip G. Pardey and Brian D. Wright, 'Conserving Genetic Resources for Agriculture: Counting the Cost', Brief 6 of the International Food Policy Research Institute (IFPRI) Series *Research at a Glance: Biotechnology and Genetic Resource Policies*, (University of Minnesota and IFPRI, Washington, D.C., January 2003).

71 The Governing Body *may* decide to do this in respect of either or both options, *ibid*.

72 I am grateful to ILA Committee Member, Karl Meesen for this suggestion. He foresees possible challenges to the pricing aspects of the commercialisation provisions from competition authorities in domestic *fora*.

73 Reference is to those signatories to the Seed Treaty, which are WTO Members and are part of the Cairns Group of non-subsidising, agricultural exporting countries, formed in 1986. The Cairns Group takes its name from the Australian city where the first meeting of the group was held. It currently consists of Australia, Argentina, Brazil,

matter of commercial payments, the first meeting of the Governing Body could end in paralysis.

The idea that the monetary and other benefits arising from PGRFA that are shared under the Multilateral System should flow back primarily, either directly or indirectly, to farmers in all countries but particularly to developing country farmers, who are involved in the conservation and sustainable utilisation of those resources, is purely utopian. From a practical point it is not clear how this is to be achieved. Moreover, there is a need to identify the 'farmers' in the absence of such a definition in the Seed Treaty.[74]

Kerry ten Kate and Sarah Laird, when discussing access and benefit sharing of genetic resources, in their work on the commercial use of biodiversity note the sheer impracticalities of monitoring and enforcing access and benefit-sharing arrangements. This is due to the fact that genetic material travels from countries of origin to public and/or private sector entities 'through a complicated route, passing through many hands from collection to commercialisation, with value being added at each stage'.[75] They also point out that the commercialised product may not be physically linked to the original genetic resources, perhaps because it has undergone basic modifications to its chemical structures, originally found in nature.[76] This makes it difficult to track exchanges of genetic resources and to link them to the sharing of benefits.

It also raises serious doubts about the extent to which collaborative partnerships can be achieved, as foreseen in the Seed Treaty.[77] A MTA, which is supposed to facilitate the access and exchange of genetic material between legal/natural persons in the Multilateral System, will have to cope with the exigencies of the scientific and business communities.[78]

Canada, Chile, Colombia, Fiji, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay).

74 Article 9 of the Seed Treaty, above note 9, speaks about Farmers' Rights but does not actually define them. However, it is generally understood that Farmers' Rights come close to the wording contained in the second paragraph of Article 9, namely the 'rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material'.

75 Kerry ten Kate and Sarah A. Laird, 'Biodiversity and business: coming to terms with the "grand bargain"' vol. 76:1 *International Affairs* (2000) 241-264 at 244.

76 Of course this ties in with the IPR issues to which reference has already been made, see above note 53 and text accompanying that note in the main body of the text.

77 Articles 13.2(d), Seed Treaty, above note 9; see also the main text accompanying note 66.

78 It should be noted that, in accordance with Article 12.5 of the Seed Treaty, above note 9, contractual disputes arising under an MTA should be settled according to the jurisdiction and governing law clauses contained in a particular MTA.

Implicit in benefit-sharing arising from the commercialisation of a PGRFA product, incorporating germplasm accessed from the Multilateral System is the notion that there can be segmented markets in PGRFA, i.e. both commercial and non-commercial markets. The commercialisation provisions in the Seed Treaty introduce this notion alongside the prospect of price setting and the possibility of cross-sectoral bargaining in the international sphere. Developing countries in particular, as centres of origin and crop diversity in the matter of PGRFA, may feel under increasing pressure to exploit their PGRFA-base for commercial gain. Possibly encouraged by the interests of private actors[79] certain developing countries may 'overplay' their genetic hand and simply overestimate the value of their PGRFA when it comes to international exchange.[80]

Moreover, the spectre of developing states (or their natural and legal persons, including national agricultural research stations, or NARCs) undercutting one another in an attempt to obtain a bioprospecting contract cannot be discounted. Another issue is the sheer practical difficulty that States face in ensuring that the benefits of facilitated access flow back to the persons/communities of origin from whence the PGRFA is sourced. A further factor for developing countries could be that their indigenous and local farming communities might simply dispose of their ownership rights to PGRFA too cheaply. This is not because they attribute low value to them but either because they are poor,[81] or they never attributed any particular financial value to those resources in the first place.[82]

Notwithstanding these remarks, the Seed Treaty appears to redress the asymmetry in plant genetic resources and bargaining power between developed and developing countries in a quite extraordinary way. There is a widespread belief that the free exchange paradigm, which arose out of the recognition of PGRFA as a common heritage of humankind, largely benefited developing countries in the South because it encouraged public and private sector breeding.

79 Article 13.2(d)(i)) of the Seed Treaty, above note 9, emphasises collaborative partnership initiatives.

80 See ten Kate and Laird, above note 75, at 244. They note that this is often due to insufficient commercial demand for access to genetic resources in order to generate the benefits that will create the incentive to conserve biodiversity.

81 Sean D. Murphy, 'Biotechnology and International Law' vol. 42:1 *Harvard International Law Journal* (Winter, 2001), 47-139, at 73, who qualifies his remarks by suggesting that it may be both immoral and inequitable for the market to be allowed to serve present and future generations in this way.

82 In some societies and communities, other values, e.g. moral, symbolic or intrinsic, may attach to PGRFA.

However, if this were true it would be counterintuitive for developing countries to support the Seed Treaty, which largely abandons the common heritage principle in favour of the principle of sovereignty.

In fact, a strong sovereignty-based Seed Treaty best serves many developing country interests. Support for this comes from a commonly held view in those countries that the free-exchange paradigm has worked to their disadvantage, by allowing bioprospectors from the North unprecedented access to their genetic diversity without fair and adequate compensation. The Seed Treaty redresses this imbalance. By restoring the sovereignty paradigm, developing countries are able to (re-)assert ownership of PGRFA located within their territories as limited but valuable property rights and as a means of extracting benefits from those who use them for scientific research, plant breeding or genetic resource conservation.[83] Once again the underlying schism in environmental and developmental concerns, so prevalent in many developing countries, is played out in the field of genetic resource management, as has been the case on previous occasions in respect of other common heritage régimes.[84]

3.2 The common heritage principle forsaken? Article 15 and the 'ex situ' collections

This leads on to the issue of the relationship of the Seed Treaty to the International Undertaking, the latter of which held that 'plant genetic resources are a heritage of [hu]mankind and consequently should be available without restriction'. It would appear that the common heritage principle has largely been abandoned in favour of a 'common concern of humankind' approach towards PGRFA, as evidenced by the preambular text in the Seed Treaty.[85] This is

83 Ambassador Costa Mahalu, Chairman of the African Group of Members to the FAO and ILA Committee Member, explains the African countries' support for the Seed Treaty in these terms.

84 Other common heritage régimes include the deep seabed (Article 136 UN Convention on the Law of the Sea, entered into force 1994, 1833 *U.N.T.S.* 3 at 446); outer space, in particular the geostationery orbit (Article 1, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, in force 11 July 1984, 610 *U.N.T.S.* 205, at 207; and geographical and cultural sites of importance to our common heritage (Preamble to the Convention for the Protection of the World's Cultural and Natural Heritage', in force 23 November 1972, 1037 *U.N.T.S.* 151 at 152).

85 Seed Treaty, Preamble (third recital), above note 9; the actual text speaks of the 'common concern of all countries' rather than the 'common concern of humankind'.

consonant with the principle and practice of modern international environmental law, in particular the preambular text of the CBD.[86] Even so, the common heritage principle may live on in the more modest guise of Article 15 of the Treaty, which attempts to maintain it for part of the *ex situ* collections of PGRFA, held in the seedbanks of the twelve IARCs under the CGIAR and other international agricultural institutions, around the world.

A vast majority of crop germplasm held in those research stations was collected from the fields and forests of farming communities in the developing countries of the Southern Hemisphere. Scientists and many governments have always believed this germplasm to be held 'in trust' for the benefit of the international community, in particular, for developing countries. However, entry into force of the CBD in 1993, with its emphasis on states' permanent sovereignty over their natural resources and global partnership instead of the common heritage approach, gave rise to concern about the legal status of those *ex situ* collections.[87] Already in 1994, as an interim measure and in order to deal with the entry into force of the CBD and its sovereignty-based, bilateral approach towards the exchange of genetic resources, the FAO[88] and the CGIAR jointly decided to develop agreements with the twelve IARCs in order to keep the germplasm at those research stations in the public domain for the benefit of all humanity. It eventually led to the placing of some 660, 000 crop germplasm accessions in the international network and the agreements were renewed in 1998.[89]

The Seed Treaty continues to recognise these *ex situ* collections of PGRFA as being held 'in trust' by the IARCs while a new system of agreements must

86 CBD, Preamble (third recital), above note 8.

87 The CBD does not explicitly deal with *ex situ* collections, such as exist at the 12 IARCs in the CGIAR, or other genebanks and that were established prior to the CBD's entry force mainly because no agreement could be reached on the matter. Instead, negotiators adopted Resolution 3 at the Nairobi Conference, requesting that it be dealt with through the *FAO Global System*; see above, note 24.

88 In fact the FAO operating though the FAO Commission on Plant Genetic Resources (since re-named the Commission on Plant Genetic Resources for Food and Agriculture, or CGRFA).

89 The IARCs agreed to conserve PGRFA germplasm under conditions that met international standards and not to take out any exclusive intellectual property right on the collected germplasm. They further undertook to ensure that entities receiving germplasm samples were bound by the same obligations and, in the event that the material was transferred or exchanged, under a material transfer agreement (MTA), to transfer this obligation to another person or entity, as well as any subsequent transfers; see Footer, note 13, at 78-79.

be concluded between the IARCs and the Governing Body (once established) under the Treaty.[90] As a general principle, the *ex situ* collections of crop germplasm, which are listed in Annex I of the Seed Treaty and are held by the IARCs, will henceforth fall under the Multilateral System and will be subject to the provisions set out in Part IV of the Treaty,[91] upon its entry into force.[92] Financial benefits flowing from the exchange of germplasm in the *ex situ* collections that fall under the Multilateral System, i.e. the Annex I listings held by the IARCs, will accrue to the funding mechanism to be set up under the Treaty (the Trust Account). It is intended that those financial benefits will be used for conservation and sustainable use of the PGRFA in national and regional programmes located in developing countries, which are centres of genetic diversity, and least developed countries.[93]

Crop germplasm in those same *ex situ* collections, which are *not* on the Annex I list, and were collected *prior* to the date of entry into force of the Seed Treaty, will continue to use the existing FAO/CGIAR agreements (and the relevant MTA) in order to facilitate access. Once established, the Governing Body will monitor future use of the particular MTA under those agreements within four years of entry into force of the Treaty.[94] Despite the fact that Article 15 of the Seed Treaty still speaks of holdings in the *ex situ* collections as being held 'in trust' for the international community there is no actual mention of the common heritage principle, as was the case under the International Undertaking. It is therefore uncertain whether the principle can still be said to apply to these two categories of *ex situ* holdings.

Crop germplasm in the *ex situ* collections, which are *not* on the Annex I list, but were collected *after* the date of entry into force of the Seed Treaty will be made available on a bilateral basis, on terms mutually agreed between recipient IARCs and countries of origin, i.e. those countries that possess genetic resources *in situ* and those countries that have acquired genetic resources in accordance with the CBD (both considered as source countries under the Seed Treaty).[95] These holdings are designated as sovereignty-based and therefore follow the general principles of the CBD on access and benefit sharing, although

90 Article 15.1 Seed Treaty, above note 9.

91 Article 15.1, paragraph (a), and Article 15.2 Seed Treaty, above note 9.

92 As noted previously, above note 11, the Seed Treaty is in force as of 29 June 2004.

93 Article 15.1 (b)(iii) Seed Treaty, above note 9.

94 Article 15.1(b) and Article 15.2 Seed Treaty, above note 9; in practice, at least until the end of June 2008.

95 Article 15.3 Seed Treaty, above note 9; this provision is virtually identical to Article 15(3) CBD) and indeed references the CBD, above note 8.

subject to the particular legal régime of the Seed Treaty since they form a species of PGRFA.

Legally speaking, although the matter is open to doubt, the possibility exists that PGRFA under the Seed Treaty, which are held in IARCs and other international institutions, may be considered either as common heritage or as sovereignty-based holdings. Technically speaking, once the germplasm has left the IARC genebank in question, it may be difficult to maintain the strict monitoring and surveillance of the movements of that material and to deal with all the legal consequences that may arise from its possible commercialisation under the access and benefit-sharing provisions, as foreseen in the Seed Treaty for certain groups of *ex situ* collection holdings. In light of such practical difficulties, the actual nomenclature of the *ex situ* holding from which the crop germplasm has been accessed for exchange under the Multilateral System may be irrelevant. The common heritage principle appears to have been abandoned in favour of a more general form of international stewardship, which is supported by the vaguer concept of the common concern of humankind.

4. PGRFA and intergenerational equity

Alongside the evolution of an international régime for the conservation and sustainable use of PGRFA, States continue to express concern for the well being of future as well as present generations.[96] In the environmental sphere the principle of intergenerational equity draws upon notions of equality and fairness[97] in seeking to provide a balanced, safe and healthy environment for all,

96 For a list of international legal materials (bilateral and multilateral agreements) that make reference to future generations, see the Appendix in Emmanuel Agius & Salvino Busuttil, *Future generations & international law* (eds.) (London: Earthscan Publications/FIELD, 1998), 167-176. For a short but excellent appraisal of the theory of intergenerational equity, see Catherine Redgwell, 'Intergenerational Equity and Global Warming', chapter 3 in Robin Churchill and David Freestone, *International Law and Global Climate Change* (London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1991) 41-56.

97 This idea is reflected in Rawl's theory of 'justice as fairness' which would be incomplete without discussing the problem of justice between generations. Rawls explains this by applying the 'just savings principle', whereby every generation is expected to hand on the planet to its immediate posterity in a better condition than the one in which it inherited it; anything less would be unfair to future generations, anything more would be unfair to present ones. For further details of Rawl's contractarian approach, as a means for defining the principles of international equity see John Rawls, *A Theory of Justice* (Oxford: Oxford Paperbacks, Oxford University Press, 1973 ed.) 284-293. For a view

including the unborn. The principle is confirmed in the *dictum* of the International Court of Justice in its 1995 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, when it stated ' … the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.'[98] In the management of natural resources, equity continues to play a vital role in determining the allocation and sharing of those resources among the ultimate beneficiaries, as evidenced by the case law of international tribunals.[99]

Taken together we can say that the principle of intergenerational equity is the principle that governs the rights of future generations (including the unborn) to the preservation of natural resources under a sustainable management regime that protects those resources for their future benefit.[100] But intergenerational equity calls not only for equality between generations but also among generations, i.e. *intra*generational equity. This is because, as Edith Brown Weiss observes:

> '[We] as a species, hold the natural and cultural environment of our planet in common, both with other members of the present generation and with other genera-

on 'intergenerational fairness', see the Separate Opinion of Judge Weeramantry in *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Maayen* (*Denmark* v. *Norway*), ICJ Reports (1993) at 83.

98 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports (1996), 241-242, para. 29.

99 The case law of the International Court of Justice (and its predecessor, the Permanent Court of International Justice) in the matter of rights and obligations of riparian States, continental shelf delimitation and fisheries jurisdiction are fields where the contentious jurisdiction of the Court bears witness to the application of the principle of equity as a general principle of fairness and justice in deciding territorial and natural resources disputes. See also Judge Weeramantry's remarks concerning intergenerational fairness, above note 97 and his specific reference to the emerging principle of intergenerational equity in the Order of the International Court of Justice in the case *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 30 December 1974 in the Nuclear Tests Case (New Zealand* v. *France*) (Dissenting Opinion of Judge Weeramantry), ICJ Reports (1995), 288, para. 98.

100 For a slightly different definition, which emphasizes the role of sustainable development in intergenerational equity, see Redgwell, above note 96, at 42. It should be noted that the principle of intergenerational equity is fraught with difficulties. The immediate issue that arises is: what obligations can there be towards the unborn and even the unconceived? The paradox lies in the non-identity problem, referred to by Derek Parfit in *Reasons and Persons* (Oxford: Clarendon Press, 1984), chapter 16; see also Per Ariansen, 'Beyond Parfit's Paradox', chapter 2 in Agius and Busuttil, above note 96.

> tions, past and future. At any given time, each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits. This imposes obligations upon us to care for the planet and gives us certain rights to use it.[101]

The idea that we have obligations, as trustees or stewards of our planet, to conserve natural resources (including PGRFA) for future generations and to have access to their benefits is deeply rooted in the diverse legal traditions and practices of the international community. In specific terms intergenerational equity, as applied to PGRFA, focuses on the inherent relationship that each generation has to other generations, past, present and future in using the common heritage of plant genetic resources.[102] Intergenerational equity could thus play an important role in preserving our agricultural heritage.

Brown Weiss proposes three basic principles that underpin intergenerational equity – conservation of options, conservation of quality and conservation of access.[103] Each of these principles may constrain the actions of present generations in developing the natural and cultural resources of our planet but they do not dictate how the present generation should manage them. The first principle of *conservation of options* is the protection of diversity which enables natural resources to remain viable and serves to avoid over-exploitation, thereby not unduly restricting the options available to future generations for the use of those resources. The second principle of *conservation of quality* supplements the previous principle and requires that quality of natural resources remains unimpaired such that future generations may inherit those resources in a comparable state to the one enjoyed by the previous generation. The third principle of *conservation of access* considers that each generation must provide its members with equitable rights of access to the natural resources inherited from past generations in order to improve their socio-economic well being but recognises that the present generation has the duty to preserve this access for future generations.[104]

101 See Brown Weiss, above note 12, at 17 and also the earlier comments in relation to Franck's arguments about fairness, above note 14.

102 In fact in order for the concept of intergenerational equity to be effective there must, of necessity, be a parallel set of obligations and rights for those of the current generation that are *intra*generational in character; see Brown Weiss, above note 12, at 21-23 for an explanation of this.

103 *Ibid*, at 38.

104 *Ibid,* extensively at 40-45.

In postulating her theory of intergenerational equity, Brown Weiss is of the view that these principles form the basis of a set of planetary, or intergenerational, rights and obligations, which are integrally linked and co-exist in each generation.[105] Thus, '[I]n the *inter*generational dimension, the generation to whom the obligations are owed are future generations, while the generations with whom the rights are linked are past generations.'[106]

The Seed Treaty recognises the principle of intergenerational equity in its preambular text when it says that States are '[*A*]*ware* of their responsibility to past and future generations to conserve the World's diversity of plant genetic resources for food and agriculture'.[107] It also sets out, in its general provisions, the fundamental principle of conservation and use of PGRFA for present and future generations, thereby fulfilling the criteria for the conservation of options that Brown Weiss foresees. Only time will tell, once the Seed Treaty has entered into force and the Multilateral System is operational, whether the mechanism of facilitated access and benefit-sharing offers sufficient guarantees for the fulfilment of the principles of conservation of quality and conservation of access. In the case of the principle of conservation of access, the test may be whether parties to the Seed Treaty are capable of translating the strict conditions on access, contained in Article 13 of the Treaty, into national implementing measures, particularly those provisions that favour indigenous and local farming communities in centres of genetic origin and crop diversity from whence vital Annex I crop germplasm emanates.[108]

This ties in with the responsibility that States must shoulder for the realisation of Farmers' Rights related to PGRFA in their territories,[109] including the duty to allow farmers to continue 'to save, use, exchange and sell farm-saved seed/propagating material'.[110] Additionally, for those parts of the *ex situ* collections that are held 'in trust' for the international community it remains to be seen whether international stewardship over PGRFA can survive in the brave new world of the Multilateral System.

105 *Ibid*, at 45.

106 In the *intra*generational context this translates into planetary rights and obligations that only exist between members of the same generation.

107 Seed Treaty, Preamble (thirteenth recital), above note 9. It hereby joins the parade of international instruments that are taken up in Agius and Busuttil; for details see above note 96.

108 Article 12.3, paragraphs (e) and (h) Seed Treaty, above note 9.

109 Article 9.1 Seed Treaty, above note 9.

110 Article 9.3 Seed Treaty, above note 9.

While the Seed Treaty anticipates planetary or intergenerational obligations with respect to the crop germplasm listed in Annex I, the position of approximately 100 unlisted food crops and forages may be more precarious. Various provisions in the Seed Treaty make it clear that the Treaty applies to all PGRFA but that the access and benefit sharing obligations under the Multilateral System are limited *in fine* to Annex I food crops and forages. Due to the potential difficulty of operating the consensus rule in favour of adding new crops to Annex I in the future, the list contained therein might even be considered a closed one.[111]

Once the Seed Treaty enters into force national governments will have to exercise greater scrutiny in respect of its implementation before it is clear whether the Treaty sufficiently safeguards intergenerational rights to PGRFA, i.e. the right of each generation to receive those resources in no worse condition than the predecessor generation.[112] Does the Seed Treaty hold out the possibility, as Simone Borg suggests in respect of other natural resources,[113] that future generations have the right to inherit a sustainable agricultural environment where conservation of quality and conservation of access to PGRFA have been retained and used by preceding generations? Does the wording of Article 9, second paragraph, of the Seed Treaty contain sufficient guarantees to farmers for the protection and promotion of their rights? These guarantees are to include *inter alia* the duty of national governments to take measures in order 'to protect and promote Farmers Rights'[114] including (i) the protection of traditional knowledge in PGRFA, (ii) the right of farmers to equitable participation in the benefits arising from their utilisation and (iii) their right to participate in decision making at national level related to the conservation and sustainable use of PGRFA.[115]

The corollary of intergenerational equity is intergenerational justice and it too has attracted considerable attention. As noted already, some people have questioned how planetary rights and obligations can be ascribed to individuals that do not yet exist, either because they are unborn, or have not yet been conceived, and thus can have no legal status.[116] This begs the question of

111 Article 23.3 *juncto* Article 24.2 Seed Treaty, above note 9.

112 See Simone Borg, 'Guarding Intergenerational Rights over Natural Resources' in Agius and Busuttil, note 96, chapter 11, 127-141 at 132.

113 *Ibid*, at 133.

114 Article 9.2 Seed Treaty, above note 9.

115 Article 9, paragraph 2 *in extenso* Seed Treaty, above note 9.

116 Borg, above note 112, 131, who also reviews the issue from the perspective of intertemporal law.

how such rights can be articulated if there is no clear knowledge of who those rights are intended to protect.[117]

Jurisprudential problems aside, it appears that some national courts have not shied away from using the principle of intergenerational equity as an aid to construing existing legislation, as demonstrated by the Supreme Court of the Philippines in a landmark case of 1994. In *Minors Oposa* v. *Secretary of the Department of Environment and Natural Resources (DENR)*,[118] the principle of intergenerational equity was applied to the issue of standing in relation to forty-two children and the Philippine Ecological Network. Jointly they brought a class action calling upon the defendant, DENR, to cancel all logging permits in the Philippines because of the widespread deforestation and destruction of the country's flora and fauna, caused by excessive logging operations. The defendant sought to have the complaint dismissed on the grounds that the plaintiffs had no cause of action. The Supreme Court thought otherwise. Noting the 'special and novel element' that the petitioners in question were minors and their assertion that they represented 'their generation as well as generations unborn',[119] the Court said:

> We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the 'rhythm and harmony of nature'…. Such rhythm and harmony indispensably include, *inter alia*, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploitation, development and utilization be equitably accessible to the present as well as future generation.[120]

The Court went on to recognise that intergenerational obligations attach to such intergenerational rights:

117 *Ibid*, noting that the rights of the unborn child are adequately dealt with through the laws of succession in the civil law and through the legal notion of trusts in the common law.

118 *Juan Antonio Oposa et al* v *the Honorable Fulgencio Factoran, Jr., Secretary of the Department of Environment and Natural Resources*, Supreme Court of the Philippines, G.R. no. 10183, reproduced in 33 *I.L.M.* (1994) 173-199.

119 *Ibid*., at 185.

120 *Ibid*.

> Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthy ecology. Put a little differently, the minors' assertion of their right to a sound environmental constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[121]

The extent to which domestic courts in other countries take the same approach depends on a number of factors. The application of the principle of intergenerational equity to PGRFA in the Multilateral System might seem a little far-fetched but it could become a reality. This is because many States, while becoming parties to the Seed Treaty, are also drawing up national access legislation, conform Article 15 CBD. Some may try to dovetail the implementation of their obligations under the Seed Treaty with draft access and benefit-sharing legislation under the CBD in order to cover a diversity of genetic resources within their territories, i.e. related to livestock, forestry, fisheries and micro-organisms, all of which are used for food, fodder, fibre, fuel and pharmaceuticals, in addition to PGRFA. In future, governments could face challenges to their access legislation from individuals, or whole communities, against the grant of a bioprospecting contract or licence, because individuals have relied upon intergenerational equity in support of their cause of action or the substance of their claim.[122] An example of how this might work in practice is demon-

121 *Ibid.*

122 See Philippe Sands, 'Protecting Future Generations: Precedents and Practicalities' in Agius and Busuttil, above note 96, chapter 8, 83-91. He recalls trying to argue the principle of intergenerational equity, on behalf of plaintiffs, before the Scottish Court of Sessions against the grant of planning permission by the Secretary of State for Scotland for the Invergarry-Kyle of Lochalsh trunk road (A87) extension (Skye Bridge Crossing) in violation of Article 6 of the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats. See *Bruce Stevens, Paul Yoxon, Peter J. Findley, Kathleen McRay* v *The Secretary of State for Scotland*, Court of Sessions, 23 June 1992, *ibid*, at 88.
It appears that Indian courts have also applied the principle of intergenerational equity in environmental cases, although not always with even result. In 1993 in *People United for Better Living in Calcutta* v *State of West Bengal*, AIR 1993 CAL 215, a lower court held that 'present day society' had a 'responsibility towards the posterity', i.e. towards future generations, in respect of a clean environment. In 1996 the Supreme Court of India, citing the Bruntland Commission's definition of sustainable development with respect to future generations, held in *Vellore Citizens' Welfare Forum* v *Union of India*, AIR 1996 SC 2715 at 2720, (1996) 5 SCC 647, that intergenerational equity was a 'salient principle' of sustainable development. See Michael Anderson 'International Environmental Law in Indian Courts' in Michael Anderson and Paolo Galizzi (eds.)

strated by the following report from Peru of a seed tribunal, which has used traditional Inca procedures for community conflict resolution in order to try and resolve a dispute involving the patenting of a local Andean bean variety.

Increasingly well-organised groups of local and indigenous farmers have begun challenging resource appropriation of native cultivars, and their subsequent patenting, without the knowledge, or prior informed consent, of local farmers by means of 'seed tribunals' like the one held on 24 February 2001 in the small village of Cuyo Grande situated at one end of the *Valle Sagrado*, or Sacred Valley, home to Inca ruins in the vicinity of Cusco.[123] The complaint concerned the patenting by two University of California researchers of a local bean variety, known as ñuña, which can grow at low altitudes and is a source of nutrition for the people of the Andes. The patent restricts not only all of the United States Plant Introduction Accessions that are listed on ñuña beans but also germplasm currently held in the international bean collection of the Centro Internacíonal de Agrícultura Tropical (CIAT) in Colombia, one of the twelve IARCs in the CGIAR, which is held 'in trust' for the benefit of the international community.

Local farmers protested what they saw as the 'theft' of a resource critical to local food security and of great importance to Andean culture and history. There was anger among local and indigenous farmers that the patent could prevent local attempts to improve ñuña through breeding and future development as an export crop for Peru (currently dozens of ñuña varieties are cultivated and consumed across the Andes), besides destroying traditional methods of cultivation of the ñuña bean by Andean womenfolk.

Although the principle of intergenerational equity was not raised and the event may seem insignificant, given the remote locality of the seed tribunal, it demonstrates the growing concern of some indigenous and local farming communities about the importance of access and benefit sharing of PGRFA coupled with the protection of traditional knowledge. The only decision that the seed tribunal reached was to protest the grant of the patent on the ñuña bean nationally with the CIAT and the Peruvian National Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOPI) and

International Environmental Law in National Courts (London: British Institute of International & Comparative Law, 2002), chapter 8, 145-165 at 164.

123 Report of the Cuyo Grande Seed Tribunal Inquiry, 24 February 2001, reported to the Multistakeholder Dialogue on Trade, Intellectual Property and Biological and Genetic Resources in Latin America, Cusco, Peru, 22-24 February 2001 [on file with the author].

internationally with the World Intellectual Property Organisation (WIPO) in Geneva.

It is doubtful whether the local farmers could have done more. Even though Peru had already enacted a framework law on the Conservation and Sustainable Use of Biodiversity in June 1997, which defines the country's goals and objectives in implementing the CBD and calls for a National Biodiversity Strategy and Action Plan,[124] this is not access legislation. An ambitious and comprehensive draft Protection Regime for the Collective Knowledge of Indigenous Peoples and Regulation of Access to Genetic Resources is still in preparation, as part of a consultative process between the Peruvian Government and various national stakeholders.[125] Seeking to redress some of the asymmetries in genetic resources and bargaining power that were identified earlier, the proposed access legislation aims to strike a balance between the needs of the Peruvian State and indigenous peoples to receive fair compensation for the use and commercial exploitation of their genetic resources with the need to promote national and foreign private investment, scientific research and the development of native natural resources and knowledge.[126] The detailed regulation of the conditions on which access to genetic resources will in future be granted[127] leaves no doubt that, had the legislation already been in place when the seed tribunal convened then there would have been a proper legal basis on which the people of Cuyo Grande could have challenged the Peruvian Government's action, including the involvement of the CIAT and the INDECOPI in the process. Given the importance of the ñuña bean to the indigenous Inca peoples in sustaining their history and culture, intergenerational justice could have played a significant role in the matter.

124 Law No. 26839 on the Conservation and Sustainable Use of Biological Diversity was enacted on 8 July 1997. It recognises the value of the knowledge, innovations and practices of farming and indigenous communities for the conservation and sustainable use of biological diversity. Key features of Law 26839 are the principle of the fair and equitable sharing of the benefits arising out of traditional knowledge and the use of biological diversity, as well as prior informed consent relating to the utilisation of genetic resources. See further *Peru's Experience of the Protection of Traditional Knowledge and Access to Genetic Resources*, Report to the WTO Council on Trade and Environment and the TRIPs Council, Doc. WT/CTE/W176, 27 October 2000 and IP/C/W/246, 14 March 2001, respectively at para. 12.

125 *Ibid*, para. 15.

126 *Ibid*, paras. 16 and 17 for some details of the planned *sui generis* system.

127 *Ibid*, para. 17.

5. Summary and some conclusions

The Seed Treaty reaffirms the idea that PGRFA in the public domain should remain in free circulation and should not be unduly encumbered by private rights and obligations. In so doing, it could lay the foundations for the establishment of an equitable food and agricultural system for future generations, through a broader-based multilateral system of facilitated access and benefit sharing. However, in coming to terms with what ten Kate and Laird call the 'grand bargain', i.e. the magnificent compromise that must be struck by 'participating governments to facilitate access to genetic resources in return for a fair and equitable sharing of benefits',[128] it is by no means certain that the access and benefit-sharing provisions of the Multilateral System will provide sufficient guarantees to users of the system and thereby redress a variety of asymmetries in PGRFA and bargaining power between the gene rich South and the gene poor North.

It is particularly uncertain whether the benefits accruing from commercialisation are sufficiently containable, and capable of implementation by parties to the Treaty, for them to flow back to beneficiary indigenous and local farming communities in centres of origin and genetic diversity. In prohibiting the grant of IPR on material that is accessed through the Multilateral System, the Treaty goes some way to countering the trend towards increased privatisation (and commodification) of PGRFA. However, the wording of the IPR provision is ambiguous and could lead to extensive interpretation.

It would appear that the common heritage principle with respect to PGRFA has largely been forsaken in favour of the principle of common concern of humankind. This approach resonates with current international environmental law and practice. The abandonment of the common heritage principle in favour of a sovereignty-based, bilateral approach towards the exchange of genetic resources is usually perceived by developing countries to work in their favour.

However, the picture is less clear when it comes to the accessions held in *ex situ* collections of plant genetic resources at the IARCs and other international institutions around the world. It is doubtful whether any or some of these holdings can still be considered as part of the common heritage of humankind. It seems more likely that reference to these collections as being held 'in trust' for the international community denotes nothing more than some form

128 Ten Kate and Laird, above note 75, at 242.

of international stewardship. Future experience with facilitated access to these particular holdings in the Multilateral System may test that idea to its limit.

Significant too is the recognition, which the Seed Treaty gives to the control by indigenous and local farming communities over their PGRFA in line with similar provisions in the CBD. It remains to be seen whether the promise of intergenerational equity, which the Treaty holds out in its preambular text, and its claim for Farmers' Rights can be realised. Hopefully, the Treaty will contribute to safeguarding public agricultural research over major food crops and forages that are essential to our food security and the survival of humankind while at the same time offering farmers an incentive to continue to develop landraces, other traditional varieties and wild varieties for the benefit of present and future generations.

Ultimately, one of the goals in achieving sustainable agricultural development is to find a balanced solution to the sharing of PGRFA which takes both developmental and environmental factors into account, besides the wider environmental impact arising therefrom. Whether the Seed Treaty can fulfil that goal and at the same time help preserve agrobiodiversity and our agricultural heritage will be a tall order.

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THE CHALLENGE OF SUSTAINABLE HIGH SEAS FISHERIES

Rosemary Rayfuse

1. Introduction

The marine environment covers more than seventy percent of the world's surface. Human activities within this environment include a plethora of uses ranging from navigation to military uses, oil and gas exploration, seabed mining, scientific research, fishing and tourism. Multiple uses pose multiple threats including, *inter alia*, the deleterious effects of pollution from land based sources, maritime dumping, vessel source pollution and marine casualties, marine 'noise', destructive fishing practices, and destructive scientific research techniques. New developments such as ocean fertilization or the deliberate manipulation of the ocean environment for the purposes of mitigating the effects of ever increasing greenhouse gas emissions pose further, as yet unevaluated, risks.

Reconciliation of the development of ocean uses with the protection of the marine environment raises major challenges, both legal and practical. It is generally supposed that reconciliation of conflicting uses can best be achieved through the application of the concept of sustainable development. This concept is perhaps best understood not as a specific principle of international law but rather as the end goal or final objective of human activities which is to be pursued through the implementation of various distinct legal principles.[1] These

1 See, eg, A. Boyle and D. Freestone, "Introduction" in Boyle and Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges*, 1-18 (OUP, 1999).

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 467-499.*

principles, most of which are embodied in the Rio Declaration on Environment and Development,[2] also broadly, although not altogether uncontroversially, underlie the actions required by the 2002 Plan of Implementation of the World Summit on Sustainable Development (WSSD)[3] which establishes targets of sustainability to be reached in the coming years.

A comprehensive examination of the implementation of sustainable development in the overall law of the sea context is beyond the scope of this chapter. However, there is one particular ocean use which exemplifies the tensions in the law of the sea between the requirements and realities of sustainable versus non-sustainable development. That use is fishing and, in particular, high seas fishing, the nature of which as a common property open access regime beyond the jurisdiction of any individual state has rendered sustainable management extremely difficult.

This chapter presents a critical overview of recent state practice relating to implementation of sustainable development in the high seas fisheries context. In doing so it structures its analysis with reference to four principles which are relevant to sustainable development in the high seas fisheries context: the duty of states to ensure the sustainable use of natural resources; the principles of equity and the eradication of poverty; the precautionary approach to human health, natural resources and ecosystems; and integration and interrelationship, in particular relating to human rights and social, economic and environmental objectives.[4] It will be seen that although progress has been made in imple-

2 *Report of the United Nations Conference on Environment and Development*, I (1992) UN Doc. A/CONF.151/26/Rev.1.

3 The WSSD Plan of Implementation is available at *http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/*. The purpose of the WSSD was not to determine new legal norms. Although broadly speaking the Rio principles were accepted by the WSSD and can be identified in its outcomes, there is some controversy as to the extent of their adoption, development or retraction. See, eg, M. Pallemaerts, "International Law and Sustainable Development: Any Progress in Johannesburg?" (2003) 12(1) *Review of European Communities and International Environmental Law* 1-11 and F.X. Perrez, "The World Summit on Sustainable Development: Environment, Precaution and Trade – A Potential for Success and/or Failure" (2003) 12(1) *Review of European Communities and International Environmental Law* 12-22.

4 These principles have been identified, along with the principles of common but differentiated responsibilities, public participation and access to information and justice, and good governance, as being central to the achievement of sustainable development. See *Searching for the Contours of International Law in the Field of Sustainable Development*, Fifth and Final Report of the International Law Association Committee on the Legal Aspects of Sustainable Development, New Delhi, (2002) and the resulting New Delhi Declaration of Principles of International Law Relating to Sustainable Development

menting the relevant principles, there are still fundamental practical hurdles to be overcome in order to fulfill the requirements of sustainable development and the aspirations of the WSSD, in particular its goals of restoration of depleted fish stocks by 2015 and the prevention, deterrence and elimination of illegal, unreported and unregulated fishing by 2004.

2. High Seas Fisheries and the Duty to Ensure Sustainable Use of Natural Resources

The first principle, implementation of which will be examined, is perhaps the most fundamental one: the duty to ensure sustainable use of natural resources.[5] Without sustainable use there can be no sustainable development. It is axiomatic that as a biologically renewable resource fish should be capable of being harvested sustainably. This, however, depends on effective regulation and management of the resource.

In the high seas fisheries context the duty to ensure sustainable use finds expression in the related duties of conservation and cooperation embodied in Article 117 of the Law of the Sea Convention (LOSC).[6] The duty to conserve, which includes the duty to adopt appropriate conservation measures, arises precisely because of the exhaustible nature of the resource. While no definition of conservation is included in the LOSC, Article 119 mandates the 'qualified maximum sustainable yield' ('qualified MSY') approach calling on states to take conservation measures "on the basis of best scientific evidence" in order to maintain or restore populations of harvested species at MSY levels as qualified by relevant environmental and economic factors. These factors include the special requirements of developing states, fishing patterns, the interdependence of stocks including effects on dependent and associated species, as well as any subregional, regional or global generally recommended international minimum standards. Thus, rather than a purely biological concept, qualified MSY is essentially a political and economic concept. As such, qualified MSY represents the early embodiment of the requirement of sustainable

adopted by resolution 3/2002 of the ILA Biennial Conference held in New Delhi in April 2002 [the "ILA Principles"]. The ILA Principles are appended as an Annex to this volume.

5 ILA Principle 1.

6 United Nations Convention on the Law of the Sea, adopted 10 December 1982; entered into force on 16 November 1994. 1833 *UNTS* 3136 and reproduced in 21 *ILM* 1261 (1982).

development in the fisheries context. The terminology of qualified MSY is also used in Article 5 of the Fish Stocks Agreement (FSA),[7] the expressly stated objective of which is to ensure the long-term conservation and sustainable use of straddling and highly migratory fish stocks.[8]

The duty to cooperate is a natural corollary of the duty to conserve in that conservation of an open access resource will only be possible where all exploiting states agree on, and implement, measures to regulate that exploitation. States are not only required to take or cooperate with other states in taking necessary conservation measures for their respective nationals. Article 118 of the LOSC requires them to cooperate through the establishment, where appropriate, of subregional or regional fisheries organizations. The FSA basically institutionalizes this duty to cooperate through Regional Fisheries Organizations (RFOs) and sets out the requirements of and parameters for the operationalization of that duty. Importantly, only states which are members of RFOs or which agree to abide by the conservation and management measures adopted by those organizations may have access to the fishery concerned.[9] States which do not agree to apply the relevant measures are still obliged to fulfill their duty to cooperate which includes refusing to authorize their vessels to fish for stocks subject to those measures.[10]

An initial assessment of practice in the area of cooperation appears positive. A number of RFOs have been established over the years, the number increasing after adoption of the LOSC. The trend has continued in the post-FSA era where reference need only be made to the Australia – New Zealand Arrangement for the Conservation and Management of Orange Roughy on the South Tasman Rise,[11] the Norway, Russia and Iceland Agreement on the Barents Sea,[12]

7 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995; entered into force 11 December 2001. 24 *ILM* 1542 (1995).

8 FSA Article 2.

9 FSA Article 8(4).

10 FSA Article 17(2). For a discussion of the interrelationship between the LOSC and the FSA see R. Rayfuse, "The Interrelationship between the Global Instruments of International Fisheries Law" in E. Hey (ed) *Developments in International Fisheries Law* 107-158 (Kluwer Law International, 1999).

11 For discussion and the text of the Agreement see, E.J. Molenaar, "The South Tasman Rise Arrangement of 2000 and Other Initiatives on Management and Conservation of Orange Roughy (2001) 16 (1*) International Journal of Marine and Coastal Law* 77-124.

the South East Atlantic Fisheries Organization (SEAFO) Convention[13] and the Western Central Pacific Fisheries Convention (WCPFC).[14] Moreover, this practice has not been limited to situations involving straddling or highly migratory stocks. A number of RFOs manage discrete high seas stocks as is also provided for in the Australia – New Zealand Agreement and the SEAFO Convention. In addition, within existing RFOs an array of measures have been adopted to encourage membership or ensure compliance or restraint. These include invitations to fishing and other interested states to join organizations, adoption of protocols allowing for adherence by fishing entities, and resolutions establishing the category of cooperating non-contracting party.

Closer examination, however, reveals a less sanguine picture. Negotiations on the establishment of a Southwest Indian Ocean Fisheries Commission, initiated under the auspices of the FAO by the coastal states in the area, foundered when interested fishing states were invited to participate.[15] Failure was in part due to the diametrically opposed interests of the participants. However, rapid expansion of the high seas deepwater fisheries which it was proposed the Commission would regulate had already resulted in their depletion to below commercially exploitable levels.[16] Conveniently, there was nothing left to

12 For discussion see, O.S. Stokke, "The Loophole of the Barents Sea Fisheries Regime" in Stokke (ed) *Governing High Seas Fisheries: The Interplay of Global and Regional Fisheries Regimes* (Oxford University Press, 2001) 273-301.

13 Convention on the Conservation and Management of the Fishery Resources of the South East Atlantic, (2002) 41(2) ILM 257. For discussion see, A. Jackson, "The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean 2001: An Introduction" (2002) 17(1) *International Journal of Marine and Coastal Law* 33-77.

14 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, (2001) 40(2) *ILM* 277. For discussion see, T. Aqorau, "Tuna Fisheries Management in the Western and Central Pacific Ocean: A Critical Analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and its Implications for the Pacific Island States" (2001) 16(3) *International Journal of Marine and Coastal Law* 379-431.

15 Report of the Intergovernmental Consultation on the Establishment of a Southwest Indian Ocean Fisheries Commission, St Denis, Réunion, 6-9 February 2001, *FAO Fisheries Report* No 647 (2001).

16 Report of the Ad Hoc Meeting on Management of Deepwater Fisheries Resources of the Southern Indian Ocean, FAO Fisheries Report No 652 (2001); Report of the Second Ad Hoc Meeting on the Management of Deepwater Fisheries Resources of the Southern Indian Ocean, *FAO Fisheries Report* No 677 (2002).

'cooperate' over. The negative implications of this for future attempts to ensure sustainable use of other currently unregulated fisheries are obvious.

Even where RFOs are established, not all interested states are, or are able or even willing to become, members. Non-member state fishing continues to be a fact in all RFO regulatory areas with many states preferring to remain outside, and thus not bound by, the specific regulatory frameworks of RFOs and the FSA. Nor are repeated invitations an assurance a state will join. China has steadfastly refused to join the North Pacific Anadromous Fisheries Commission (NPAFC) despite, or perhaps because of, its vessels being among the most heavily implicated in the illegal high seas driftnet salmon fishery.[17] The constitutive agreements of some RFOs allow unhindered accession by states. In this way, for example, states such as Panama and Honduras have been enticed into the International Commission for the Conservation of Atlantic Tunas (ICCAT) while Namibia has joined the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR). Other conventions, however, require the unanimous agreement of existing parties to accession by new members. While the North East Atlantic Fisheries Commission (NEAFC) has agreed to the accession of Estonia it has yet to accept Lithuania's application, apparently due to concerns over the level of Lithuania's commitment to the objectives of the Commission as evidenced by continuing IUU fishing by Lithuanian-flagged vessels.[18]

The phenomenon of 'fishing entities'[19] further complicates matters. While a protocol was adopted and ratified by ICCAT members in 1984 providing for EC membership in the Commission,[20] a similar protocol adopted by the Inter-American Tropical Tuna Commission (IATTC) in 1999 has yet to come into force.[21] This reticence on the part of the IATTC members means that the EC, one of the major fishing entities in the Eastern Pacific Ocean, currently only participates in IATTC meetings as an observer. Spain's application to join the IATTC in the interim has taken nearly five years to obtain approval from

17 Eighth Annual Report of the NPAFC (2000) at 39.

18 Report of the 22nd Annual Meeting of the NEAFC (2003) at 5.

19 This refers to self governing territories, non-state intergovernmental organizations such as the European Union and other entities not recognized as states but which participate in high seas fishing, such as Taiwan. See LOSC Article 305.

20 Paris Protocol to the ICCAT Convention available at http://www.icat.org.

21 Protocol to Amend the 1949 Convention on the Establishment of an Inter-American Tropical Tuna Commission, reproduced in W.H. Bayliff, *Organisation, Functions and Achievements of the Inter-American Tropical Tuna Commission*, IATTC Special Report No 13 (La Jolla, 2001) at 70-71.

IATTC members.[22] EC participation in the negotiations for the WCPFC was likewise controversially restricted to observer status although it was finally admitted to full participant status in the PrepCon in 2002.[23]

Even more problematic is the situation of Taiwan, a fishing entity which flags the largest distant water fishing fleet in the world. Taiwan's participation in ICCAT and the WCPFC has been achieved through the adoption of resolutions relating to non-state fishing entities and use of the appellation "Chinese Taipei".[24] The Commission on the Conservation of Southern Bluefin Tuna (CCSBT) has formed an "Extended Commission" in which Taiwan participates.[25] However, due to the status of the Indian Ocean Tuna Commission (IOTC) as an FAO body with FAO membership rules, Taiwan is unable to become a member. Although the IOTC has created the category of 'cooperating non-contracting party' China takes the position that 'party' can only refer to a state, as opposed to an entity, and therefore excludes Taiwan. This impasse was temporarily resolved in 2002 with the agreement that Taiwanese catch data would be provided through the Japanese Organization for Responsible Tuna Fisheries to China and thence to the Commission.[26] Nevertheless, such tenuous and delicate solutions cannot beneficially serve the objective of sustainable development in the long run.

With respect to the duty to conserve the practice also initially looks promising. RFOs such as CCAMLR, NAFO and ICCAT have adopted a plethora of conservation measures over the years and increasing numbers of stocks are being managed through adoption of increasingly stringent conservation measures relating to, *inter alia*, allowable catches, quotas, fishing equipment and techniques, and closed seasons and areas. In addition, RFOs have begun to grapple with the complex requirements of the ecosystem approach, the elements of

22 At the 70th meeting of the IATTC in June 2003 Spain announced that it had received all the required approvals and that its ratification procedures were in progress.

23 Decision of the Preparatory Conference Relating to Participation in the Work of the Conference, WCPFC/PrepCon/12, 25 February 2002 and Statement of the Chairman on the Work of the Preparatory Conference during its Second Session, WCPFC/PrepCon/16, 1 March 2002.

24 See Resolution by ICCAT on Becoming a Cooperating Party, Entity or Fishing Entity, adopted 27 November 1997 and Statement by the People's Republic of China Concerning Observers at ICCAT Meetings, Proceedings of the 15th Regular Meeting of ICCAT, Annex 6-2, November 1997, in ICCAT Report Part II (1997), vol. 1, at 84.

25 Resolution to Establish an Extended Commission and an extended Scientific Committee, adopted at the 7th Annual Meeting of the CCSBT (April 2001). Taiwan became a member of the Extended Commission on 30 August 2002.

26 Report of the 7th Session of the IOTC (2002) at 9 para 70.

which find expression in Article 119(1)(b) of the LOSC, Article 5 of the FSA and the 1992 Convention on Biological Diversity.[27] Conservation measures are increasingly being adopted with reference to dependent and associated species and the need to ensure their biological sustainability. Examples include measures which restrict the amount of by-catch taken in a directed fishery for another species, or which mandate particular fishing techniques to avoid incidental mortality of sea-birds or dolphins.

However, the situation is not entirely satisfactory. Not all high seas stocks fall under management regimes. Large geographic areas and many discrete high seas stocks are still unregulated. As witnessed in the Indian Ocean, conservation and sustainable long-term use of these stocks is thus far from certain. However, even existence of an RFO does not necessarily imply adoption of measures. The IOTC, for example, has repeatedly failed to adopt any conservation measures in respect of bigeye tuna despite repeated advice from its Scientific Committee of the urgent need to reduce catches through limitations on directed fishing and juvenile by-catch and time/area closures.[28] The IATTC, too, has yet to adopt conservation measures in respect of most of the stocks under its mandate.

In addition, adoption of conservation measures does not necessarily imply their adequacy as tools in meeting the goal of sustainable use. Catch quotas are often set far in excess of scientifically advised sustainable limits either due to failure to accept the sufficiency or accuracy of the scientific information or due to extraneous political factors. In this respect qualified MSY, which mandates the consideration of non-biological factors, has resulted in the very antithesis of the goal of sustainable use as evidenced by continuing overfishing and stock declines which have led, in turn, to adoption of increasingly restrictive measures including total moratoria on increasing numbers of stocks.

Neither does adoption of conservation measures necessarily imply compliance with them. In NAFO Canada continues to report on high levels of member non-compliance with moratoria, quota allocations and gear regulations.[29] CCAMLR, too, has been plagued by non-compliance by its members which has become the subject of increasingly acrimonious debate within the Commis-

27 Adopted 22 May 1992; entered into force 29 December 1993. 31 *ILM* 818 (1992).

28 Report of the 7th Session of the IOTC (2002) at 5 paras 48-61. Proposals for management measures reflective of the scientific advice again failed at the 8th Session of the IOTC in 2003.

29 See, eg, presentations on compliance made by Canada and the EU. Report of the 24th Meeting of the NAFO Fisheries Commission (2002) at 6 para 3.2.

sion. In 2003 at least 12 members of the Commission were implicated in non-compliant fishing activities.[30] Likewise in ICCAT lack of member compliance with data reporting obligations and quota allocations is continuously cited as one of the major challenges facing the Commission. Lack of compliance by non-contracting parties and by cooperating non-contracting parties also continues to be problematic.

Progress is, however, being made. High seas driftnet fishing appears to have been virtually eradicated – at least in the North Pacific Ocean. The high seas salmon fishery in the North Atlantic is likewise a thing of the past although, in truth, North Atlantic salmon are almost themselves a thing of the past, some stocks even being listed as endangered species in Canada and the United States.[31] The North Atlantic Salmon Conservation Organization (NASCO) is also taking a proactive approach to the adoption of measures aimed at protection and restoration of salmon habitat.[32] A more pro-active approach is also being evidenced in other RFOs with the adoption of conservation measures requiring enhanced data submission often assisted by catch certification schemes, limitation or reduction of fishing effort and capacity, and multi-year action plans or rebuilding programs for particularly threatened stocks. These measures are particularly related to implementation of the precautionary approach, discussed in Part IV below. In addition, attempts to implement an ecosystem approach, first (and so far most comprehensively) adopted in CCAMLR[33] are also in-

30 Report of the 22nd Meeting of the Commission, CCAMLR-XXII (2003) paras 14.24-14.29.

31 There is no commercial salmon fishery on the east coast of Canada or the United States and in some cases not even a recreational fishery is permitted since some Atlantic salmon are now listed under the *Species at Risk Act*, SC ch-29 (2002) and the *Endangered Species Act* 16 USC 1988 § 1531 respectively.

32 These measures have recently been consolidated in the Resolution by Parties to the Convention for the Conservation of Salmon in the North Atlantic Ocean to Minimize Impacts from Aquaculture, Introductions and Transfers, and Transgenics on the Wild Salmon Stocks, [the "Williamsburg Resolution"] adopted by NASCO in 2003 which consolidates and improves its existing strategies. Report of the 20th Annual Meeting of the Council (2003) at 197-234.

33 See, eg, D. Butterworth, "Antarctic Marine Ecosystems Management" (1986) 23(142) *Polar Record* 37; M. Basson and J. Beddington, "CCAMLR: The Practical Implications of an Eco-System Approach" in A. Jørgensen-Dahl and W. Østreng (eds) *The Antarctic Treaty System in World Politics* 54 (1991); J. Beddington, M. Basson and J. Gulland, "The Practical Implications of the Eco-System Approach in CCAMLR" (1990) 10 *International Challenges* 17; J. Croxall, I. Everson and D. Miller, "Management of the Antarctic Krill Fishery" (1992) 28(164) *Polar Record* 64; S. Nicol and W. de la Mare, "Ecosystem Management and the Antarctic Krill" (1993) 81 *American Scientist* 36, I.

creasingly being reflected in conservation measures dealing with by-catch, incidental mortality and destructive fishing techniques although the complicated implications of the ecosystem approach have yet to be fully worked out.[34]

Measures to ensure compliance are also being strengthened, with many RFOs having already adopted both at-sea and in-port control measures applicable *inter partes*. In addition, measures aimed at ensuring compliance or total restraint by non-contracting parties are increasingly being adopted. These include positive lists of vessels authorized to fish in RFO regulatory areas and negative lists of vessels found to be undermining RFO measures, catch documentation schemes, surveillance and information sharing, and measures calling for control of nationals involved in non-contracting party operations. They also include measures denying landings and transshipments from vessels believed to have been fishing in a manner that undermines the effectiveness of RFO measures and, as discussed further in Part V below, trade restrictive measures. Importantly non-contracting parties have often acquiesced in the application of these measures against their vessels and have agreed to implement them themselves.

Whether all of this activity results in the elimination of the continuing phenomenon of illegal, unreported and unregulated (IUU) fishing and the long-term conservation and sustainable use of high seas fisheries resources remains to be seen. IUU fishing continues to be conducted not only by non-members of RFOs but, importantly, by members as well. Moreover, recent jurisprudence which pits the conservation agenda against other rules contained in the LOSC gives cause for concern. In the *Volga* case,[35] a Russian flagged vessel was fishing illegally for Patagonian toothfish within the Australian EEZ and in contravention of CCAMLR conservation measures. The vessel was arrested by Australia and bond and other conditions set for its release. In prompt release proceedings brought by Russia before the International Tribunal for the Law of the Sea (ITLOS) Russia argued that the bond was excessive and that the vessel should be immediately released. In a decision which may have serious ramifications for the fight against IUU fishing, the ITLOS refused to consider the well expressed concerns of Australia and CCAMLR members (including

Everson, "Consideration of Major Issues in Ecosystem Monitoring and Management" (2002) 9 *CCAMLR Science*; and A.J. Constable, "CCAMLR Ecosystem Monitoring and Management: Future Work" (2002) 9 *CCAMLR Science*.

34 E.J. Molenaar, "Ecosystem-Based Fisheries Management, Commercial Fisheries, Marine Mammals and the 2001 Reykjavik Declaration in the Context of International Law" (2002) 17(4) *International Journal of Marine and Coastal Law* 561-596.

35 The *Volga* case *(Russian Federation v Australia)* Application for Prompt Release, Judgment, 23 December 2002, available at http://www.itlos.org/.

Russia), in particular, and the international community, in general, relating to IUU fishing and the measures needed to be taken to deal with the problem, as an aggravating circumstance warranting a higher bond or more stringent measures in return for the vessel's prompt release. This led to a controversial – and unsuccessful – proposal by Australia within CCAMLR to amend the application of Article 73(2) of the LOSC, which mandates prompt release of arrested vessels and crews, so that it would not apply to vessels or support craft apprehended for IUU fishing in the CCAMLR area and would thereby prevent such vessels from resuming fishing activities after forfeiture of a posted bond.[36]

If the key to achievement of sustainable development lies in the effective implementation[37] by all states of the duty to ensure sustainable use of natural resources then all states must be equally and equally effectively subject to enforcement and sanction if they do not. International fisheries law has not, however, yet reached this stage.[38] Additionally, competing principles of international law and the LOSC, adopted long before the sustainable use imperative was articulated, may need to be revisited and reformulated to accommodate the changing emphasis.

3. High Seas Fisheries, Equity and the Eradication of Poverty

The second principle, implementation of which will be examined, is that of equity.[39] This encompasses two separate but related principles which are also central to the attainment of sustainable development: the principles of inter- and intragenerational equity. Intergenerational equity requires states to take into account not only the interests of present generations but also those of future generations in order to ensure that development activities in the present do not adversely affect the ability of future generations to enjoy the benefit of the

36 Report of the 21st Meeting of the Commission, CCAMLR-XXI (2003) paras 8.62-8.73.

37 D. Freestone, "The Challenge of Implementation: Some Concluding Notes" In Boyle and Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges*, 359-364 at 364. See also Report of the Secretary General on Oceans and Law of the Sea, 29 August 2003, where he reiterates that the main impediment to the fight against IUU fishing remains the lack of political will on the part of states to implement the relevant international instruments. UN Doc. A/58/65.Add.1 at paras 65-69 and 151.

38 For an analysis of the enforcement issue see, eg, R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, 2004).

39 ILA Principle 2.

resource base.[40] Intragenerational equity requires fair and equitable access to and utilization of natural resources by current generations. This encompasses the need to attain equity in the development opportunities afforded to both developed and developing states as an essential means of eradicating poverty. Essential to this objective is the consideration of the special needs of developing countries.[41]

The centrality of both of these principles to the achievement of sustainable development has been reaffirmed in the Millennium Development Goals adopted by the United Nations in its Millennium Declaration.[42] Goal IV, which deals with protecting the common environment, resolves to implement a "new ethic of conservation and stewardship" by which no effort is to be spared to "free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs". The requirement of intragenerational equity is embodied in Goal III in which states resolve to create an environment at both national and international levels "which is conducive to development and to the elimination of poverty".

In the high seas fisheries context, attainment of intergenerational equity is both inherent in and a natural result of successful implementation of the requirements of cooperation and conservation embodied in Articles 117-119 of the LOSC and of long-term conservation and sustainable use in Article 2 of the FSA, discussed above. In theory, at least, all fisheries conservation measures are intended to further this aim, the specific achievement of which has now been called for in the WSSD Plan of Implementation requirement that fisheries be restored to and maintained at their maximum sustainable yields by 2015. In truth, the successful achievement of intergenerational equity can only ever be judged in the future taking advantage of the benefit of hindsight. However, a superficial contemporary examination of high seas fisheries from

40 For discussion of this principle see, eg, E.D. Brown Weiss, *In Fairness to Future Generations, International Law, Common Patrimony and Intergenerational Equity*, (New York, 1989) and C. Redgwell, *Intergenerational Trusts and Environmental Protection*, (MUP, 1999).

41 For analysis of this principle see D.A. French, "International Law and the Achievement of Intragenerational Equity" 31 *Environmental Law Reporter* 10469-10485 (2001). See also, P. Birnie and A. Boyle, *International Law and the Environment* (2d) 91-92 (OUP, 2002).

42 United Nations Millennium Declaration, Resolution adopted by the General Assembly, 18 September 2000, UN Doc. A/Res/55/2.

the standpoint of intergenerational equity raises concerns as to the suitability of existing efforts to implement the sustainable development imperative.

The singular hallmark of high seas fisheries to date has been the boom and bust cycle of exploitation, followed by commercial collapse, followed by exploitation of new species farther and farther down the food chain and about which little information as to the effects of exploitation is known. A 'skeptical environmentalist' analysis[43] of this phenomenon might suggest that we need not worry. Others have persuasively argued that 'Malthusian' and 'neo-Malthusian' claims that natural resources will run out are flawed, at least in respect of non-renewable resources, because human ingenuity will always lead us to new reserves of needed resources or to alternate resources and technologies which take their place.[44]

Renewable resources such as fish should, by their very nature, pose no difficulty. Even if overfishing of a species occurs the skeptical argument posits that the resultant commercial non-viability of a fishery will simply lead to development of new fisheries for previously unexploited species. Further, if all these fisheries are depleted to commercial non-viability then arguably aquaculture can serve to provide human protein needs and fishermen can simply move into other employment sectors. Thus while the oceans' biodiversity may be diminished, economic development is sustained. Indeed, skeptics might point to the difference between commercial extinction and biological extinction to argue that as commercial viability collapses and fishermen move into other employment sectors the fish will have the opportunity to regenerate and fisheries will eventually reemerge. A cynic might even suggest that this apparently ideal *laissez-faire* solution lies behind the EU's refusal to ban cod fishing in its waters despite irrefutable scientific evidence that the cod are now fished well beyond safe biological limits. Why risk political suicide and heavy compensation burdens by closing the fishery now when nature and market mechanisms will force the closure in due course in any event?

However, these 'skeptical' arguments fail to account for a number of realities. First, the obligation is one of passing on existing fisheries resources – not substitutes therefore. This is implicit in the requirements of cooperation and conservation of living marine resources found in the LOSC and in the requirement of long-term conservation and sustainable use of existing straddling

43 B. Lomborg, *The Skeptical Environmentalist: Measuring the Real State of the World* (CUP, 2001).

44 T.L. Anderson and L.-R. Kosnik, "Sustainable Development and Sustainable Skepticism" (2002) 53 *Case Western Reserve Law Journal* 439-448.

and highly migratory fish stocks which is the central objective of the FSA. The Millennium Declaration itself requires prudence to be shown in the management of all living resources as "only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants".[45] Such requirements, admonitions and exhortations would surely be meaningless if they did not refer to existing resources. Second, these arguments fail to account for the 'inherent' value of fish and high seas fisheries both to humanity and to the various communities, including not only fishermen, but ship builders, provisioners, processing plants, consumers and so on, which depend on these fisheries for their existence.[46] In emotive terms it serves to remember that the ocean depths are the original source of life on Earth. Overexploitation of species there may not only deprive future generations of their use but may also eliminate the earth's ability to regenerate life should another major extinctive event occur.[47] Third, the ability of stocks to regenerate after a commercial extinction is increasingly open to doubt. Despite a ten year moratorium on pollock fishing in the Central Bering Sea trial fishing activities have resulted in the catch of no more than 30 *individual fish* in the past three years.[48] In the North Atlantic a ten year moratorium on cod fishing has not resulted in increase of stocks. On the contrary, Canada has been forced to permanently terminate its entire EEZ cod fishery[49] and the high seas moratorium in NAFO continues.[50] The Antarctic Cod, *Notothenia rossi*, has likewise failed to regenerate despite nearly twenty years of moratorium.[51]

Contributing factors to the inability to regenerate include the inability to control taking of threatened species as by-catch in other fisheries and IUU

45 Millennium Declaration, para 6.

46 This issue has received considerable attention in NASCO, See, eg, the Report of the Technical Workshop on Development of a Framework for Assessing Social and Economic Values Related to Wild Salmon, Report of the 20th Annual Meeting of the Council (2003) at 235-256.

47 Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, *A Sea of Troubles,* GESAMP Reports and Studies no 70 (2001), and Greenpeace, *Report on the World's Oceans* (1998).

48 See Reports of the 5th, 6th and 7th Meetings of the Annual Conference of the Parties to the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (2000-2002), under agenda item "Trial Fishing".

49 "Minister Thibault Implements Measures to Protect Northern Cod" Department of Fisheries and Oceans, Canada, Press Release NR-NL-03-20, 20 July 2003.

50 25th Annual Meeting of NAFO (2003), Press Release, para 5.

51 Directed fishing for *Notothenia rossi* has been banned under annually renewed CCAMLR Conservation Measures since 1986.

fishing which continues even in the face of moratoria and rebuilding plans. In other words regeneration may be rendered impossible due to failures in management, compliance and enforcement which are only exacerbated by the nature of the international legal regime according to which only members of RFOs are traditionally obliged to comply with their conservation measures. As noted above, management, compliance and enforcement issues are increasingly being addressed within RFOs. However, evidence that the FSA obligation of 'compliance or restraint' has become a customary obligation binding on all states is, as yet, equivocal.[52]

In addition, scientific evidence now indicates that regeneration may also be being affected by biological and environmental changes caused by habitat destruction, alteration of predator-prey relationships and climatic changes. Deep sea trawling on sea mounts for orange roughly destroys not just the fishery but also the benthic and associated communities on which the species rely for regeneration and which also constitute valuable biodiversity assets.[53] Other marine uses such as marine pollution and dumping of radioactive wastes may damage stocks and their habitat beyond their natural capacity to regenerate. Predator species may take a higher percentage of remaining prey merely by virtue of reduction in prey numbers or they may turn to new prey.[54] The attraction to sharks of tuna dangling on long-lines, unable to escape, has become a significant concern in long-line fisheries.[55] Climate change, whether natural or anthropogenically induced, and associated sea temperature rise is already suspected of being implicated in the failure of some stocks to regenerate and in the migration of other stocks away from traditional fishing areas. In other words, even if moratoria and rebuilding programs are in place it may already be too late for some stocks and species,[56] particularly given that these measures have, to date, only been introduced after a stock has fallen below commercially

52 R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (2004) esp. at chapter 8.

53 See, eg, GESAMP, *A Sea of Troubles*, *op. cit*. This has also been the subject of extensive discussion within the United Nations Informal Consultative Process on Oceans and Law of the Sea (UNICPOLOS). See, eg, Report on the Work of UNICPOLOS, 26 June 2003, UN Doc. A/58/95.

54 This lies behind the controversial arguments being raised by Japan, Norway, Iceland and others in a number of RFOs, that whales and seals are eating too many fish and are to blame for the failure of stocks to regenerate.

55 This issue has, for example, been raised by Japan in the Indian Ocean Tuna Commission. See Report of the 5th Session of the Scientific Committee, November 2002 at 41, reproduced as Appendix IX to the Report of the 7th Session of the IOTC (2002).

56 *Report of the Third Meeting of Regional Fishery Bodies, Rome 2-4 March 2003*, FAO Fisheries Report No. 703 (FAO, 2003) at para 19.

useful limits. A number of RFOs are developing scientific research programs to examine the effects of environmental impacts on high seas fisheries. However, without successful implementation of other principles such as that of precaution, discussed in Part IV below, intergenerational equity looks increasingly like the mere "chimera" it has elsewhere been accused of being.[57]

The requirement of intragenerational equity is, like its counterpart, an articulated goal of both the LOSC and the FSA. The preamble of the LOSC reiterates the desirability of equitable and efficient utilization of the ocean's resources and the conservation of living marine resources as a means of contributing to a "just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries". In concrete terms Article 116 gives to *all* states the right for their nationals to engage in high seas fishing subject to the duty to cooperate in conservation of high seas fisheries, the rights and duties of coastal states, and other treaty obligations. Article 119 makes clear that conservation measures are not to discriminate in form or in fact against the fisherman of any state. To improve access to fisheries for all, the FSA requires that RFOs be open to all states with a 'real interest' in the fishery[58] and it encourages states to become members of RFOs relevant to them. It also sets out specific criteria to be considered in determining the nature and extent of participatory rights of these new members.[59]

However, intragenerational equity requires not just recognition of the special needs of developing states in relation to access to and allocation of resources. It also requires consideration of the special requirements of developing states in terms of provision of assistance in capacity building to ensure reduction and elimination of unsustainable patterns of production and consumption. The FSA is particularly explicit in recognizing and delineating what those special requirements are and in specifying the forms of assistance that are to be provided and towards what ends.[60] It specifically calls for assistance to developing states to enable them to participate in high seas fisheries, including facilitating access

57 A.V. Lowe, "Sustainable Developments and Unsustainable Arguments" in Boyle and Freestone, *International law and Sustainable Development: Past Achievements and Future Challenges* 19-38 at 27.

58 FSA Article 8(3). For a discussion of the meaning of 'real interest' see E.J. Molenaar, "The Concept of 'Real Interest' and other Aspects of Cooperation through Regional Fisheries Management Mechanisms" (2001) 15(4) *International Journal of Marine and Coastal Law* 77-124.

59 FSA Article 11.

60 FSA Articles 24-25.

to those fisheries.[61] In addition, it requires special assistance to be provided to assist developing states to implement the FSA itself and to establish new RFOs where necessary or to strengthen existing ones.[62] Finally, the FSA calls for the establishment of special funds to assist developing states in its implementation.[63]

At first blush, the pursuit of intragenerational equity appears increasingly well served. With respect to access to resources, as discussed in Part 2 above, new members are being welcomed into RFOs and states which do not seek or cannot afford membership are being encouraged to participate as cooperating non-member states or to refrain from fishing. New RFOs have been established, particularly in areas surrounded by developing states. In addition, more and more states, including developing states, are flagging vessels which fish on the high seas and presumably reaping some benefit therefrom.

Provision of assistance in capacity building is also developing both as it relates to participation in fisheries and to participation in RFOs themselves. On a global level, establishment of a voluntary trust fund pursuant to the FSA has been the subject of discussions in the UN General Assembly[64] and within the Informal Consultations of the States Parties to the FSA. Terms of Reference for the 'Assistance Fund' were adopted by the Second Informal Consultation in August 2003.[65] The purposes of the Assistance Fund are to: facilitate participation of developing states in the meetings and activities of RFOs and other international organizations dealing with high seas fisheries; support ongoing and future negotiations to establish new RFOs and strengthen existing ones; provide capacity building in the area of effective exercise of flag state responsibilities, monitoring, control and surveillance, data collection and scientific research; facilitate the exchange of information and experience; provide assistance with human resources and technical training; and to assist in meeting costs of dispute settlement procedures. The Terms of Reference have been submitted to the General Assembly and it remains to be seen whether the Fund will be established and, more importantly, whether any contributions to it will be forthcoming.

Regionally, a special fund to be financed by voluntary contributions, was established within ICCAT in 2003 to assist developing states to meet the

61 FSA Article 25(1)(b).
62 FSA Article 26(2).
63 FSA Article 26(1).
64 UNGA Resolution 57/143 of 12 December 2002, paras 13-15.
65 Report of the Second Informal Consultation of the States Parties to the FSA, August 2003, ICSP2/UNFSA/REP/INF.1 Annex II.

requirements of data collection, quality assurance and reporting obligations.[66] This appears to go further than the CDS Fund established by CCAMLR in 2000.[67] That fund, which is financed by contributions from member states of the proceeds from fines and confiscations arising from violations of the CCAMLR Toothfish Catch Documentation Scheme, is used to fund activities of the Commission primarily related to scientific research. Agreement on the terms of a Special Requirements Fund, to be financed from assessed contributions, has also been reached in the Preparatory Conference for the WCPFC.[68] The fund will be used to assist developing states to attend meetings and to participate in commission activities through enhancing the capacity of technical personnel.

Nevertheless, mere establishment of funds does not fully satisfy the obligations of intragenerational equity. Implementation of statistical and catch documentation programs and port inspection schemes in a number of RFOs including the IOTC, ICCAT and CCAMLR has been particularly hampered by the inability of developing states to meet the financial, personnel and technical burdens imposed by these schemes. In the absence of institutional responses bilateral assistance has been offered, and in some cases actually provided, by developing states. However, more is still needed.

More fundamentally, the achievement of intragenerational equity and its concomitant goal of eradication of poverty in the high seas fisheries context continues to run headlong into the thorny and, as yet, unresolved issue of allocation. In theory an 'olympic' style fishery such as that conducted in CCAMLR is non-discriminatory since anyone can participate to the greatest extent physically possible. As such it may go some way to meeting the distributive justice aspects of intragenerational equity. However, such fisheries may be discriminatory, in fact, against developing states which are unlikely to have the technical and financial expertise to ensure their vessels, if they have them, are on spot and up to the required capacity. Brazil, for example, made this point in CCAMLR in 2000 when announcing plans to engage in joint ventures to obtain appropriate fishing vessels.[69] Nevertheless, RFOs are increasingly developing 'black lists' of IUU vessels and adopting measures calling

66 Personal communication with Secretariat.

67 Report of the 19th Annual Meeting of the Commission, CCAMLR–XIX (2000) paras 5.28-5.30.

68 See Statement of the Chairman on the Work of the Preparatory Conference During it Fifth Session, WCPFC/PrepCon/35, 3 October 2003.

69 Report of the 19th Annual Meeting of the Commission, CCAMLR-XIX (2000), para 7.18.

upon members to refuse all dealings with those vessels. This effectively limits the pool of available vessels from which developing countries can economically obtain their fishing fleets. In addition, it misses the point that it is not the vessel but rather the crew and owners who commit IUU fishing. This is being addressed through adoption in some RFOs of measures requiring members to verify the pedigree of vessels and to ensure that they cannot, once reflagged, engage in IUU fishing. The costs of these procedures may, however, be prohibitive for developing states.

Management by distribution of national quota such as carried out in NAFO, NEAFC and ICCAT is even more problematic. Disputes between members over allocation of quotas are legend. While disputes such as that between Canada and Spain over turbot allocations in NAFO have been between two developed states,[70] the issue is increasingly affecting the participation of developing states in RFOs. Quota allocations have generally been based on criteria such as historic catch and effort. As developing states with no historic catch 'track record' seek to develop their own fisheries and associated industries, they are increasingly demanding quota allocations. In NAFO, for example, Bulgaria and Korea have regularly complained that their quota allocations are so small as to render any fishery commercially non-viable. Pre-existing quota holders, in many cases developed and distant water fishing states are, however, reluctant to reduce their quotas. Indicative of the intractability of the issue, the NAFO Working Group on Allocation of Fishing Rights to Contracting Parties which was established in 1999 has yet to complete its work.

In the meantime, at least four possible solutions present themselves: set no catch limits; increase the total allowable catch from which quota allocations are made; invoke an objection procedure to exclude the objecting state from application of the quota measures; or simply ignore the quota allocations and fish in excess thereof. Each of these approaches, however, only results in fishing beyond what are already assumed to be biologically safe limits. Indeed, over-quota fishing as a result of basic non-compliance continues to be a problem for all RFOs. In addition, non-quota fishing resulting from invocation of objection procedures has become especially problematic in ICCAT, where Brazil, Morocco and South Africa, among others, have repeatedly objected to catch limits and quota allocations and have therefore not complied with them.

70 This led, in 1995, to the infamous 'Turbot War'. For a discussion of the dispute see, eg, P. Davies, "The EC/Canadian Fisheries Dispute in the Northwest Atlantic" (1995) 44 *International and Comparative Law Quarterly* 927.

Attempts to regulate overall catch through vessel capacity limitations have also yet to prove successful. Although the IATTC has agreed in principle on the optimum vessel capacity (in metric tonnes) for the Eastern Pacific Ocean no agreement has yet been reached as to the allocation of this capacity which will, in any event, require a reduction of existing capacity.[71] Some Latin American states particularly object to proposed allocations on the basis that they are insufficient to service their emerging canning and fish processing industries.

Capacity limits have also proved difficult to achieve in the IOTC with proposals from the EU and Japan repeatedly failing due to the concerns of Iran, India and other developing states that proposed limits would prevent growth in their fishing industries while at the same time guaranteeing existing levels of excessive capacity for the developed distant water fishing states.[72] These concerns may well be justified. In 2003 the IOTC finally agreed to a resolution on capacity which provides a cap on the number of vessels authorized to fish in the IOTC area. On its face the resolution goes some way to accommodating the developing state concerns by allowing for proposals for increases in fleet sizes for members with less than 50 vessels to be brought before the Commission in the form of 'development plans'.[73] However, the resolution's reference to 'authorized' vessels, rather to than to 'vessels currently active in the Indian Ocean' belies a more troubling agenda. Japan, the EC and Korea authorize, respectively, approximately 590, 230 and 178 vessels to fish in the Indian Ocean. Far fewer vessels actually fish there. For example, Korean catch in the Indian Ocean in 2002 was only 1000mt which equates to less than five active vessels. Not only does the resolution clearly do nothing to reduce the capacity to overfish the Indian Ocean, it does nothing to assuage the concerns of developing coastal state members that the developed distant water fishing states are basically 'stacking the deck' for their own benefit.

Allocation also remains a problem with respect to new members. South Africa has, for example, attempted to condition its membership in the CCSBT on allocation of an acceptable quota. RFOs have, however, refused to guarantee allocation with a grant of membership. Instead, like NAFO, ICCAT and a number of RFOs are working to adopt allocation criteria to guide the expecta-

71 See Resolution on Fleet Capacity adopted at the 68th Meeting of the IATTC (2002) and the Draft Plan for Regional Management of Fishing Capacity, Doc IATTC-70-10a presented to the 70th Meeting of the IATTC (2003).

72 Report of the 7th Session of the IOTC (2002) at 7, para 55.

73 Personal communication with secretariat.

tions of new members which generally provide only for allocation to new members of previously unallocated species or catches.[74] It is true that RFOs are increasingly adopting conservation measures providing for reduced catch limits and quota allocations. NAFO, for example, has introduced a multi-year rebuilding plan for the now infamous turbot fishery which includes substantial quota cuts. The recipients of quota allocations, however, remain the same. In other words the 'haves' continue to have, albeit in ever decreasing amounts, and the 'have nots' continue to be offered only possible 'left-overs'.

The difficulty of achieving an equitable balancing of allocations which will ensure economic development for developing states without prejudicing that of developed states is not unique to high seas fisheries. Neither is the solution necessarily unique. What is still needed, despite the advances of the last twenty years of international fisheries law, is the political will and courage on the part of states which have previously reaped the greatest benefit from high seas fisheries to make the hard sacrifices and compromises necessary not only to adopt but to enforce measures that pay more than mere lip service to the principle of intragenerational, and with it intergenerational, equity. Whether those sacrifices and compromises will be made as a matter of volition or will continue to be made only as a matter of factual necessity once stocks have crashed remains to be seen.

4. High Seas Fisheries and the Precautionary Approach to Human Health, Natural Resources and Ecosystems

The third principle, implementation of which will briefly be examined, is that of the precautionary approach.[75] Embodied in this principle is the requirement that lack of full scientific certainty should not be used as a reason for postponing adoption of cost effective measures where threat of serious or irreversible damage to the environment exists.[76]

74 See, eg, ICCAT Criteria for the Allocation of Fishing Opportunities, ICCAT Report 2000-01 Part II (2001) vol I at 211-212.

75 ILA Principle 4.

76 This is the core of the principle as formulated in Principle 15 of the Rio Declaration. For comprehensive examinations of the precautionary principle in international law see,

The origin, content and application of the precautionary approach in the context of high seas fisheries have been extensively canvassed elsewhere.[77] Suffice it to say that the need for a precautionary approach to fisheries management is both inherent in the duty to conserve and is essentially necessitated by the requirement that qualified MSY be achieved through measures based 'on the best scientific evidence available' and other environmental and economic factors, including effects on dependent and associated species, articulated in Article 119 of the LOSC.

The requirement of precaution is now also firmly recognized in the FSA which limits the amount of 'qualification' permissible in the achievement of qualified MSY by mandating imposition of the precautionary approach. Article 5 sets out the general principles on which cooperation in conservation is to be based repeating the requirements of qualified MSY in the LOSC and further mandating, *inter alia*, adoption of ecosystem and precautionary approaches. Article 6 then defines the parameters of the precautionary approach. States are required to apply the precautionary approach to conservation management and exploitation of straddling and highly migratory fish stocks in order to protect all living marine resources and preserve the marine environment. Caution is required when information is uncertain, unreliable or inadequate and the absence of scientific information must not be used as a reason for postponing or failing to take conservation measures. In implementing precaution states must obtain and share the best scientific information available and generally implement techniques for dealing with risk and uncertainty with respect to targeted and dependant and associated species as well as within new or exploratory fisheries. Guidelines for the establishment of precautionary reference points are set out in Annex II which also provides for action to be taken when these reference points are, or are in danger of being, exceeded.

eg, D. Freestone, *The Precautionary Principle: The Challenge of Implementation* (Kluwer Law International, 1996) and A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Kluwer Law International, 2002).

77 See, eg, G. Hewison, "The Precautionary Approach to Fisheries Management: An Environmental Perspective" (1996) 11(2) *International Journal of Marine and Coastal Law* 301; D. Freestone "International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle" in Boyle and Freestone (eds) *International Law and Sustainable Development* 135-164; S. Garcia, *The Precautionary Approach to Fisheries*, *FAO Fisheries Technical Paper* 350/1 (1995); and M. Earle, "The Precautionary Approach to Fisheries" (1995) 25 (2/3) *The Ecologist* 70-75.

Application of a precautionary approach to high seas fisheries is not free from difficulty.[78] The constituent treaties of many RFOs predate the articulation of the precautionary approach. Conventions establishing organizations such as CCAMLR, the IATTC and ICCAT, for example, merely call for the adoption of conservation measures on the basis of scientific evidence or research with no reference to precaution. Implementation of the precautionary approach in pre-FSA RFOs has, therefore, been a question of organizational practice. To date that practice has related primarily to the setting of catch limits and to acquisition of the scientific data and information on which precautionary measures can be based.

Perhaps the most successful manifestation of the precautionary approach has so far been evidenced in the practice within CCAMLR. Indeed there are those who suggest that the very adoption of the CCAMLR convention was an exercise in precaution.[79] Since 1991 CCAMLR has set precautionary catch limits on krill and in 1998 it began development of a regulatory framework for dealing with management under uncertainty. The framework involves, *inter alia*, the establishment of precautionary catch limits for new and exploratory fisheries as well as guidance on data and information requirements and design of control mechanisms, such as the Scheme of Scientific Observation, that enable its collection. In 1998 NASCO adopted an Agreement on Adoption of a Precautionary Approach which serves as a guide on which management decisions are now based.[80] Pursuant to this agreement, an Action Plan for the Application of the Precautionary Approach to Protection and Restoration of Atlantic Salmon Habitat, was adopted in 1999.[81] The objective of the Action Plan is to maintain and, where possible, increase the current productive capacity of Atlantic salmon habitat. In 2003 NASCO adopted a resolution which consolidates and improves its existing strategies and provides positive guidance as to what measures parties must take to fully implement the precautionary

78 See, eg, S. Garcia, "The Precautionary Principle: Its Implications in Capture Fisheries Management" (1994) 22(2) *Ocean and Coastal Management* 99-125 and T. Essington, "The Precautionary Approach in Fisheries Management: The Devil is in the Details" (2001) 16(3) *Trends in Ecology and Evolution* 121-122.

79 G. Parkes, "Precautionary Fisheries Management: The CCAMLR Approach" (2000) 24 *Marine Policy* 83-91.

80 NASCO Doc CNL(98)46, Report of the 15th Annual Meeting of the Council (1998) 167-172.

81 NASCO Doc CNL(99)48, Report of the 16th Annual Meeting of the Council (1999) 145-160.

approach in order to minimize potential threats associated with introductions, transfers, aquaculture and transgenics.[82]

Methodologies for implementing the precautionary approach have also been discussed in NAFO since 1998, although to date little appears to have been achieved due to fundamental differences of opinion as to the manner in which precaution should best be incorporated into NAFO management.[83] The adoption, in 2003, of significantly reduced quotas and a multi-year rebuilding program for turbot may, however, signal a convergence of opinion and the beginning of a cooperative precautionary approach.[84] Within NEAFC implications of the precautionary approach were discussed in 2001 and linked to discussion on the request for scientific advice from ICES on which management measures are based.[85] There was considerable disagreement amongst the members as to whether stocks were being managed in a precautionary fashion.[86] Nevertheless, the issue does not appear to have been revisited. ICCAT, too, has been exploring the implications of the precautionary approach for tuna management.

In all RFOs the need to improve data acquisition on which more accurate assessments can be made has resulted in adoption of improved and more detailed collection and reporting measures. The need for reliable data has also been the impetus behind introductions of catch certification schemes such as the Toothfish CDS in CCAMLR and statistical document programs such as the IOTC's Bigeye Tuna Statistical Document Program, ICCAT's Bluefin Tuna and Swordfish SDPs, and the Southern Bluefin Tuna SDP adopted by the CCSBT.[87]

Post-FSA RFOs have incorporated the requirement of a precautionary approach into their constitutive treaties. Article 6 of the WCPFC reflects almost verbatim the FSA requirements while the precautionary approach is also mandated by Article 7 of the SEAFO Convention. The manner in which these provisions will be implemented remains, however, to be seen. Also a matter for future examination, in June 2003 the IATTC adopted a text of a new con-

82 The Williamsburg Resolution, *op. cit.*

83 See 16 *NAFO News* (2002) at 3.

84 25th Annual Meeting of NAFO (2003), Press Release, para 5.

85 NEAFC does not have its own Scientific Committee but relies, instead, on the International Council for the Exploration of the Sea (ICES) for its scientific advice.

86 Report of the 20th Annual Meeting of NEAFC (2001) at 13.

87 These schemes establish a framework for tracking landings and trade flows of the various species to assist in determining total amounts of fish taken by both members and non-members of RFOs.

vention[88] which is intended to incorporate recent developments in international fisheries law. Article 4 of the Antigua Convention mandates the application the precautionary approach "as described in the relevant provisions of the Code of Conduct and/or the 1995 UN Fish Stocks Agreement". Commission members are to be more cautious when information is uncertain, unreliable or inadequate and the absence of scientific information is not to be used as a reason for postponing or failing to take conservation and management measures. Enhanced monitoring is to be conducted where uncertainty over stock status exists in order to review the efficacy of measures and measures are to be revised regularly in light of new scientific information. It remains to be seen whether this convention will come into force and, if so, what effect this will have on the practice of the Commission.

Despite this progress, however, the reality of non-precautionary management remains. The most obvious manifestation of this is continuing scientific advice that ever increasing numbers of stocks are being fished at or over biologically sustainable limits. In some cases, in apparent direct contravention of the precautionary approach, uncertainty or disagreement over the scientific assessments on which this advice is based is specifically articulated as the reason for refusal to adopt conservation measures. Within the IOTC the EC has repeatedly objected to a proposal for a moratorium on FAD-assisted bigeye tuna fishing on the basis that the advice from the Scientific Committee – which has clearly called for such a measure – is supported by inadequate science.[89] Even without specifically maligning the quality of scientific assessments, RFOs continue to ignore them, setting TACs at limits in excess of those advised such as continues to occur in NAFO, ICCAT and NEAFC or, as in the case of the IOTC and the IATTC, failing to set any catch limits at all despite advice as to their necessity. The short term "economic risk of unnecessarily foregoing catches" seems still to take precedence over the "risk of biological stock depletion with longer-term economic consequences".[90]

The difficulties inherent in implementing the precautionary approach are perhaps best demonstrated in the Southern Bluefin Tuna dispute between Japan, Australia and New Zealand. An overall TAC for SBT was set by agreement

88 Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica, adopted at the 70th Meeting of the IATTC held at Antigua, Guatemala, 24-27 June 2003 (the "Antigua Convention").

89 Report of the 7th Session of the IOTC at 7 paras 53-54.

90 T. Polacheck, "Experimental Catches and the Precautionary Approach: The Southern Bluefin Tuna Dispute" (2002) 26 *Marine Policy* 283-294.

between the parties in 1989 however total catches had been increasing due to non-party and over-quota fishing and there was evidence of serious stock decline. The CCSBT was established in 1993 with the express management objective of rebuilding SBT stocks to 1980 levels by the year 2010. This was later extended to 2020.[91] From the start disputes persisted in the Commission over the setting of a TAC and allocation of national quotas. By 1998 Australian and New Zealand scientists were predicting a low probability of recovery while Japanese scientists using the same information but different calculation methods were predicting a high probability of recovery of the SBT stocks.[92] In the face of continuing disagreement in 1998 Japan unilaterally introduced an experimental fishing program (EFP), which involved significant over-quota fishing on its part, despite the fact that the parties had not yet agreed on an evaluation process for such a program and over the strenuous and continuing objections of Australia and New Zealand.

In 1999 Australia and New Zealand commenced arbitral proceedings against Japan pursuant to Annex VII of the LOSC alleging, *inter alia*, that the EFP violated Japan's obligations under the LOSC and seeking an order banning Japan and its nationals from conducting over-quota fishing. Pending establishment of the arbitral tribunal Australia and New Zealand also sought an order for provisional measures from the ITLOS asking that Japan be ordered immediately to stop its EFP and to do nothing to prejudice the conduct and outcome of the Annex VII arbitration. In what appears to have been an unstated invocation of the precautionary approach, provisional measures were granted, despite the scientific uncertainties surrounding the case.[93] Definitive resolution of the question of the legality of Japan's EFP and any other resolution of issues relating to the precautionary approach was, however, stymied by the subsequent decision of the Annex VII arbitral tribunal that it lacked jurisdiction to hear the case.[94]

91 See, A. Bergin and M. Haward, "Southern Bluefin Tuna Fishery: Recent Developments in International Management" (1994) 18(3) *Marine Policy* 263-273.

92 For an analysis of the different positions see Polacheck, *op. cit.,* at 285-287.

93 *Southern Bluefin Tuna* cases (*New Zealand v Japan; Australia v Japan*) (Provisional Measures) Order, 27 August 1999. See also, S. Marr, "The Southern Bluefin Tuna Cases: The precautionary Approach and Conservation and Management of Fish Resources" (2000) 11(4) *European Journal of International Law* 815-831.

94 *Southern Bluefin Tuna* Case *(Australia and New Zealand v Japan),* Award on Jurisdiction and Admissibility, rendered by the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, 4 August 2000 available at *http://www.worldbank.org/icsid.*

The outcome of the dispute highlights the procedural difficulties caused by the existence of a plethora of conflicting, overlapping and possibly inconsistent dispute settlement mechanisms which may render determination of the substantive issues relating to implementation of the precautionary approach impossible.[95] The members of the CCSBT are still not agreed on the status of the SBT stocks or on how to manage threats thereto. Indeed, in 2003 it was suggested that the management objective of restoration of stocks to 1980 levels by 2020 was wholly unrealistic, would never be met given current fishing levels, and should therefore be revised.[96] Given this precedent, it can at best only be said that it remains to be seen whether the precautionary approach will ever be successfully implemented in all RFOs or whether in default thereof fisheries management will remain a rear-guard action in which attempts to rebuild stocks only occur once stock depletion has occurred below commercially – or biologically – viable levels.

5. High Seas Fisheries and Integration and Interrelationship, Particularly relating to Human Rights and Social, Economic and Environmental Objectives

The final issue to be considered in this chapter relates to the principle of integration which reflects the interdependence between social, economic, financial, environmental and human rights objectives and requires states to work to resolve apparent conflicts between these various competing objectives. While this issue arises in a plethora of contexts, mention is briefly made here of but one example; the interrelationship between international fisheries law and international trade law.

The interrelationship between the requirements of fisheries and trade law arises in a number of contexts. For example, utilization of trade related measures holds considerable potential for more effective, and thus more sustainable, management of high seas fisheries. Statistical documentation programs or catch documentation schemes are increasingly being adopted to acquire trade data

95 See, C. Romano, "The *Southern Bluefin Tuna* Dispute: Hints of a World to Come… Like it or Not" (2001) 32 *Ocean Development and International Law* 313-348 and L. Sturtz, *Southern Bluefin Tuna Case*: Australia and New Zealand v Japan" (2001) 28 *Ecology Law Quarterly* 455-486.

96 Report of the Extended Commission of the Tenth Annual Meeting of the Meeting of the CCSBT (2003) paras 37-48.

from which more accurate assessments of overall catches – in real terms – can be made.[97] However, these programs are limited to the extent that they are not implemented or enforced by non-members states of RFOs. In addition, there is growing evidence of their abuse through inadequate implementation and follow-up as well as fraudulent reporting and forged documentation.[98] Within CCAMLR this led, in 2002, to the highly controversial, and ultimately unsuccessful, proposal by Australia that Patagonian toothfish should be listed under Appendix II to the Convention on International Trade in Endangered Species (CITES)[99] in order to facilitate control of trade in toothfish amongst states not participating in the CDS. Interestingly, one of the main objections of other member states (aside from strong resentment of the unilateral manner in which the listing had been sought) was that CCAMLR was perfectly capable of being master in its own house and should not undermine its own authority by turning, in this way, to an external treaty regime.[100]

Other interfaces with international trade law also arise. In addition to trade *related* measures, trade *restrictive* measures are increasingly being invoked as a form of sanction against states which engage in IUU fishing. The practice, which appears to have initiated in ICCAT and has now spread to a number of RFOs, involves requiring member states to refrain from importing specified fish or fish products from a state whose vessels have fished in contravention

97 Even some members do not implement the schemes. Within CCAMLR, Canada repeatedly declined requests from other members of the Commission to implement the Toothfish CDS Scheme. In 2003, however, it announced that it would do so. Report of the 22nd Annual Meeting of the Commission, CCAMLR-XXII (2003) para 7.2. Non-members, the People's Republic of China, Indonesia, Mauritius, Seychelles and Singapore also participate in the scheme however, there is still room for more non-member participation given that vessels from other non-member states including Belize, Bolivia, Equatorial Guinea, Ghana, St Vincent and the Grenadines and Togo all fish in the CCAMLR area.

98 In 2003 CCAMLR reported on concerns that catches of toothfish are being laundered through Hong Kong. Although the PRC (at least partially) implements the Toothfish CDS it does not do so in respect of Hong Kong on the basis that Hong Kong has an independent administration. CCAMLR-XXII (2003) paras 8.8-8.12. In 2002 Japan produced extensive evidence in the IOTC, which it also presented in ICCAT, the IATTC and elsewhere, of fraudulent activities. See Japanese Report on the Current Situation of IUU LSTLVs (large-scale tuna longline vessels), IOTC Doc S7-02-08 submitted to the 7th Session of the IOTC, December 2002.

99 Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted 3 March 1973; entered into force 1 July 1975, 993 *UNTS* 243, 12 *ILM* 1085 (1973).

100 Report of the 21st Annual Meeting of the Commission, CCAMLR-XXI (2002) para 10.1 *et seq*.

of the conservation measures adopted by the RFO. By denying any market to IUU fish, it is supposed that IUU fishing will no longer be profitable and will cease.

Impediments to the successful invocation of the trade restrictive measures approach were amply demonstrated in the *Tuna-Dolphin* cases where two GATT panels held that United States legislation banning imports of tuna which had been caught in a non-dolphin-friendly manner violated international trade law.[101] The decision in the *Shrimp-Turtle* case in which the WTO Appellate Body held that an import ban implemented by the United States on shrimp and shrimp products caught using equipment that did not include turtle excluding devices violated the GATT, reinforced this position.[102] Accordingly, much effort has ostensibly been expended to ensure current RFO restrictive trade measures regimes do not fall foul of the GATT/WTO regime. This has resulted in the design of lengthy processes within RFOs for their invocation. A state must first be identified as one whose vessels fish in contravention of the RFOs conservation measures. It must then be asked to rectify the situation. Its attempts at rectification are then assessed by the RFO and, if found wanting, the state

101 The impugned legislation was the *Marine Mammal Protection Act*, 16 USC § 1371, first introduced in 1972 to regulate setting on dolphins by purse seine vessels under US registry. After a series of amendments the legislation eventually banned imports of tuna from Mexico. In 1991 Mexico filed a complaint under the GATT dispute settlement procedure. In 1992 the EC filed its own complaint which led to a second Panel Report. Neither Report was adopted, however, and the matter was left to be dealt with through other channels. See *United States – Restrictions on Imports of Tuna*, Report of the GATT Panel, August 16, 1991 (1991) 30 ILM 1594 (Tuna/Dolphin I) and *United States – Restrictions on Imports of Tuna*, Report of the GATT Panel, May 20, 1994 (1994) 33 *ILM* 839 (Tuna/Dolphin II). For discussion of the controversy and cases see, eg, J. Joseph, "The Tuna Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic and Political Impacts" (1994) *25 Ocean Development and International Law* 1; S. Fleischer, "The Mexico-US Tuna Dolphin Dispute in GATT: Exploring the Use of Trade Restrictions to Enforce Environmental Standards" (1993) 3 *Transnational Law and Contemporary Problems* 515; T. Strom, "Another Kick at the Can: Tuna/Dolphin II" (1995) 33 *Canadian Yearbook of International Law* 149; and T. McDorman, "The 1991 US-Mexico GATT Panel Report of Tuna and Dolphin: Implications for Trade and Environmental Conflicts" (1992) 17 *North Carolina Journal of International Law and Commercial Regulation* 461-488.

102 *The United States – Import Prohibition of Certain Shrimp and Shrimp Products* case, WTO Doc. WT/DS58/AB/R (98-000), 12 October 1998. For a multifaceted discussion of the case see the "Symposium: *The United States – Import Prohibition of Certain Shrimp and Shrimp Products* Case" (1999) 9 *Yearbook of International Environmental Law* 1998 3-17.

is then warned that restrictive trade measures may be taken. Only after this warning has achieved no tangible result will measures be adopted.

The deleterious results of this convoluted approach are manifest. To begin with, given the nature of RFO administrative and procedural processes, the entire process takes from two to three years for any measures to be adopted. In the meantime high levels of IUU fishing can – and do – continue. Once adoption of measures is imminent, vessels simply reflag to a non-identified state and continue fishing.[103] The increasing number of states being identified each year bears witness to this practice. In addition, states can avoid adoption of trade restrictive measures by appearing to act. This may simply involve advising the RFO that it will take steps against the vessel concerned. However, no mechanism other than public scrutiny exists to review the *bona fides* and effectiveness of these actions. The potential for misleading and ineffective action is great. Even assuming measures are adopted by the RFO to be implemented against states whose vessels engage in IUU fishing, such measures are only binding on non-objecting member states. Objection procedures have particularly been invoked by developing coastal states within ICCAT to absolve themselves of the necessity of implementing trade restrictive measures against other non-member developing states on the basis that these measures are discriminatory in fact, even if not in form, against developing states. The most obvious result of this has been a rise in the practice of port-hopping by IUU vessels to objecting and/or non-member states which then act as 'launderers' of IUU fish. It is unclear whether this time consuming and complicated approach is really necessary to satisfy the rules of international trade law or even whether it, in fact, does so.

Furthermore, in most cases these trade restrictive measures operate only as against non-members of RFOs. ICCAT appears so far to be the exception, having also adopted trade restrictive measures against at least one member state. In an interesting twist in CCAMLR in 2003 known non-member IUU vessels reflagged to member state Russia which, due to the requirement of consensus in the Commission, then succeeded in having the vessels kept off the IUU vessel list.[104] The point here is that so far these trade restrictive measures have only succeeded in continually 'exporting' the problems of IUU fishing. In this

103 See, eg, E.J. Molenaar, "Marine Fisheries in the Netherlands Antilles and Aruba in the Context of International Law" (2003) 18(1) *International Journal of Marine and Coastal Law* 475-531 which discuses incidents of reflagging in the CCAMLR area.

104 See Report of the 22nd Annual Meeting of the Commission, CCAMLR –XXII (2003) paras 8.19-8.59.

respect, the requirements of the international trade regime seem to undermine the requirements of sustainable development of international fisheries.

While the GATT/WTO consistency of these RFO measures has yet to be tested, the legality of trade restrictive measures in the absence of RFO involvement was at issue in the EC-Chile swordfish dispute in which parallel proceedings were brought in the WTO[105] and ITLOS[106] to determine the legality of Chile's closure of its ports to vessels fishing for swordfish on the high seas in contravention of conservation measures unilaterally adopted by Chile. It is generally accepted that a state has the right to close its ports on a non-discriminatory basis in respect of interests recognized by the international community as appertaining either generally or specifically to that state.[107] At issue was whether Chile's right to adopt the conservation measures was recognized as pertaining to it and whether the measures violated Articles V and XI of the GATT 1994.[108] However, both cases were suspended following agreement on a Provisional Arrangement which provides, *inter alia*, for access by a prescribed number of Spanish vessels to Chilean ports subject to a number of notification and other procedures.[109] Accordingly, no legal resolution of the issues involved has yet been achieved. It is interesting to note, however, that Chile's willingness to settle appears to have been influenced by its desire for

105 *Chile – Measures Affecting the Transit and Importation of Swordfish*, Request for Consultations by the European Communities, WT/DS193/1, G/L/367, 26 April 2000 (00-1676) and *Chile – Measures Affecting the Transit and Importation of Swordfish*, Request for the Establishment of a Panel by the European Communities, WT/DS193/2, 7 November 2000 (00-4761, available at http://docsonline.wto.org/.

106 *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South Eastern Pacific Ocean (Chile/European Community),* Constitution of Chamber, Order 2000/3, 20 December 2000, available at http://www.itlos.org/.

107 A. Lowe, "The Right of Entry into Maritime Ports in International Law" (1997) 14 *San Diego Law Review* 621 and G. Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port States Regime* (Martinus Nijhoff, 1993) at 20-21.

108 Marakesh Agreement Establishing the World Trade Organization, Annex 1A, General Agreement on Tariffs and Trade 1994, 33 *ILM* 29 (1994).

109 The text of the Provisional Agreement is incorporated in *Chile-Measures Affecting the Transit and Importation of Swordfish*, Agreement between the European Communities and Chile, Communication for the European Communities, WT/DS193/3, 6 April 2001 (01-1770). See also WT/DS193.Add.1, 9 April 2001 suspending the WTO proceedings. The ITLOS proceedings were suspended by ITLOS Order 2001/1, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v European Community)* 15 March 2001.

a free trade agreement with the EC.[110] In addition, the negotiation of a permanent multilateral conservation regime for swordfish called for in the Provisional Arrangement seems to have fallen off the agenda.[111] In the absence of any evidence that the Provisional Arrangement is assisting in the long-term conservation of swordfish stocks it would seem that the duty to conserve has been subjugated to trade concerns and the desire to develop. Whether this is the intended result of the application of the concept of sustainable development of marine living resources is debatable.

6. Conclusion

This chapter has examined practice relating to implementation of the principles of sustainable development in the high seas fisheries context. Certainly practice is developing which indicates attempts at broad conformity with the requirements of sustainable development. However, a glance beneath the surface confirms that the practice fully reflects the underlying tensions in the ongoing debates surrounding the status and content of the principles of sustainable development. Many of these tensions have been addressed here and in other chapters in this book. Fundamentally they relate to the issues of whose development is intended and whether what is being accomplished is sustainable.

With respect to the first issue, despite the legal advances of the last decade, it appears that practice in the high seas fisheries context remains open to the criticism that the criteria of development continues to be satisfied primarily in respect of developed, and in particular, distant water fishing states. With respect to the second issue, the practice indicates that achievement of the goal of conservation and long-term sustainable use of high seas fisheries resources is still far from certain. In part this is due to limitations in the existing legal regime which takes the LOSC as its starting point. Given that the provisions of the LOSC predate the articulation of the sustainable development imperative a flexible and evolutionary interpretation of those provisions, which reflects

110 M. Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO" (2002) 71 *Nordic Journal of International Law* 55 at 69.

111 The Provisional Agreement includes a commitment to work for a multilateral framework for management and conservation of swordfish in the Southeast Pacific. Meetings were held in May 2001 and July 2002 and attended by Chile, Colombia, Ecuador, the EU and Peru. Although agreement was reached to recommend establishment of a multilateral arrangement open to all parties fishing or intending to fish in the Southeast Pacific, no further progress has been made to date.

more recent legal developments, must surely be necessary. Moreover, this interpretative approach must be applied in respect of the activities of all states involved in high seas fisheries, not just those party to the more recent global fisheries agreements. Selective, inconsistent, or non-universal, implementation of these principles will doom the sustainable development imperative to failure.

The real crux of the issue lies, therefore, in the political will of states to fully and effectively implement the principles of sustainable development. This may, however, require a degree of altruism and self sacrifice that the international community is simply unable to achieve. Consternation at the inability of the international community to meet the challenge of sustainable development is not necessarily misplaced when it is remembered that fish stocks have continued to decline despite being under RFO management and that IUU fishing continues despite the extensive efforts of the past years to eradicate it. Certainly progress is being made. Nevertheless, it remains to be seen whether the WSSD goal of restoration of depleted high seas stocks by 2015 will be met and whether high seas fisheries will continue sustainably thereafter.

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WILDLIFE CONSERVATION: INSTITUTIONAL AND NORMATIVE CONSIDERATIONS

Peter Stoett

1. Introduction: The Extinction Crisis and Wildlife Conservation

There is widespread acknowledgement that the rapid rate of species loss currently inflicted by anthropomorphic activity presents a fundamental challenge to long-term planetary survival, and that the economic value of biodiversity is in itself a legitimate concern for economists and policy analysts alike (see Pearce and Moran, 1994; Perings et.al., 1995). One of the primary threats to wildlife is the multi-billion dollar trade in body parts, which occurs today on an unprecedented international level. A *New York Times* article written in 1997 suggested that "black market" sales of endangered species generate as much as $10 billion a year (Webster, 1997); up considerably from the estimated $1.5 billion of 1986 (see Slocombe, 1989:23).

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is the primary global regulatory mechanism.[1] Though it

1 CITES boasts 166 Parties. Under the CITES system, species are divided into three appendices. Appendix 1 listings are for the most seriously endangered species; almost all trade of any parts of these species is prohibited and, when trade is permitted, both export and import permits are required; import permits require a pre-arranged buyer. Appendix II species can be traded, but export permits are required, and trade is prohibited if the CITES administrators determine it is not in the interests of the species survival. Appendix III lists species that are internally regulated by a state but are not necessarily recognized as endangered by the international community. CITES issues import permits when a) the import will be for purposes which are not detrimental to the survival of

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 501-518.*

would be phantasmic to conclude that a strong global regime with extraordinary powers exists in this area, it is true that the Convention has encouraged many states to increase their border monitoring activities, has (through related organizations, such as the International Union for the Conservation of Nature) promoted public awareness of the need to protect endangered species, and has led to the routinization of a weak but resilient form of soft global governance. However, the implementation and decision-making activity of the CITES organization has also revealed fundamental and growing rifts in the quest to preserve endangered species, and this is illustrative of greater divides that will affect the even more urgent need to move quite beyond poaching control and pursue effective habitat preservation.

The Convention has been the location of a virtual battleground between participants with contrasting ideological perspectives. On one side are *preservationists*, who hold that nature and wildlife should be preserved in as "pristine" a condition as possible, and that the widespread utilisation of (usually select) species should be abandoned in favour of a new environmental ethic. On the other hand, *conservationists* have no problem with utilisation, provided it is not excessive and doesn't threaten the future of the species (which would make future utilisation impossible). These are the two ideal types, as it were, of the debate. Most people fall somewhere between the two, and – if pressed, in fact favour some species over others. Polar and panda bears, whales, elephants, gorillas: these "charismatic mega-vertebrates" tend to stand out as worthy of complete protection, while concern is less concentrated for snail darts, mussels, and the thousands of plant species facing extinction. It is another matter, however, to place international institutions dedicated specifically to species conservation along this ideological spectrum.

However it would be incomplete to view this as an ideological debate within the specific realm of animal rights questions and principles. The greater charge is that the universalizing tendencies of global governance mechanisms, and even

the species; b) when the proposed recipient of a living specimen is suitably equipped to house and care for it; c) the specimen is not to be used for primarily commercial purposes (article III (3)). Export permits for species form Appendices I and II are issued if the country of export can determine that a) the export will not be detrimental to the species survival; b) the specimen was not obtained in contravention of the laws of that state and c) any living specimen will be appropriately prepared and shipped to minimize the risk of injury (Article III (2)). See Hill, 1990. Note also that states can enter a "reservation", exempting themselves from the permit requirements for a particular species (Article XXIII). Japan did this with regard to sea turtles (Green Hawksbill and Olive Ridley, which are listed in Appendix One; it withdrew the reservation in 1994).

the seemingly progressive modifications to simplistic economics envisioned by ecological economics, can limit the ability of non-western cultures to flourish and sustain self-identities based on subsistence harvesting techniques such as trapping, whaling, and ivory tusk collection. The claim that far-off institutions, such as CITES and the International Whaling Commission (IWC), have the political legitimacy to make decisions with evident local impact is in itself challenged by the diplomatic context in which they operate, seldom involving those most directly affected. On the other hand, without international regulations, market-based allocations of endangered species (living and dead) threaten their very existence.[2]

This chapter will explore the normative distance between conservationists and preservationists. It will first situate the debate within the broader context of a discussion of human-nature relations, and then further situate it within the context of an international conflict of ideas with short and long-term policy impact. The claim that global governance on issues such as wildlife preservation constitutes a form of soft cultural imperialism is not without merit. Yet it is also quite evident that a hard necessity exists: without some form of international co-operation, endangered species will be in much greater peril. We will use the recent evolution of CITES as an empirical referent, but return in the final analysis to the even more urgent question of habitat protection.

2. Human-nature Relations

In late July 2001 the International Whaling Commission held its annual meeting in London, England. Even before the meeting began it became apparent that a repetition of previous conflicts was in order: a Japanese delegate referred to minke whales as "cockroaches of the sea"; anti-whaling NGOs (Non-Governmental Organizations) accused the Japanese of funding pro-whaling states, and decried Japanese/Norwegian demands for a lifting of the global moratorium on commercial whaling.[3] Former Executive Secretary of the IWC Ray Gambell expressed his frustration (to the present author) when dealing with such polar-

2 Note that, as Kevin Hill writes, CITES itself "contains neither animal rights or deep ecology philosophy. …Although its primary goal is to preserve endangered species, its secondary goal is to allow a sustainable level of exploitation of those species" (Hill, 1990:245). Similarly, the Non-Proliferation Treaty is designed to curb the horizontal spread of nuclear weapons, but it is also intended to promote the nuclear power industry – I have explored this functional duality elsewhere (see Stoett, 1995).

3 See http://ens-news.com/ens/jw/2001/2001L-07-24-03.html.

ized perspectives, most often represented by the Americans on the anti-whaling side and the Japanese on the pro-whaling side.[4]

This discrepancy regarding the ethics of whaling is echoed in many other areas as well. Indeed, the present author was struck by the veracity of the split between what are commonly labelled conservationists and preservationists when he attended the CITES Conference of the Parties in Nairobi in the summer of 2000. While many states attending the conference were non-committal, many others were quite ideological in their position, regardless of scientific estimates in terms of species status. This was a window on broader and seemingly axiomatic ontological differences.

It may well be the case that one of the most divisive and consequential differences in civilizational attitude is centred on human-nature relations. This normative/ideological condition influences the way governments and societies effect environmental protection, pursue sustainable development, and transmit similar orientations to younger generations. It is within the field of wildlife conservation where such differences can appear most visible, but it can be argued that these manifestations are repeated elsewhere in areas as diverse as dam construction and engineering, pesticide use, and bulk water sales.

There are several ways of explicating differing perspectives on human-nature relations. It is assumed from the outset here that reverting to a chronological/temporal division as procrustean as pre-modernity, modernity, and post-modernity would do a great disservice to analytic promise. While there may be a confluence between modernization approaches in the development literature and the proclivity to engage in large-scale hydro-development plans and other forms of mega-infrastructure, we can assert today that not all pre- or post-moderns (whatever either of these hazy terms implies) are in possession of identical environmental values. Moreover, this invites the lazy interpretation of those dependent on harvesting wildlife as "behind in the times", as opposed to embracing a complicated understanding of cultural relativity.

Elsewhere the present author has used a classification system based on the identification of a fairly standard set of organizing principles (see Laferriere and Stoett, 1999). *Utilitarian* ecology is based on valuing nature for what are essentially human-needs centred potential uses. This is not by definition a perspective incapable of valuing conservation, however. In many cases, conservation in itself has an end-use; the eco-tourism market is an indication of the economic value of nature. Further, most conservationists, as outlined above

4 Personal interview with the author, April 2001.

in reference to the normative split that engulfs venues such as CITES today, would be classified as utilitarian. This is not a monolithic category, either: conservationists differ in their opinions regarding the end-use utility of species. While many hunters and anglers would certainly be best labelled with this phrase, there are also a good many policymakers who, through no close or even electoral affinity with hunting and fishing industries, would also be quite comfortable with the label. This may be the biggest problem many have with it, as such; it is an easy label to adopt, and yet receive credit for an environmental awareness predicated on a human-needs approach.

Radical ecology, however, is quite critical of utilitarian ecology: deep ecologists reject the idea that human ends are the purpose of natural environments. Though there are many variants of radical ecologists most of them suggest that the environmental crisis is in part the result of our misunderstanding of the symbiotic condition of life, and in part the result of inegalitarian social and political systems. They generally encourage less stratified social orders and the decentralisation of authority, and many would adopt a preservationist attitude to wildlife in general.

Yet another branch of ecopolitical thought, which can be labelled *authoritarian* ecology, suggests that, contrary to the anarchic streak in radical ecology, what is needed to deal with scarcity issues is a strong state, highly centralized, that can make enforceable decisions towards environmental conservation. Though there are less palatable versions of this perspective which have been linked to "eco-facism", the general thrust is that even liberal institutions and values may have to be suspended to avoid ecological collapse.

We see reflections of all these perspectives in the international debate over global governance. While it is obvious that species impoverishment is indeed a global problem, it is less clear what international structures can be erected to reverse the trend; what level of authority they will or even can possibly possess; and how local communities can be expected to interact with such structures in a way that does not obscure their identity of decision-making power. Added to this dilemma is the political problem of legitimacy: how can such institutions maintain credibility and respect, when they have little or no recourse to either physical coercion or cultural support?

The three broad perspectives outlined above can be seen as rather isolated modes of thinking. In most cases they speak rapidly past each other, despite a common and (one might assume) genuine concern with the same thing: preserving the natural diversity and life on earth. Put simply, it is much too general to even consider an entity such as a "conservationist" or "environmental" movement. Others have put forth categorizations which are equally

useful (see Wiessenburg, 2001; Dobson 1999). There is also a philosophical debate about just how it is possible to actually value wildlife in the first place, assuming we are all subjective in our assessments. Some reject this, claiming there is an intrinsic value to nature that cannot be quantified. Further, one can reject the notion of intrinsic value, yet still maintain a high priority for the biosphere as "values which are specifically environmental are most often extrinsic and objective, not intrinsic" (Green, 1996: 45).[5] We shall return to this concept, and the importance of maintaining healthy habitat for wildlife species, in our conclusion.

There is widespread agreement amongst radical ecologists that heterogeneity – in ecological and biological terms, but also in social terms, cultural diversity – is a value worth sustaining, even to the point where social anarchists would deny the right of governments to impose the uniformity of centralised governance. There is also, however, a tendency amongst most environmentalists to seek universal standards when it comes to human-nature interaction. This may not be the inherent contradiction in terms it appears to be. For example, it is possible to promote diversity as a universal value. However, moving into the realm of international wildlife policy serves to demonstrate that this is a difficult fit at best, and it is decried by state actors claiming to represent those most closely wedded to the utilitarian perspective. States pushing what appear to be conservationist values in international forums may appear hypocritical, as many of them are western industrial states whose economic foundations lay in a hyper-utilitarian paradigm of intense resource exploitation. This is the case with the United States, whose representatives currently refuse to commit to what they perceive as self-sacrificial global accords, such as the Kyoto Protocol on global warming, while simultaneously striving to deny coastal whalers the right to kill mammals no longer endangered by a resumption of small-scale whaling.[6]

When it comes to the specific debate about trade in animal and plant parts, however, the larger divide would appear to be that between conservationist, or "sustainable-use advocates", and preservationists, who would seek to dis-

5 "Beautiful rock formations, like beautiful paintings, may be valued as ends, but their value will be relative to the existence of creatures capable of appreciating beauty. Healthy ecosystems, by contrast, will have value that is independent of any conscious valuer since their health is constitutive of the health of the biosphere." Ibid.

6 To heighten the contradiction, it is quite apparent today that the largest threat to whale populations is indeed the unknown consequence of global warming itself on the aquatic environment. (In the case of fisheries, overfishing remains the most immediately potent problem, but climate change is certainly the long-term issue.)

continue human utilization of some species altogether. We explicate these positions in the following section.

3. The Utility of Wildlife Debate

Conservationists, then, are closest to the utilitarians outlined above. Policies limiting poaching, fishing, whaling, or other resource extraction are encouraged, provided they are not applied to species out of danger. Generally, this group includes fishers and hunters, people who have relied on resources for subsistence or commercial activity. It also includes big game hunters and some industrialists who argue that conservation can be introduced only if it is profitable or valuable for the local population. Although there is a genuine desire to work within international organizations, many conservationists would reject the ability of such bodies to make decisions that will have a negative impact on local populations, especially if they threaten livelihoods. The plea that such decisions are based on long-term thinking may or may not be effective.

There are further splits amongst the conservationists themselves. One of the staples of environmental crises literature is the dilemma over common pool resources, leading to a situation where accelerated individual consumption leads to common ruin. While some (as in the authoritarian ecologists described above) would advocate strong government to force solutions on the population, others would suggest that privatization of resources would be as effective, enhancing individual self-responsibility in the process. This approach is most often challenged in wildlife conservation circles, however, because there may be immediate conflicts of interest between private land-holders and what is perceived as the common good of a particular species found on that land. And at any rate this approach is at best difficult to apply in the international context and especially the areas free from sovereign jurisdiction such as the oceans (unless one makes a vulgar equation between privatization and territorialization).[7] One can conclude that amongst the utilitarian/conservationist adherents there are in fact wide divisions of praxiological emphasis.

If the conservationists wrestle amongst themselves, the preservationists have already declared the winner. Species values are assumed to be immutable by

7 The standard reference here is to the extension of 200 n.m. "exclusive economic zones", with or without the ratification of the 1982 UN Convention on the Law of the Sea. Early hopes that this would encourage greater fisheries conservation have been largely discarded.

market dynamics; they are inherent, and though a small schism exists between those who would qualify as deep ecologists (espousing a purely bio-centric paradigm) and those who would see species value as something contingent on their relation to planetary survival, the general agreement is that we cannot, accurately, put a monetary value on fauna or flora. However, even here there is a certain discrepancy. While it is apparent that the preservationist ethos differs significantly from conservationism, as outlined above, it is also apparent that some species would fall into a higher order than others when it comes to the daily realities of actually seeking relevant policies. This is the heart of the contention many conservationists aim at the former: cuddly species are not necessarily most at risk, but they are the most conducive to fund-raising campaigns. In their defence, the campaigners are making the best of a bad situation, and if public relations exercises could be conducted based on a holistic ecological approach they probably would be. At the same time, the focus on charismatic vertebrates opens up the charge of oversimplification, reification of such simplicity, and the tokenism associated with making too strong a link between popularity and urgency.

It is indeed difficult to move toward a universal understanding of the value of not only human life, but non-human life as well, despite the concerted efforts of ecological economists. Part of the issue here is that it has always been a difficult task to give wildlife a value. Lower animal forms have traditionally been given less priority (see Tobin, 1990), yet it clear that habitat preservation requires the survival of all. Furthermore, "[b]ecause of their transient and transitory status, wildlife are not normally considered property until they are killed or claimed" (Naughton-Treves and Sanderson, 1995:1269). There are further questions about the scale, and level, of value-placement, particularly as reflected by numbers of mammals. In the well-known and controversial case of the CITES African elephant Appendix One listing (see Stoett, 1997b; Glennon, 1990), Treves and Sanderson suggest "[t]here may be too many at one scale (Zimbabwe, perhaps) and not enough at another (Africa). Should southern Africa "pay" for East African conservation problems?".

In fact the elephant case is quite illustrative of the types of problems faced by, and some would argue caused by, efforts at international regulation. The elephant issue has been one of the most controversial, because the mammal has become an icon for the preservationists. But there is another reason why the African elephant, in particular, has become such an important issue. International treaties are generally based on the prior principle that states are not to be asked to surrender a considerable amount of their sovereignty, or the right of state leaders to pursue the policies they wish inside their borders, including

what they export to and import from the outside world. A ban on trade, it can be argued, curtails this right, demanding that states that disagree comply voluntarily. Without this compliance, the regime means little other than a congruence of interests. The question is, when push comes to shove, how long are state leaders willing to play along? Would they reach a breaking point where they would trade regardless of the CITES conference? Would the threat of sanctions prevent this? Would the legitimacy of the institution survive the challenge? Beyond the ideological issue that has permeated its personality, CITES is not unlike other international institutions: it is inherently weak, and its legitimacy is both crucial and on permanent probation.[8]

In 1985, CITES established the Ivory Trade Review Group, co-ordinated by the CITES Secretariat. That year, a general amnesty on illegal ivory stockpiles, designed to flush the market and reduce future illegal shipments, proved to be a disaster as prices soared due to unanticipated demand from the rapidly growing economies of Asia. The Trade Review Group found that, indeed, the African elephant was on the way to extinction. Between 1979 and 1989, the number of elephants in Africa underwent a precipitous decline, from roughly 1.3 million to around 625, 000. It has been estimated that some 300, 000 were killed between 1986-1989 alone; and as the full-grown bulls, with their massive tusks, were killed off, increased numbers of younger elephants were taken to produce the same amount of ivory. This was, without question, largely the result of intense poaching. Ivory was selling for as much as $100 (U.S.) per kilogram by the time the Appendix One listing occurred (a listing in Appendix One curtailed almost all legal trade in any products from the species).[9] Shortly after, the price dropped significantly, and poaching became much less common;

8 A survey compiled by the consultants Environmental Resources Management suggests, however, that stakeholders consider CITES as very relevant to the conservation of endangered species; some 70% of the respondents thought it was effective in deterring illegal trade. See Hepworth, 1998. On the concept of legitimacy and multilateral environmental organizations, see Caron, 1995, and Stoett, 1997a.

9 This ban was lifted temporarily in 1999 for a one-time sale of southern stock to Japan. In addition, CITES established the MIKE (Monitoring the Illegal Killing of Elephants) and ETIS (Elephant Trade Information System, which works with TRAFFIC) programmes. Currently southern African Elephant populations are listed on Appendix Two, but the international trade ban on ivory remains in effect. At the CITES COP, in Nairobi, 2000, no elephant populations were downlisted to Appendix II, as several southern African states (Botswana, Namibia, and Zimbabwe) proposed. India, Kenya, and the United States were the most vocal opponents of the downlisting; and in fact Kenya proposed that all elephant populations be uplisted to Appendix I – this proposal did not succeed either, however. See Berger, 2001, for an updated analysis.

indeed, elephants began returning to some areas, such as Northern Kenya, where they had been all but eradicated. Lower ivory prices may have increased domestic consumption of ivory, but this increase was apparently small compared to the foreign demand. The American market, which had previously imported some twelve percent of the trade, was closed altogether.

To preservationists, the strategy behind the Appendix One listing of the elephant was simple: it would cut off demand. Poaching would make less sense if trade in resultant products was virtually impossible. Naturally, an underground market would survive, but the African states that pursued elephant protection in a vigorous manner would be able to ensure the survival of their elephants. Preservationists hoped that, aside from the symbolic victory the ivory ban represented, demand would eventually wither away. Much the same long-term thinking has gone into the moratorium on commercial whaling, as well. If you can disrupt the market, this can create a potential space for the changing of attitudes towards wildlife and the environment in general, generating wider acceptance of a particular interpretation of the meaning of sustainable development itself.

The problem with this approach, of course, is that it is rather western and in fact quite representative of urban western environmentalism in particular. Even within western states there is no consensus: for example, while some Canadians would accept the idea that elephants, whales, seals, bison, and other mammals should not be killed for commercial activity, many would not, especially in rural areas and on the east coast, where a seal fishery has been preserved for many years. Aboriginals, in particular, reject the idea that organisations such as the IWC should have any right to tell them what sustainable development entails. While attitudes towards nature have certainly shifted in the west (though the degree to which this has taken place is highly controversial) this does not translate into a universal experience. More people in the United States, Canada, and Europe may be more sensitive to the plight of elephants and rhinoceros, but what about the people living in Africa, who have to co-exist with these mammals? Should they not be allowed to trade elephant parts, especially after rescuing the elephant from near-extinction? How else can we encourage African governments to pay conservation officers that may have to risk their lives against poachers? Even the debate about non-lethal use of such mammals, especially whales, can raise the question of western cultural imposition (see Palazzo, 1999).

Conservationists would point out that, whether they are killed for ivory or because there simply isn't enough living space for them to coexist with agri-

culturists, elephants are going to be killed unless they are perceived as valuable.[10] Alternative techniques for population control are welcome and hold some promise, though they all take us quite far from the preservationist stance described above. But the essential point that can't be overlooked is that local communities need to be rewarded for their conservation efforts, not punished for them. Clearly, there was fairly widespread opinion in the affected southern African countries that the latter was the case. Similarly, native Canadians and others reliant on fur trapping and sealing consider groups such as the International Fund for Animal Welfare to be cultural imperialists, imposing their own set of values on others. The case of species conservation gives us some idea of how complex the interplay between values, international politics, and trade can be, and demonstrates the difficulty of achieving anything approaching a consensus on what, exactly, is meant by terms such as sustainable development.

4. Imperialism, Global Governance, and Regulation

Sustainable development clusters many themes, such as common heritage, that may be seen as threatening by local cultures. It may be suggested that the outlook sponsored by international institutions is at odds with what Milton Freeman (1997) and others have called subsistence security (see also Wenzel, 1991; Lynge, 1992). Though the IWC permits aboriginal whaling, this remains contentious because the definition of aboriginal whaling is a strict one that applies to Alaskan and Russian whalers but not to Japanese and Norwegian ones. In the case of CITES, southern Africans have argued the ban on trade in ivory, though temporarily suspended from 1998-2000, imposed an economic burden tantamount to punishment.

It can be argued, from a neo-Gramscian perspective, and "given that knowledge is never value-neutral, the thinking, theorising and 'evidence' used in support of environmental security arguments end up underpinning political arguments for hegemonic strategies which tend to serve some groups more than others" (Warner 2000:254). Amongst others, Ken Conca has pointed out the discrepancy in prioritization when it comes to defining global issues:

10 Generally speaking, elephants and rhinos have been valuable only when dead: when, in other words, their body parts (and in particular the ivory and rhino horn, of course) can be sold at the international marketplace. See Heimert, 1995. Others argue trade bans simply increase the incentives for illegal activity (Favre, 1993).

> "both the scientific emphasis on global-scale interconnections and the globalizing politics of the environmental movement rely on a fundamentally physical notion of what is global. Phenomena such as climate change, biological diversity, and depletion of the ozone layer, which are 'globally' linked in an immediate, physical sense, are generally interpreted as global problems. At the same time, localized, cumulative developments such as soil erosion are not typically assigned 'global' status within global-change discourse, and are therefore relegated to a secondary level of concern. The ability of sovereign states to claim jurisdiction is thus a key determinant of whether particular problems or trends are accorded 'global' status." (Conca 1995:152)

It should not come as a surprise to us, therefore, that efforts at international wildlife trade regulation are often considered part of a western agenda, or are labelled culturally imperialistic. There are a number of contributory factors here: the colonial legacy, wherein game reserves were established to preserve hunting grounds for the colonial masters; the insensitivity to non-western mainstream values often displayed by development project managers and tourists alike; the rise of western animal rights concepts and organizations and the political conflict this creates (see Emberley 1997; DeGrazia, 1996); the economic notion that international regulation is in fact harming the trade opportunities of less-advantaged states. The adoption of a seemingly (but admittedly soft) preservationist stand by Europe and the United States is seen as hypocritical and culturally insensitive.

More than ever, then, it is incumbent upon northern states to embrace the need for a sensitive understanding and appreciation of local issues in the areas affected by international and national regulation (for an exploratory study on this topic written by economists, see Shyamsundar and Kramer, 1996).[11] This may involve complex compensation plans for resource-dependent areas forced to conserve for the better of the species as a whole. It may also imply acceptance of the need for limited trade in parts, even if the domestic market for such parts has been decidedly diminished by changing attitudes in the west itself. The alternatives, harshly enforced restrictions based on power politics within conferences such as CITES and others, can only exacerbate cultural tensions and force more products onto a black market where monitoring and regulation is either an arduous and conflictive process or, worse, a mute issue.

11 Note that today the line between international and national environmental regulation is a fine one; many nationally implemented programs are in fact either strongly encouraged by adherence to international regimes, or are funded either partly or wholly by outside agencies.

We should be aware as well that the debate is hardly geographically determined. The typical manner in which CITES is viewed is in terms of the North-South divide, but this is far too general. In fact, it is clear that Norway and Zimbabwe have more in common than Canada and Japan when it comes to CITES bargaining and voting behaviour. Thus the argument that the conservationist/preservationist split still determines essential alliance formation on issues related to moving species listings from one Appendix to the other. And of course within western states there is great discrepancy, not only in terms of the differences within the European Union but between northern Inuit and urban voters in North America.

Invariably, international institutions will reflect these differences, but the liberal internationalist hope that they will fundamentally alter them as we coalesce toward some common ground is chimerical. There is no grand paradigm awaiting discovery and adoption by the entire world's peoples; indeed, only the most fervent advocates of neo-liberal conception of benign globalization would even seriously entertain such a notion today. Rather, political bargaining based on hardened positions remains the norm, and this also involves the deliberate manipulation of foreign aid packages and public relations campaigns. Though market dynamics, shifts in public opinion, and other contextual factors will have demonstrable effect, it is insulting to the utility-use participants to argue they will eventually "come around" and realize the errors of their ways.

5. Conclusions: Habitat Protection as the Great Frontier

Habitat loss is a consequence of expanded industrial and residential development; some refer to this as the enclosure of the commons under capitalism and globalization; it is a manifestation of local industrial spread in the southern hemisphere and elsewhere, but it is also part of the broader "ecological footprint" left by the high consumption societies of the north (see for example Sachs, 1999:87; Wackernagel and Rees, 1996).[12] One area where the diverse lines of thought explicated above converge is in the essential need to pursue habitat protection as a means of preserving species. Though there are some who argue *ex-situ* conservation – maintaining endangered species in zoos, small

12 It makes increasing sense to discard old notions of first/second/third world, industrialized and "developing" countries, or even northern and southern hemispheres, but to refer instead to high consumption versus low consumption societies. Such is the approach taken by Lafferty and Meadowcraft, 2001.

enclosed parks, or even reconstructing them through genetic manipulation – is the most pragmatic approach, a majority would insist that, though controls on poaching and trade in products are important, the overwhelmingly vital task at present is to ensure species have a natural environment, albeit one that faces the inevitability of human intervention. (For example, whales are not seriously threatened by harpoons, but by the unknown impact of climate change on the oceans; see Burns, 2001.) This would apply to utilitarians, who wish to use the species for human purposes, as well as to radical ecologists, who recognize an inherent right of natural survival, and even to authoritarian ecologists, who would concede that without habitat protection strong governmental action can only slow down the inexorable process of species decline.

What is necessary, then, is a widespread recognition that local control of resources is a vital aspect of cultural survival; that the international community must temper its demands for complete solutions to popular environmental issues with trade bans, and focus instead on providing as much scientific expertise on wildlife populations as possible. The Convention on Biological Diversity demands that access and benefits of genetic resources be shared, an effort to avoid the exploitation inherent in most forms of resource extraction with a North-South legacy. As many authors have argued, there are both positive and negative aspects related to bio-prospecting agreements, which walk the fine line between "bio-piracy and partnership" (see Mulligan and Stoett, 2000). But in their absence we revert to a "discovery" principle which is not only difficult to interpret but fosters aggressive policies and common pool resource dilemmas, referred to often as "tragedy of the commons" scenarios. This is another reason, as well, for economists to pursue the path of valuing eco-systems (see Carson 1998, Costanza, 1989) instead of individual species (Brown and Goldstein, 1984); and for NGOs to pursue the promotion of a holistic approach to conservation instead of enamouring the public with key species.[13]

Other multilateral efforts to encourage habitat protection include the 1971 Ramsar Convention on Wetlands and UNESCO's Man and the Biosphere project (MAB). The Ramsar Convention has attracted 130 Contracting Parties, which have declared some 1140 wetland sites totalling 91.7 million hectares.[14] Listing a site under the Convention does not, of course, guarantee its protection, but it does make it harder for future governments to justify harmful development

13 This is of course much easier said than done, since the public has been bombarded with focus points over the last several decades. But with continued global warming and related phenomena a more encompassing focus would seem both timely and indeed essential.

14 See the Ramsar website at http://www.Ramsar.org

projects, and the Convention's scientific committee can add credibility to the claim that habitat protection is vital in these sensitive areas. MAB, also established in 1971, promotes the establishment of national or transboundary protected areas, which can help organize sustainable use patterns and promote peace between states. Many such Biosphere Reserves are also Ramsar sites. Another important habitat-related agreement is the 1972 World Heritage Convention, with 167 member states, and 721 cultural and natural sites that have been deemed of global significance; 31 of these are listed as "World Heritage Sites in Danger." Inter-state co-operation is further encouraged by the Convention on Migratory Species of Wild Animals, and various programmes supported by the CBD. While these agreements are certainly constructive, they do not exceed the traditional emphasis on state sovereignty as the central tenet of global politics. State leaders have little to fear on this front, as these agreements demonstrate.

One of the principal concerns, then, is misdirected toward the impact of international regulation on national sovereignty, as important as this factor will be in regime building. It is as important, if not more so, that there is a concerted effort to understand and gauge the impact of limitations on trade and development projects on those most directly affected: local communities with a stake in the preservation of species. If this concern is not handled with care and diplomatic tact, then international organizations such as CITES will maintain quite limited legitimacy and will need to resort to less co-operative means of satisfying international demand for conservation measures.[15] Further, the role of civil society groups[16] is fundamental to the successful implementation of most environmental treaties, whether they serve as watchdogs, educational catalysts, or, even, industry self-regulators. Their voice should be heard in international arenas, despite the disinclination of a state-sponsored system to incorporate them, since biodiversity protection will of necessity be a process of collaborative management (see Borrini-Feyerabend, 1996).

15 Amongst others, Hill (1990) and Glennon (1990) have argued that CITES should be able to compensate developing states for the lost opportunity costs for protecting endangered species; this could be viewed as payment for the performance of custodial duties. However, it is difficult to envision CITES with this type of positive spending power.

16 This is in itself a controversial term, since so many NGOs claim the right to be representative of what is in fact such a broad cluster on interests that putting them all under a single label raises both analytic, strategic, and even philosophical questions; see Stoett and Teitelbaum, 1999, for discussion.

This being said, it is clear that threats to environmental security, from local pollution to global warming, are the result of a path of development adopted by most societies today that stresses the value of industrialisation, the mass production of commodities which are sold at home and abroad, and the use of large-scale energy to power the process. In short, the economy generates wealth and environmental threats at the same time. Any attempt to curb the latter will have to involve the regulatory forces that can, at least partially, influence or manage the economy. As Kevin Hill argues, the "dichotomy between a principled concern for animals and the economic pressure for wildlife commerce pervades the entire conservation movement and presents a particular problem for CITES' operation" (1990:233). It is clear that CITES will continue to operate within the broader context of global trade agreements, not within the context of animal welfare efforts (see Granadillo, 2000).[17]

Ultimately we are engaged in a long-term struggle against a form of global ecocide. But in the process it would be doubly shameful if we neglected the importance of cultural diversity, and of avoiding the imposition of double-standards on those with less structural protection.

References

Berger, J. 2001. "The African Elephant, Human Economies and International Law: Bridging the Great Rift for East and Southern Africa." *Georgetown International Environmental Law Review*, 13:2, 417-461.

Borroni-Feyerabend, G. 1996. Collaborative Management of Protected Areas: Tailoring the Approach to the Context. Gland, Switzerland: IUCN.

Brown, G., and J.H. Goldstein. 1984. "A model for valuing endangered species." *Journal of Environmental Economics and Management* 11(4): 303-309.

Burns, W. 2001. "From the Harpoon to the Heat: Climate Change and the International Whaling Commission in the 21st Century." *Georgetown International Environmental Law Review*, 13, 2:335-359.

Carson, R.T. 1998. "Valuation of tropical rainforests: philosophical and practical issues in the use of contingent valuation." *Ecological Economics* 24(1): 15-29.

Caron, D. "The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures." *American Journal of International Law*, 89:154-171.

17 In fact, Article XIV (3) of CITES prohibits the agreement from altering any obligations arising from other international trade conventions (see Granadillo, 2000:445; and Crawford, 1995).

Conca, K. 1995. "Environmental Protection, International Norms, and State Sovereignty: The Case of the Brazilian Amazon." In G. Lyons and M. Mastanduno, eds., *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore: Johns Hopkins University Press), 147-169.

Costanza, R., S.C. Farber, and J. Maxwell. 1989. The Valuation and Management of Wetland Ecosystems. *Ecological Economics* 1: 335-362.

Crawford, C. 1995. "Conflicts Between the Convention on International Trade in Endangered Species and the GATT in Light of Actions to Halt the Rhinoceros and Tiger Trade." *Georgetown International Environmental Law Review*, 7:555-585.

DeGrazia, D. 1996. *Taking Animals Seriously: Mental Life and Moral Status*. Cambridge: Cambridge University Press.

Dobson, A., ed. 1999. *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice*. Oxford: Oxford university Press.

Emberley, J., 1997. *The Cultural Politics of Fur*. Montreal, McGill-Queen's University Press.

Favre, D. 1993. "Debate Within the CITES Community: What Direction For the Future?" *Natural Resources Journal,* 33:875-888.

Freeman, M. 1997. "Issues Affecting Subsistence Security in Arctic Societies", *Arctic Anthropology*, 34(1): 7-17.

Freeman, M. and U.P. Kreuter (eds.). 1994. *Elephants and Whales: Resources for Whom?* Gordon and Breach Publishers.

Glennon, M. 1990. "Has International Law Failed the Elephant?" *The American Journal of International Law*, 84: 1-43.

Granadillo, E. 2000. "Regulation of the International Trade of Endangered Species by the World Trade Organization*." The George Washington Journal of International Law and Economics*. 32:3, 437-464.

Green, K. 1996. "Two Distinctions in Environmental Goodness." *Environmental Values* 5: 31-46.

Heimert, A. 1995. "How the Elephant Lost Its Tusks." *Yale Law Journal*, 104.6:1473.
Hill, K. 1990. "The Convention on International Trade in Endangered Species: Fifteen Years Later." *Loyola of Los Angeles International and Comparative Law Journal*. 13:2, 231-278.

Hepworth, R. 1998. "The Independent Review of CITES*." Journal of International Wildlife*. 1:3, 412-432.

Laferriere, E., and P. Stoett. 1999. *International Relations Theory and Ecological Thought: Toward a Synthesis*. London: Routledge.

Lafferty, W., and J. Meadowcraft. 2001. *Implementing Sustainable Development: Strategies and Initiatives in High Consumption Societies*. Oxford: Oxford University Press.

Lynge, F. 1992 *Arctic Wars: Animal Rights, Endangered Peoples.* University Press of New England, Hanover.

Macauley, D. "Be-Wildering Order." 1997. In R. Gottlieb, ed*., The Ecological Community*. New York: Routledge, 104-135.

Mulligan, S., and P. Stoett. 2000. "A Global Bioprospecting Regime: Partnership or Piracy?" *International Journal*, LV:2 (2000), 224-246.

Naughton-Treves, L., and S. Sanderson. 1995. "Property, Politics and Wildlife Conservation." *World Development*, 23:8, 1265-1275.

Palazzo, J. T. 1999. "Whose Whales? Developing Countries and the Right to Use Whales by Non-Lethal Means." *Journal of International Wildlife Law and Policy* 2, 1:69-78.

Pearce, D. and D. Moran. 1994. *Economic Value of Biodiversity*. London: Earthscan.

Perrings, C., K.G. Maler, C. Folke, C.S. Holling, and B.O. Jansson (eds.). 1995. *Biodiversity Loss: Economic and Ecological Issues*. Cambridge: Cambridge University Press.

Sachs, W. 1999. *Planet Dialectics: Explorations in Environment and Development*.

Shyamsundar, P., and R Kramer. 1996. Tropical Forest Protection: An Empirical Analysis of the Costs Borne by Local People. *Journal of Environmental Economics and Management* 31(2): 129-145.

Slocombe, D. 1989 CITES, the Wildlife Trade and Sustainable Development. *Alternatives*, 16:1, 20-29.

Stoett, P. 1997a. *The International Politics of Whaling*. Vancouver: University of British Columbia Press.

-- 1997b "To Trade or Not to Trade? The African Elephant and the Convention on International Trade in Endangered Species", *International Journal*, LII:4, 567-575.

-- 1995 *Atoms, Whales, and Rivers: Global Environmental Security and International Organization.* Commack, New York: Nova Science.

-- with P. Teitelbaum. 1999. "The Hague Appeal for Peace Conference: Reflections on Civil Society and NGOs." *International Journal*, LV:1, 35-44.

Tobin, R. 1990. *The Expendable Future: U.S. Politics and the Protection of Biological Diversity.* Durham, NC: Duke University Press.

Wackernagel, M., and W. Rees. 1997. "Perceptual and Structural Barriers to Investing in Natural Capital: Economics from an Ecological Footprint Perspective*." Ecological Economics*, 20: 3-24.

Warner, J. 2000. "Global Environmental Security: An emerging 'concept of control'?" In P. Stott and S. Sullivan, eds., *Political Ecology: Science, Myth and Power* (London: Arnold), 247-265.

Webster, D. 1997. "The Looting and Smuggling and Fencing and Hoarding of Impossibly Precious, Feathered and Scaly Wild Things." *New York Times Magazine*, Feb. 16, 26-35.

Wenzel, G.W. 1991, *Animal Rights, Human Rights: Ecology, Economy and Ideology in the Canadian Arctic*. Belhaven, London.

Wissenburg, M. 2001. "Dehierarchization and Sustainable Development in Liberal and non-liberal Societies." *Global Environmental Politics* 1:2, 95-111.

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CLIMATE CHANGE AND HAZARDOUS WASTE LAW: DEVELOPING INTERNATIONAL LAW OF SUSTAINABLE DEVELOPMENT

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1. Introduction: Sustainable Development in International Law

While sustainable development is a relatively ambiguous and ill-defined term in international relations, it is gradually acquiring a clearer legal content at both the international and the national level. On the basis of current and progressively developing international environmental, economic and human rights law, it is now possible to identify certain general concepts and principles, as well as some more concrete rules, that form the core of the emerging law of sustainable development, although different sources and authors categorize them differently.[1] Such general principles and concepts include the rule of law in international economic relations (states should abstain from measures that are detrimental to the sustainable development opportunities of other states); the duty to co-operate; the right to development; the integration principle; the precautionary

1 In the literature there are several types of classifications of the principles of sustainable development. Nico Schrijver (in 'On the eve of Rio + 10: Development – the neglected dimension in the international law of sustainable development', dies natalis address, Institute of Social Studies, The Hague, 11 October 2001) also distinguishes between general and specific principles of international law but our classification differs somewhat from his. P. Birnie and A. Boyle (in *International Law and the Environment*, Oxford University Press, Oxford, 2001, pp. 86-95) distinguish between substantive and procedural elements of sustainable development law. The Resolution 3/2002 of the International Law Association: The New Delhi Declaration of Principles of International Law Relating to Sustainable Development identifies seven sets of principles, but does not classify them.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 519-551.*

principle; and the notions of intergenerational and intra-generational equity and of common but differentiated obligations of states. The more concrete rules consist, among others, of the duty not to cause significant harm to other states, or to property or persons therein; the obligation to respect fundamental human rights; sovereignty over natural resources, with all rights *and* duties arising therefrom; the common heritage and the common concern of humankind; the 'polluter pays' principle; norms imposing a duty to undertake an environmental impact assessment and to take the results into account in a timely manner; emerging rules in the spheres of public participation and access to information; and, increasingly, good governance including democratic accountability.[2]

This chapter examines the above-sketched progressive development of international law by analyzing whether two major international environmental regimes have taken up the challenges posed by the notion of sustainable development. The status and content of various elements of the emerging law on sustainable development referred to above will be examined in the contexts of the 1992 UN Framework Convention on Climate Change[3] and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,[4] respectively. Relevant features of both regimes will be compared and differences between them will be contrasted. These two specific regimes were selected for several reasons. They both attempt to combat and/or prevent major environmental problems that have a clear North-South dimension. In addition, both regimes have proved to be rather dynamic and have been added on to or modified relatively soon after their creation. These regime changes occurred in response to newly emerging concerns and (at least some) consensus on more concrete ways to combat climate change, and to pressure, especially from developing countries and non-state actors, to tighten the Basel Convention regime. Both the North-South dimension and the dynamic nature of the selected regimes increase the likelihood that they are in the forefront of operationalizing sustainable development and thus might provide interesting insights regarding the progressive development of the international law on sustainable development.

2 Ibid.

3 Adopted in New York on 9 May 1992; entry into force: 21 March 1994; 31 ILM 1992, pp. 851 ff.

4 Hereafter Basel Convention. Adopted in Basel on 22 March 1989; entry into force: 24 May 1992; 28 ILM 1989, pp. 657 ff.

2. Clarifying the International Legal Implications of Sustainable Development: The Case of the Climate Change Regime

2.1 The Climate Change Convention and Sustainable Development

The climate change problem refers to the potential danger of the warming of the earth's atmosphere as a result of increasing anthropogenic emissions of greenhouse gases. In order to deal with this problem, emissions of such gases need to be controlled and sinks and reservoirs of such gases need to be enhanced.[5] The problem was first dealt with seriously at the global level by the 1992 United Nations Framework Convention on Climate Change (FCCC). Three years after the entry into force of the FCCC, in 1997, the Kyoto Protocol to the Convention was adopted.[6] In 2001, the Marrakech Accords were adopted which provide guidelines with regard to the implementation of the Kyoto Protocol.[7] Below an analysis will be made of the extent to which these three instruments have incorporated sustainable development concerns.

The term 'sustainable development' is used only once in the entire text of the Climate Change Convention. Article 3 on "Principles", in paragraph 4, states that: "The Parties have a right to, and should, promote sustainable development." The meaning of sustainable development is not explained or defined anywhere in the text. However, it appears to be a central term in the entire text, since it is one of only two substantive rights referred to in the Convention. The other is the sovereign right of states to exploit their own resources, pursuant to their own environmental and developmental policies.[8]

If one then examines the FCCC for clues on the meaning of sustainable development one is faced with different routes. The first is an examination of the use of the term "sustainable" in the text, which occurs relatively frequently.

5 See e.g. J.T. Houghton et al. (eds.), *Climate Change 2001: The Scientific Basis – Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)*, Cambridge University Press, Cambridge, 2001; and B. Metz et al. (eds.), *Climate Change 2001: Mitigation – Contribution of Working Group III to the Third Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)*, Cambridge University Press, Cambridge, 2001.

6 Not yet entered into force. 37 ILM 1997, pp. 1436 ff.

7 Climate Change Secretariat, The Marrakech Accords and the Marrakech Declaration, Bonn, 2001.

8 Preambular para. 8. States parties to the FCCC also have a right to vote (Art. 18) but this is of a different nature and bearing than the two substantive rights referred to.

Paragraph 22 of the Preamble to the Climate Change Convention refers to the need for sustainable social and economic growth. It recognizes that:

> "all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow taking into account the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general, including through the application of new technologies on terms which make such an application economically and socially beneficial."

A second route leads to the ultimate objective of the FCCC, which goes a step further to ensure that the problem is solved in a time frame that allows economic development to proceed in a sustainable manner. According to Article 2:

> "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

Article 4(1)(d) provides a third route towards interpreting sustainability in the FCCC. Under the heading "Commitments" it specifies that countries must promote sustainable management of sinks and reservoirs of greenhouse gases. And finally, in relation to the developed countries, Article 4(2)(a) further specifies that countries will need "strong and sustainable economic growth" in order to achieve the aspirational goals in the Convention.

The above analysis clarifies that when sustainable development is elaborated in the FCCC, this tends to be done in terms of sustainable economic development. For, sustainable development is mostly seen as synonymous with sustainable economic development. At the same time, however, FCCC Article 3(4) suggests the opposite. After referring to the right to (and obligation to promote) sustainable development, it states that:

> "Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change."

One could interpret this provision as implying that, although countries have the right to and should promote sustainable development, economic development is seen as a necessary pre-condition for taking measures on climate change and sustainable development. FCCC Article 3(5) also suggests that the two terms are not synonymous, as it calls for both "sustainable economic growth and sustainable development in all Parties, particularly developing country Parties".

In conclusion, although within the framework of the Climate Change Convention sustainable development is seen as something desirable that in general terms even has the status of a right,[9] it is not necessarily always the first priority. More emphasis is put on sustained economic growth. This is a reflection of the fact that a considerable number of states parties tend to see sustainable economic growth as a more immediate concern and/or as a pre-condition for sustainable development.[10]

An interesting question is whether the indeterminacy in the FCCC's language is because of the North-South conflict over the issues involved. While northern countries seem very enamoured by the concept of sustainable development, Southern countries apparently see it as something designed to prevent their economic growth.[11] This leads certain Southern nations to argue that first there should be economic growth and then sustainable development. Fair enough, if this argument is based on the famous 'inverted U curve', which theorises that as a country gets richer it has more resources at its disposal to invest in environment friendly technologies and lifestyles.[12] But, this would imply that there is no ambiguity in the relatively rich North regarding its ability to achieve sustainable development. However, a re-examination of the Convention text shows that even provisions focusing on developed countries do not unambiguously embrace the sustainable development concept. Thus, we find that FCCC Article 4(2)(a), that focuses on the quantitative obligations for developed countries, states that the obligation to stabilize emissions at 1990 levels by 2000 is subject to the recognition of the need to "maintain strong and sustained economic growth". Thus, even for the developed countries, it apparently is

9 Albeit weakly formulated in Art. 3(4) FCCC as "should promote".

10 See, for example, D. Bodanksy, 'The United Nations Framework Convention: A Commentary', *The Yale Journal of International Law*, 18(2), pp. 451 – 558 at p. 504.

11 See, for example, J. Gupta, *The Climate Change Convention and Developing Countries: From Conflict to Consensus?,* Kluwer Academic Publishers, Dordrecht, 1997.

12 This is based on the thesis that, as countries get richer, their pollution continues to increase until a certain point after which the pollution per capita begins to decrease.

important to have sustained economic growth as a pre-condition for sustainable development. Or, put differently and more positively, it appears that it is necessary for the developed countries to avoid a dichotomy between sustainable development and sustained economic growth.

2.2 The Kyoto Protocol and Sustainable Development

The 1997 Kyoto Protocol to the Climate Change Convention (KP) includes quantitative commitments for developed countries and provides them with a list of potential mechanisms for achieving those commitments. Does the Kyoto Protocol provide greater clarity regarding the concept of sustainable development? Its Article 2 emphasizes that each country listed in Annex I (i.e. developed countries) shall promote sustainable development while achieving its quantified emission limitation and reduction commitments. It goes on to state that sustainable development should be promoted in the elaboration of policies and measures in relation to energy efficiency, sinks and reservoirs, sustainable forms of agriculture, promotion, development and increased use of new forms of energy, carbon sequestration technologies and environmentally sound technologies, progressive phase-out of market imperfections, appropriate reforms in relevant sectors including the transport sector, reduction of methane emissions through recovery and use in waste management and in the production, transport and distribution of energy and cooperation with other states parties.

All the obligations listed in Article 3 are also subject to the goal of sustainable development. This provision specifies among others that the states parties listed in Annex I should ensure that their emissions do not exceed their assigned amounts (targets), and that each country should have made demonstrable progress by 2005.

Kyoto Protocol Article 10 emphasizes that all Parties need to aim at sustainable development when implementing their obligations in relation to financial assistance to developing countries, to technology transfer, and to the role of developing countries in the implementation of the Climate Change Convention.[13] The same provision further states that, in implementing these three FCCC provisions, relevant and cost-effective programmes for updating local emission factors need to be prepared by all states parties. They need to arrange climate change programmes with measures in relation to energy, trans-

13 FCCC Arts. 4(3), 4(5) and 4(7).

port, industry, agriculture, forestry, waste management, adaptation technologies and methods, and improved spatial planning, and to communicate such information to the Secretariat. KP Article 10 also reaffirms the obligation to transfer technologies to developing countries, to cooperate in scientific and technical research, education and training programmes, and to provide details of the implementation of these obligations in the national communications.

Finally, KP Article 12 includes an obligation to ensure that cooperation with developing countries also leads to sustainable development. This was seen as necessary from the point of view of the history of the development of the Clean Development Mechanism (CDM).[14] According to Article 12(2) the purpose of the CDM is "to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3". But, in many ways the victory for developing countries is a hollow one, since a general obligation for all policies to be consistent with sustainable development already exists.

At Marrakech in 2001, several critical decisions were taken that clarify the content of the Kyoto Protocol and will pave the path towards the ratification of the Protocol. Accordingly, and because of the critical nature of the Marrakech decisions, conclusions on the meaning of sustainable development in the Kyoto Protocol, can only be drawn after having addressed the substance of the Marrakech Accords and Declaration.

14 The history of the development of the CDM brings us to a discussion of Joint Implementation. The 1992 FCCC mentioned the concept of Joint Implementation according to which countries could implement measures in other countries in return for climate credits. This concept received a controversial response from developing countries. They were afraid, *inter alia*, that somehow such projects would divert human and financial resources from their own priorities. However, in the ensuing negotiations a pilot phase for joint implementation was set up in 1995 during which countries could participate on a voluntary basis and during which no crediting was allowed. But by the time the Kyoto Protocol was being negotiated, only east and central European countries were unambiguously interested in the concept while the developing countries still had their reservations. This lead the negotiations on joint implementation to develop exclusively as an instrument that applied primarily to the group of developed countries listed in Annex I. In the meanwhile the negotiations of a Clean Development Fund metamorphosised into a new form of Joint Implementation with developing countries and the key distinction was supposed to the focus on sustainable development as opposed to only climate change. However, even the article on Joint Implementation is subject to the goal of sustainable development and so the distinction at this level is minimal.

2.3 The Marrakech Accords and Sustainable Development

The Marrakech Ministerial Declaration states that decisions to deal with climate change may contribute to sustainable development.[15] In doing so, it recognizes that "the problems of poverty, land degradation, access to water and food and human health remain at the centre of global attention". Accordingly:

> "the synergies between the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity, and the United Nations Convention to Combat Desertification (…), should continue to be explored through various channels, in order to achieve sustainable development."[16]

The Declaration's provisions on capacity building for developing countries and countries with economies in transition "will, in a coordinated manner, assist them in promoting sustainable development while meeting the objective of the Convention."[17] Given that all countries are different, there is "no 'one size fits all' formula for capacity building". Rather, it should reflect national sustainable development strategies.[18] Also, there should be a focus on developing technical capacity to "effectively integrate vulnerability and adaptation assessments into sustainable development programmes and develop national adaptation programmes of action".[19] Since such programmes should be country driven, each country with an economy in transition must itself prepare policies for implementing the FCCC and for participating in the Kyoto Protocol, in line with its national sustainable development strategies.

Further references to sustainable development are made in provisions on adaptation, land use and forestry activities (which are supposed to contribute to "the conservation of biodiversity and sustainable use of natural resources"),[20] and on the so-called flexibility mechanisms of Joint Implementation or the Clean Development Mechanism.[21] National communications that are to be prepared regularly by the Parties to the Convention and submitted to the Conference of the Parties through the Secretariat must also provide information about how policies and measures have led to quantified emission limitation and reduction

15 Decision 1/CP7.
16 Ibid., para. 3.
17 Annex A of Decision 2/CP.7, para 4; Annex A of Decision 3/CP.7, para 4.
18 Annex A of Decision 2/CP.7, para 5.
19 Ibid., para 17(c).
20 Annex to Decision 11/CP.7, paras. 1(e) and 1(f).
21 Decision 16/CP.7, Decision 17/CP.7.40

and thereby contributed to achieving sustainable development. Finally, the National Adaptation Programmes of Action (NAPA) to be prepared by least developed country parties should be guided *inter alia* by sustainable development.[22] These Programmes are expected to help countries prepare for the impacts of climate change so that they are in a better position to deal with them. Sustained economic growth seems to be included only once in the Marrakech Accords, in relation to the impacts of measures taken in developed countries on developing countries.[23]

2.4 The Climate Change Regime Assessed: Sustainable Development Unambiguously Adopted

The introduction to this paper specified possible general and specific elements of the emerging international law of sustainable development. This section assesses whether these elements have been adopted in the climate change regime.

The FCCC includes some specific references to international economic relations.[24] It contains a duty to cooperate to promote a supportive and open international economic system; in technology development and transfer; for the conservation and enhancement of sinks; for adaptation; in research, public awareness, education and information.[25] The Kyoto Protocol emphasizes that such cooperation should "enhance the individual and combined effectiveness of their policies and measures" and strengthen national capacity building.[26] The Marrakech Accords in general call on countries to cooperate, but specifically on Annex I and non-Annex I countries to cooperate in order to create favour-

22 Decision 28/CP.7, para 7.

23 Decision 5/CP.7 on Arts. 4(8) and (9).

24 Para. 21 of the FCCC Preamble affirms "that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty". FCCC Art. 3(5) adds that "Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade". FCCC Art. 4(10) indicates that in taking measures the adverse effects of implementation on other countries should be taken into account.

25 In FCCC Arts. 3(5) and 4(1)(c), KP Art. 10(c), FCCC Arts. 4(1)(d) and (e), 4(1) (g) and 5(c), KP 10(d), FCCC Arts. 4(1)(i), 6(b) and 4(1)(h) respectively.

26 KP Arts. 2(1)(b) and 10(e).

able conditions to support economic diversification and to promote the development and transfer of non-energy uses of fossil fuels and less greenhouse gas emitting advanced fossil fuel technologies.[27]

The right to development is referred to in the Preamble as follows: "*Noting* that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs".[28] This is also taken to imply that although developing countries should enact effective environmental measures, they cannot be expected to apply the standards applicable in other countries if these are either inappropriate or of unwarranted economic and social cost.[29] Another preambular paragraph emphasises the need to take the legitimate priority needs of developing countries into account,[30] while yet another recognises that, as a consequence, the energy consumption of developing countries will need to grow.[31] Article 4 which specifies the obligations of Parties also specifies that the implementation of developing countries will depend on the financial and technological support they receive and that "economic and social development are the first and overriding priorities of the developing country Parties".[32] The Kyoto Protocol also reiterates that developing countries need to enact policies keeping their "development priorities, objectives and circumstances" in mind.[33]

The principle of integrating environmental policy and climate change policy in developmental policy is clearly mentioned in the Preamble[34] and in FCCC Article 3(4):

> "Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be

27 Decision 5/CP.7, paras 22, 25, 26, 28.

28 FCCC Preamble Para 3.

29 FCCC Preamble Para 10 states: "*Recognizing* that States should enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries, "

30 FCCC Preambular Para 21.

31 FCCC Preambular Para 22.

32 FCCC Paragraph 4.7.

33 KP Article 10.

34 FCCC Preambular Para 21.

> integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change."

The Kyoto Protocol does not refer to the integration principle. The Marrakech Accords contain only a limited reference to that principle and state that countries should integrate adaptation and early warning systems into sustainable development programmes.[35]

The precautionary principle is emphasized by the overall objective of the Convention. However, its exact meaning and implications are not adequately defined. According to FCCC Art. 3(3):

> "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors (…)."

Neither the Kyoto Protocol nor the Marrakech Accords mention the precautionary principle.

On inter- and/or intra-generational equity, the FCCC clarifies that it is determined to protect the climate system for present and future generations.[36] The Kyoto Protocol does not refer to equity or the rights of future generations. The Marrakech Declaration briefly does so in an amendment removing Turkey from the list of developed countries (Annex I). In general terms, however, the FCCC views sustainable development as including equity and the common but differentiated responsibilities and respective capabilities of parties.[37] The Marrakech Accords reiterate the need to take action on the basis of common but differentiated responsibilities and capabilities but only in a draft Decision

35 Decision 5/CP.5, Para 9 of the preambular section: *Affirming* that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty. Decision 5/CP.7, 7 A(ii) and (vii).

36 See FCCC Preamble, paras. 11 and 23, and Art. 3(1).

37 FCCC Art. 3(1).

and in an amendment removing Turkey from Annex II.[38] Overall in the climate change regime, one may argue that the equity principle has the following dimensions:

- the principle of leadership[39] by the developed countries in Annex I in taking action;
- the leadership should include not only reducing emissions and increasing sinks, but also, for countries listed in Annex II, technology transfer, financial assistance and scientific cooperation with the South, including the particularly vulnerable;
- such leadership should not lead to unilateral policies that could "constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade".

More specifically on common but differentiated responsibilities, all three main climate change instruments make special arrangements for countries with economies in transition and for the least developed countries. The Convention and the Kyoto Protocol allow for flexibility in terms of base years in relation to the aspirational targets under the Convention and the commitments under the Protocol.[40] The Marrakech Accords allow for capacity building for countries with economies in transition and for financial support for the participation of experts from such countries in expert review teams.[41]

In relation to the least developed countries (LDCs), the FCCC specifies that the Parties should take account of the specific needs and special situations of the least developed countries.[42] Furthermore, LDCs can submit their first national communications 'at their discretion'.[43] The Kyoto Protocol does not mention LDCs, but does refer to the needs of vulnerable countries (small islands and export dependent countries) in its Article 2. The Marrakech Accords, however, focus on the need for conducting 'needs assessment' for LDCs, and point out that special attention needs to be paid to LDC and small island states in relation to technology transfer under FCCC Article 4(5).[44] Special privileges

38 Draft Decision – CMP.1, Decision 26/CP.7.

39 For a detailed analysis of the leadership concept, see J. Gupta, 'Leadership in the Climate Regime: Inspiring the commitment of developing countries in the post-Kyoto phase', *Review of European Community and International Environmental Law*, 7(2), 1998, pp 178-188.

40 FCCC Art. 4(6) and KP Art. 3(5). See also KP Art. 10.

41 Annex with 'Guidelines for Review under Article 8 of the Kyoto Protocol', para 27.

42 FCCC Art. 4(9).

43 FCCC Art. 12(5).

44 Decision 4/CP7, Annex, para. 6 and Art. 20(c).

are not just accorded to LDCs, countries in transition and small island states, but also to countries with low-lying coastal areas; countries with arid and semi-arid areas, forested areas and areas liable to forest decay; countries with areas prone to natural disasters; countries with areas liable to drought and desertification; countries with areas of high urban atmospheric pollution; countries with areas with fragile ecosystems, including mountainous ecosystems; countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and land-locked and transit countries.[45]

Some of the specific elements of the law of sustainable development outlined at the beginning of this chapter have also been taken up in the climate change regime. Apart from the reference to the no harm principle in preambular paragraph 8, the FCCC adopts the precautionary principle which also incorporates the no harm principle.[46] The Kyoto Protocol is more stringent, in stating, in Article 2(3), that Annex I parties:

> "shall strive to implement policies and measures (…) in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties, especially developing country Parties (…)."

According to the same provision, the Conference of the Parties should, at its first session, consider what actions are necessary to minimize the adverse effects of climate change and/or the impacts of response measures on the parties. The issues of "funding, insurance and transfer of technology" should also be addressed.

On human rights, the climate change regime has not much to offer. While the Convention and the Protocol aim at protecting the collective rights of present and future generations, they do not go as far as to protect individual human rights.

The principle of sovereignty over natural resources is reiterated in FCCC preambular paragraphs 8 and 9 which refer to the sovereign right of states to exploit their own resources, and to the sovereignty of states in international cooperation to address climate change. Neither the Kyoto Protocol nor the Marrakech Accords mention sovereignty over natural resources.

45 FCCC Art. 4(8).
46 FCCC Art. 3(3).

The Preamble to the Convention specifies that climate change is a common concern of human kind. This is not repeated or further referred to in the Kyoto Protocol or the Marrakech Accords.

The 'polluter pays' principle is not referred to in the Convention, the Protocol or the Marrakech Accords. The developed countries are expected to provide financial and technological assistance to developing countries, but the wording is couched in such a way – that the underlying principle appears more to be the leadership principle than the polluter pays principle, much to the disappointment of several developing country critics.[47]

The duty to undertake an environmental impact assessment is mentioned in the FCCC, but only as an example of the possible measures that can be taken and only if it is appropriate.[48] The Marrakech Accord reiterates that in relation to capacity building in the area of, inter alia, impact assessment can be offered to economies with countries in transition[49] and that the GEF is mandated to also support such activities under the Convention.[50] The Decision on Joint Implementation also calls on project investors to prepare impact assessments of their projects[51] and that on CDM as well.[52]

Article 6 of the Climate Change Convention explicitly mentions the need to raise public awareness, to increase public access to information and to promote public participation in addressing climate change. Kyoto Protocol Article 10(e) highlights the need to cooperate to increase public access to and promote public participation in climate policies. The Marrakech Accords refer to the need to enhance public awareness in capacity building programmes in developing countries and countries with economies in transition, in terms of

47 Gupta 1997, op. cit. n. 11; A. Agarwal, S. Narain and A. Sharma, *Green Politics: Global Environmental Negotiations*, Centre for Science and Environment, New Delhi, 1999.

48 FCCC article 4.1(f) states: "Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example, impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;"

49 Article 20d of the Annex to Decision3/CP7 of the Marrakech Accords.

50 (a)iii of Decision 5/ CP.7.

51 E . 33. d of the Annex on the Guidelines for the Implementation of Article 6 to Decision 16/CP.7.

52 37(c) of the annex on the Modalities and Procedures for a Clean Development Mechanism to decision 17/CP 7.

the adverse effect of climate change, and guidelines for review.[53] While there are no provisions for public participation, there are strongly worded requests that information should be made public under the different obligations in the Protocol.

Good governance and democratic accountability are not mentioned as such in any of the three instruments under review, although there is some care taken to ensure that the financial mechanisms under the Kyoto Protocol enhance financial accountability.

Given the remarkable ambiguity of the text of the Climate Change Convention, the Kyoto Protocol came as a refreshing change. In one and the same breath the Convention refers to sustainable development as a right and duty, and then qualifies that by stating that "economic development is essential for adopting measures to address climate change."[54] This ambiguity appears to have disappeared in the Protocol. The words "sustained" and "economic" are not used in combination anywhere, and sustainable development is prioritized everywhere. By including sustainable development in the opening of KP Article 2, all policies and measures adopted by developed countries are subject to the obligation to be consistent with sustainable development. Similarly, by including sustainable development in KP Article 10, all measures to implement existing obligations under the Convention are subject to the requirement of consistency with sustainable development. It is only in the context of the oil exporting countries that the term sustained economic growth is still used in the Marrakech Accords. Thus the FCCC's ambiguity has gradually disappeared in the Kyoto Protocol and the Marrakech Accords.

Some innovative elements of sustainable development have been articulated in the Kyoto Protocol too. Firstly, there is the idea that, especially in poor countries, sustainable development can be achieved partly by exploring the synergies between the FCCC, the Biodiversity and Desertification Conventions, and partly by capacity building programmes. Secondly, the sustainable development concept is also elaborated in terms of the cost-effectiveness principle which is mentioned in the article on Principles of the FCCC[55] and Article 10 of the Kyoto Protocol.

53 17 (f) of Decision 1/CP7; 20 (f) of Decision 3/CP7; 7 (vii) and 14(a) of Decision 5/CP.7; 1(h) of Dec. 6/CP.7.

54 FCCC Art. 3(4).

55 FCCC Art 3(3).

3. Clarifying the International Legal Implications of Sustainable Development: The Case of the Basel Convention on Transboundary Movements of Hazardous Wastes

3.1 The Basel Convention and Sustainable Development

In response to a string of dumping scandals of hazardous wastes in developing countries in the mid 1980s, international law-making on the transboundary movements of such wastes rapidly gained momentum. With the active involvement of the United Nations Environment Programme and non-governmental organizations (Greenpeace International in particular), the global treaty regime of the 1989 Basel Convention was created within the very short timespan of two years only.[56] The negotiations were full of fierce controversies, especially between representatives of developing countries (who wished to see a complete ban on North-South movements of hazardous wastes, or even a world-wide ban) and those of developed countries (who largely were in favour of some regulation but wished to maintain options for exporting hazardous wastes without too many tight restrictions). Disagreements continued to exist until the very end of the negotiation process. According to Kummer, at the opening of the adoption ceremony, the spokesperson of the African states that had participated in the drafting of the Basel Convention stated that they:

> "were not prepared to sign the Convention, as they considered it too weak (…). This came as a considerable surprise to the other delegations. A number of other states, including important industrialized states (…) also deferred their decision on signature, for exactly the opposite reason".[57]

Greenpeace apparently paved the way for overcoming a stalemate on this fundamental issue by proposing to include a provision in the Basel Convention mandating the Conference of the Parties regularly to reconsider a complete or

56 For analysis of the drafting history of the Basel Convention, see e.g. K. Kummer, *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules*, Oxford University Press, Oxford, 1995, pp. 38-47, and P.S. Chasek, *Earth Negotiations: Analyzing Thirty Years of Environmental Diplomacy*, United Nations University Press, Tokyo, 2001, pp. 110-116.

57 Kummer, ibid., p. 44.

partial ban.[58] After the Basel Convention was signed, out of dissatisfaction over the results reached, African states decided to address the problem by developing their own regional instrument within the framework of the Organization of African Unity. Their initiative led to the conclusion of the so-called Bamako Convention in 1990.[59] Following this rather turbulent start, the Basel Convention got into slightly smoother waters. After its entry into force in May 1992 the ratification record rose ever rapidly to 160 states parties in April 2004, including a growing number of African states that have given up their initial resistance to the Convention.[60]

While the Basel Convention does not explicitly use the terms sustainable development or sustainability at all, several of its major provisions certainly express their spirit. In the broadest sense, the Convention seeks to promote sustainability in the generation, handling and disposal of hazardous wastes. The general objective is to seek to control the transboundary movement and disposal of hazardous wastes through regulation. It aims to realize this through a combination of measures. These include: commanding respect for unilaterally declared import bans on hazardous wastes by state parties;[61] not allowing imports or exports to non-parties;[62] requiring prior and written informed consent by the state of import for a proposed transboundary movement between states parties;[63] duties to re-import hazardous wastes in case the terms of the contract for the export cannot be met,[64] and in case of illegal traffic due to

58 Ibid., p. 45. See Basel Convention, Art. 15(7) according to which such a review shall take place three years after entry into force and at least every six years thereafter. Both Greenpeace and developing countries (G-77) played a very interesting role in the negotiations on the Basel Convention, and in seeking its strengthening and implementation thereafter. In pursuing these missions, they got engaged in a strong, mutually beneficial, and rather unusual alliance.

59 African Convention on the Ban on the Import of all Forms of Hazardous Wastes into Africa and the Control of Transboundary Movements of such Wastes Generated in Africa, adopted on 30 January 1991, text e.g. reproduced in 20 E*nvironmental Policy and Law* no. 4-5, 1990, pp. 173-181.

60 Kummer, op. cit. n. 57, p. 46. For current ratification data, see http://www.basel.int/ratif.

61 Basel Convention, Arts. 4(1), 4(2e) and 13.

62 Ibid., Art. 4(5).

63 Ibid., Art. 6.

64 Ibid., Art. 8. However, this provision is relatively weakly phrased as it includes an escape clause demanding return of the wastes to the state of export "if alternative arrangements cannot be made for their disposal in an environmentally sound manner".

the conduct of the exporter or generator;[65] creating competent authorities to facilitate implementation of the Convention;[66] criminalizing illegal traffic in hazardous wastes;[67] and requiring state parties to review periodically the possibilities for reducing the volume and/or pollution potential of hazardous wastes exported elsewhere.[68]

In sum, under the 1989 Basel Convention transboundary movements of hazardous wastes were only allowed in three situations. Firstly, when the state of export "does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes (…) in an environmentally sound and efficient manner". The element of efficiency included here leaves undesirable space to financial arguments, for example relating to cost differences of disposal in developed and developing countries. For, disposal in the South can be up to 40 to 100 times as cheap as disposal in the North, and thus could be seen as financially highly efficient.[69] 'Environmentally sound management' (ESM) of hazardous or other wastes is a central notion in almost all provisions of the Basel Convention, and a notion which lies in the core of sustainable development. For the clarity of the Basel regime it is problematic that ESM is defined in very general terms only, in Article 2(8), as meaning: "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes". According to Basel Convention Article 4(8), technical guidelines for environmentally sound management of wastes were to be adopted by the first Conference of the Parties. Since 1991, work has been in progress on this issue. It culminated in the adoption of several relevant sets of guidelines by the Conference of the Parties, and, in 1999, in a Ministerial Declaration on the subject which will be discussed in section 3.3 below. Secondly, the 1989 Basel Convention allowed for transboundary movements of wastes when "required as a raw material for recycling or recovery industries in the State of import". Obviously, this 'recycling gap' was a major loophole in the Basel Convention regime. It is in the process of

65 Ibid., Art. 9(2). Again, this duty is qualified by a potentially far-reaching exception: "if impracticable" return of the wastes to the state of export is not required but the wastes can be "disposed of in accordance with the provisions of" the Basel Convention.

66 Ibid., Art. 5.

67 Ibid., Arts. 4(3and 4) and 9(5)

68 Ibid., Art. 4(13).

69 J. Krueger, 'The Basel Convention and the international trade in hazardous wastes', in O. Stokke et al. (eds.), *Yearbook of International Cooperation on Environment and Development 2001/2002*, Earthscan Publications, London, 2001, p. 44.

being formally corrected through an amendment to the Convention adopted in 1995 as will be discussed in section 3.2 below. And thirdly, such movement would be permissible "in accordance with other criteria to be decided by the Parties".[70] For all options, according to the Basel Convention Article 6, written 'prior informed consent' by the state of import is an absolute requirement. This is a rare requirement in current international law. According to Birnie and Boyle, it "is simply an expression of the sovereignty of a state over the use of its territory and resources. It is this which differentiates transboundary disposal of wastes from the use of common spaces or shared resources."[71]

In addition, the Convention requires states parties to take appropriate measures to ensure that:

- the generation of wastes within them "is reduced to a minimum, taking into account social, technological and economic aspects";
- adequate disposal facilities shall be available within them, "to the extent possible";
- "persons involved in the management of hazardous wastes (…) within it shall take such steps as are necessary to prevent pollution due to hazardous wastes (…) arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment";
- transboundary movements of hazardous wastes are reduced to the minimum and in a way that "will protect human health and the environment against … adverse effects".[72]

Within the constraints of the conditions surrounding its adoption (of time-pressure and of contradictory interests – e.g. between some developing and some developed countries, between states within which significant amounts of wastes were generated or recycled or between governments and industry involved in the lucrative aspects of waste trade), the 1989 Basel Convention was an encouraging first step in the global regulation of trade in hazardous wastes. However, the constraints referred to clearly account for a number of significant weaknesses and ambiguities in the Convention text.[73] Fortunately, a further tightening and development of the Basel regime could be accomplished in subsequent years.

70 Ibid., Art. 4(9).

71 Birnie and Boyle, op. cit. n. 1, p. 432.

72 Ibid., Art. 4(2a, b, c and d).

73 There is a certain parallel here with the development of the FCCC. See above, at the end of section 2.1.

Some relevant examples of this progressive development will be presented below.

3.2 The 1992-1995 'Basel Ban' Decisions and Sustainable Development

By March 1994, conditions had changed such that the Conference of the Parties could reach agreement on tightening the Basel Convention regime by introducing an immediate prohibition of all transboundary movements of hazardous wastes (for the purpose of final disposal) from OECD to non-OECD states.[74] OECD to non-OECD movements of wastes destined for recovery or recycling were phased out by the end of December 1997. Rather than through a formal amendment of the Convention, this change was made by way of a Conference of the Parties' decision.[75] This decision in effect constituted an interpretation of the Basel Convention. After all, the Conference of the Parties (COP) made its decision because "transboundary movements of hazardous wastes from OECD to non-OECD States have a high risk of not constituting an environmentally sound management of hazardous wastes as required by the Basel Convention".[76] The route of a COP decision was chosen instead of a formal amendment because of doubts that opponents to the ban would ratify a formal amendment, and in that case would be able to hold up the process. Immediately after the path breaking 1994 COP decision, a debate ensued on its legal nature and implications. Supporters of the ban argue that the COP decision constitutes a legally binding decision:

> "decision II/12 stands on its own and is written in the strongest legal terms short of an amendment. (…) [A]mendment will not replace Decision II/12, but will

74 The change in terminology from 'developing countries' to non-OECD countries was significant because the ban now unequivocally covered states in Central and Eastern Europe as well. Previously this was not watertight.

75 See COP decision II/12, March 1994. This decision was highly facilitated by important groundwork of the first COP in December 1992. COP Decision I/22, December 1992, requested industrialized countries to prohibit transboundary movements of hazardous wastes for disposal to developing countries. Movements for the purposes of recovery and recycling were not affected by this request. Developing countries were requested to prohibit the import of hazardous wastes from industrialized countries.

76 COP decision II/12, preambular para. 2.

enshrine it within the formal Convention itself, strengthen it and protect it against future attempts at sabotage".[77]

Opponents of the ban claim that the 1994 COP decision formally has no binding force, but, at best, has moral value. From an international law point of view the matter is indeed not fully clear. The Basel Convention defines the mandate of the Conference of the Parties, which extends to the adoption of amendments.[78] Apart from the adoption of rules of procedure for the COP and subsidiary bodies, and of "financial rules",[79] both of which are supposedly binding, the Convention does not explicitly specify that the COP can take decisions binding all states parties. However, it is mandated to "[c]onsider and undertake any additional action that may be required for the achievement of the purposes of this Convention".[80] By extensive interpretation of this provision one could perhaps argue that adopting a binding complete or partial ban would fall within the COP's competence, as action required for the purposes of the Convention, especially when considering that the COP is also mandated periodically to consider the adoption of such a ban.[81]

In order to put an end to all uncertainty, the Conference of the Parties then adopted a formal amendment to the Convention in September 1995.[82] COP Decision III/1 inserts a new preambular paragraph 7bis which is surprisingly broadly worded in recognizing "that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention". A new Article 4A confirms the 1994 ban decisions, but now between Annex VII (members of OECD, EC and Liechtenstein) and non-Annex

77 Greenpeace, 'The Basel ban – The pride of the Basel Convention: An update on implementation and amendment – September 1995', http://www.greenpeace.org/~comms/97/toxic/bbp.htm, accessed on 27 Aril 1999. See also Jim Puckett, 'The Basel ban: a triumph over business-as-usual', Basel Action Network, http://www.ban.org/about_basel/jims_article.html, accessed on 1 May 2000.

78 Art. 15(5b).

79 Art. 15(3).

80 Art. 15(5c).

81 Art. 15(7). For a slightly more elaborate discussion of the legal and political status of COP decision II/12, see Kummer, op. cit., p. 57, pp. 64-65. She takes the position (at p. 64) that "the legal value of such a decision is not clearly defined."

82 COP Decision III/1, September 1995, http://www.basel.int/meetings/sbc/cop/cop3-b.htm, accessed on 21 August 2002.

VII states.[83] While the amendment has not yet been ratified by the required number of states for entry into force,[84] the 1994 COP decision still stands as before and imposes (although perhaps soft-law) obligations on the states parties.

In the end, and despite counterpressure by industry and some OECD countries, since 1 January 1998 a full ban is in place, including the export of waste for recycling purposes. This change was a real victory for the non-governmental organizations and developing countries involved in the campaign to introduce a full ban under the Basel Convention. Obviously, the ban is a helpful step ahead in the struggle against the harmful effects on the environment and on human health of transboundary movements of hazardous wastes to vulnerable destinations.

Like their mother document, none of the Basel ban decisions refers explicitly to sustainable development or sustainability. The 1992 COP preparatory decision I/22 just mentions the negotiations leading to the United Nations Conference on Environment and Development and the fact that developing countries called for a North-South ban on hazardous waste shipments. The subsequent 1994 and 1995 decisions and amendment do not repeat this.

3.3 The 1999 Ministerial Declaration on 'Environmentally Sound Management', the 1999 Protocol on Liability and Compensation, and Sustainable Development

In December 1999, on the occasion of the fifth Conference of the Parties, the Ministerial 'Basel Declaration on Environmentally Sound Management' (ESM)

83 There is no significant change of applicability involved in this change of terminology. It mainly served to mention the European Community "as a separate entity within the OECD. Furthermore, Liechtenstein, although not an OECD country, was added to Annex VII (…)." Because of its customs union with Switzerland, "Liechtenstein is not able to control its borders and could therefore represent a loophole for the export ban". Greenpeace, 'The Basel Convention – what is it all about?', http://www.greenpeace.org/~comms/97/toxic/baselwhatisitabout.htm, accessed on 27 April 1999. In response to some attempts by ban opponents to further expand the list of Annex VII countries, Basel COP 4 decided "to leave Annex VII unchanged in its current structure until the Ban Amendment enters into force." See press release 'Basel meeting on hazardous wastes ends on note of optimism', http://www.unep.ch/iuc/submenu/press/sbc/pr2-98a.htm, accessed on 27 April 1999.

84 On 14 April 2004, 44 out of the required 62 ratifications were registered. For current ratification data see www.basel.int/ratif.

was adopted.[85] The Declaration finally incorporates explicit sustainable development concerns into the Basel Convention regime. The ministers reiterate their "commitment to sustainable development and full support for the implementation of the Rio Declaration, Agenda 21 and the [1997] programme for its further implementation (…)".[86] Subsequently they list a range of activities that should be pursued to achieve ESM, including prevention of waste, promotion of cleaner technology and production, and developing compliance mechanisms for the Basel Convention. The COP itself also adopted a decision on ESM. It further elaborates the list of activities tabled by the Ministerial Declaration. Among other items, it refers to the need to promote:

> "financial and other economic instruments or concepts, with a view to identifying *sustainable* and self-sufficient solutions for the minimization and environmentally sound and efficient management of (…) wastes subject to the Basel Convention, bearing in mind that such instruments should be affordable and socially acceptable, as well as economically viable".[87]

It also calls for enhancing cooperation between the Basel Convention's secretariat and relevant international organizations. This "is to include cooperation with United Nations bodies active in the field of sustainable development", and is supposed to serve "the incorporation of policies on the environmentally sound management of hazardous wastes in Parties' national environmental management and *sustainable development* plans."[88]

COP 5 also adopted a Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal.[89] The Protocol's preamble starts with a reference to principle 13 of the Rio Declaration, which apparently was a source of inspiration for its adoption. However, the Protocol does not necessarily follow the 'polluter pays principle' that is also embodied in the Rio Declaration and which, according

85 Http://ww.basel.int/COP5/ministerfinal.htm, as accessed on 21 August 2002.

86 Ibid., para. 4.

87 Loc. cit. n. 85, para. 1(a). Emphasis added.

88 Ibid., para 1(h). Emphasis added.

89 Http://www.basel.int/COP5/docs/prot-e.pdf, as accessed on 21 August 2002. The Protocol was open for signature until 10 December 2000, and 13 signatures were registered. In August 2002 no ratifications had been registered as yet (20 ratfifications are required for entry into force). For current ratification data, see http://www.basel.int/ratif/ratif.pdf.

to some is even contrary to it[90] because the waste generator is not always liable. There is no single actor liable at all stages. Rather, a combination of potential liability of generators, exporters, importers and disposers is opted for. The Protocol introduces a combination of strict and fault liability. Like its mother document, the Basel Liability Protocol represents a clear compromise, forged under high time pressure and under the influence of North-South controversy. This, in combination with the complexity of the subject matter, accounts for the many loopholes and weaknesses embodied in it.[91] These are all the more serious in light of Krueger's observation that:

> "Whatever the position taken on the final outcome, the Protocol *is* the first of its kind in a multilateral environmental agreement (MEA) and as such will be regarded as a precedent for other areas – such as biosafety and persistent organic pollutants (POPs) – where some actors advocate similar agreements."[92]

All in all, the 1999 ESM instruments have finally embedded sustainable development terminology into the Basel Convention arena. The Basel Liability Protocol does not mention the term at all, although it does refer to the Rio Declaration.

3.4 Basel Assessed: Is Sustainable Development Still Controversial?

Similar to the assessment of the Climate Change regime in section 2.4, this section will appraise to what extent the general and specific elements of the emerging international law of sustainable development, as identified at the beginning of this chapter, have been adopted in the Basel Convention regime.

The rule of law in international economic relations, the right to development, the precautionary principle and equity are general elements of sustainable development law that are not explicitly referred to in the Basel Convention nor in any of the major instruments related to it. The remaining three other general elements are better off, although some only slightly. The duty to cooperate is accounted for in Article 4(2h) of the Basel Convention which states that, each

90 Basel Action Network (BAN), 'BAN report and analysis of the fifth Conference of the Parties to the Basel Convention, December 6-10, 1999,' http://www.ban.org/COP5/cop5rep.htm, section II first bullet, as accessed on 5 January 2000.

91 For further analysis, see ibid., and Birnie and Boyle, op. cit. n. 2, pp. 435-436.

92 Krueger, loc. cit. n. 69, p. 46.

party "shall take appropriate measures to cooperate" in order to improve the environmentally sound management of wastes and to achieve prevention of illegal traffic. Article 10 further elaborates this, in specifying that, to that end, states parties shall: make available information to promote ESM of wastes; cooperate in monitoring effects of waste management on health and the environment; cooperate in developing and implementing new environmentally sound low-waste technologies, in improving existing technologies, in transfer of technology and management systems; cooperate in assisting developing countries in implementing Article 4(2a-d) of the Convention. The duty to cooperate also underlies the obligations spelled out in Article 9(3-5) concerning disposal of wastes moved illegally, due to conduct of the importer or disposer, or when responsibility cannot be assigned to the exporter, generator, importer or disposer. Other Basel instruments seek to promote cooperation on certain specific issues, but do so more in terms of requests and recommendations, rather than in the form of a duty. The integration principle is only referred to in the 1999 COP decision on environmentally sound management, which refers to cooperation between the Basel Convention secretariat and relevant international organizations as a means "to encourage the integration of policies on the environmentally sound management of hazardous wastes in Parties' national environmental management and sustainable development plans".[93] The recent challenges to the Basel Convention, and for that matter other Multilateral Environmental Agreements, within the World Trade Organization (WTO) underline the urgency of the integration principle.[94] Its serious implementation not only requires integration of sustainable development concerns into national policies, but would also demand consistent behaviour by all states parties at the international level, including the WTO. The notion of common but differentiated responsibilities is part and parcel of the Basel regime. For example, the ban on transboundary movements of hazardous wastes applies to such movements from OECD and EC member states and Liechtenstein to all others (which include a large number of developing countries and countries in transition), but not the other way around or among non-Annex VII countries. The particular position and needs of developing countries are stressed in several places in the Convention text.[95]

93 Loc. cit. n. 88, para 1(h).

94 As the Basel Convention imposes trade restrictions, it could be challenged within the WTO/GATT dispute settlement system. See e.g. Birnie and Boyle, op. cit. n. 1, pp. 705-706, and Krueger, loc. cit. n. 69, pp. 47-48.

95 See e.g. Arts. 4(2e), 10(2d, 3 and 4), and also para. 6(e) of the Ministerial Declaration on ESM.

Just over half of the specific elements of the emerging international law of sustainable development as identified at the beginning of this chapter are represented in the Basel Convention regime. There is no human rights perspective at all in the Basel Convention. Human rights are not mentioned, although the related aspect of human health (and the need to avoid it being negatively affected) is referred to many times.[96] The ideas of common heritage or concern of mankind, good governance and democratic accountability do not appear in the Basel regime. The no harm principle appears in it, not in relation to states but, as indicated above, in relation to human health. In effect that extends to harm to people within states. Sovereignty over natural resources is explicitly raised in Basel Article 4(12), which stresses that:

> "Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law (…)".[97]

Besides, several general references are made to sovereignty in general, for example in relation to the creation of political or economic integration organizations, through references to areas under national jurisdiction.[98] State sovereignty is tacitly recognized through inclusion of the right to prohibit imports unilaterally and the requirement of prior informed consent before allowing any waste to enter the territory of another state.[99] Apart from rights, the Basel Convention also clearly attaches duties to state sovereignty, among others in the sphere of preventing damage and punishing illegal traffic.[100] A more complicated picture arises for the polluter pays principle. In fact, the Basel Convention contains contradictory provisions and signals concerning the polluter pays principle. Its Article 12 on liability avoids the issue, and only states that a protocol should be adopted, "setting out appropriate rules and procedures in the field of liability and compensation for damage". Its Article 14(2) seems to suggest that the polluter pays principle will not necessarily be the basis for dealing with damage claims. For, it considers the option for states parties (who are not in all case the polluters) to establish a fund to minimize damage arising

96 See e.g. its Arts. 2(8), 4(2c, d, f), 10(2b), 13(1 and 2d), and 15(5a).
97 This statement is repeated in the Basel Liability Protocol, Art. 3(5).
98 See Basel Convention Arts. 2(20), 2(3, 9, 15 and 16) and 4(7a).
99 Ibid., Arts. 4(1a) and 6.
100 See e.g. ibid., Arts. 4(2c) and 9(5).

from accidents involving transboundary movements of hazardous wastes. In parallel to similar developments in other areas, for example in the sphere of marine pollution, states could of course at the national level require contributions from polluters to such a fund. However, the Convention does not make any reference to the issue. The loose way in which duties to re-import or dispose of illegally moved hazardous wastes, and the escape clauses provided to the polluters involved (e.g. through inclusion of exceptions such as "or, if impracticable", or "as necessary" or "as appropriate") also indicate that the Convention does not solidly rely on the polluter pays principle.[101] As observed above, the Basel Liability Protocol shows the same deficiency. The 1999 Conference of the Parties' Declaration on Environmentally Sound Management, in its paragraph 3(b), in turn encourages financial strategies that will "harness market forces to promote" ESM and waste minimization and to provide opportunities for investment in this field. That statement suggests renewed attention for the polluter pays approach. The duty to undertake an environmental impact assessment comes up more or less in Basel Convention Article 4(2f), which requires states parties to render "information about a proposed transboundary movement of hazardous wastes (…) to the State concerned (…), [and] to state clearly the effects of the proposed movement on human health and the environment." Identification of such effects would usually require an environmental impact assessment-like exercise. While Basel, just like the FCCC, contains relatively elaborate provisions on the substance of the annual national reporting obligations for states parties, and on provision of information about accidents or relevant procedural aspects,[102] issues of public participation and access to information are hardly dealt with. Article 10(4) of the Basel Convention refers to the promotion of public awareness of the hazardous waste problem. The Ministerial Declaration on ESM of 1999, in paragraph 6(g), supports the "[e]nhancement of information exchange, education and awareness-raising in all sectors of society". Article 15(6) of the Basel Convention introduces the option for any national or international, governmental or non-governmental, body "qualified in fields relating to hazardous wastes" to be an observer to the meetings of the Conference of the Parties, after successfully having gone through the procedure set for that purpose. According to Article 16(1b) of the Basel Convention, the Secretariat can also receive information from non-governmental entities.

The above presentation shows that the Basel Convention regime incorporates about half of the identified elements of the emerging international law on

101 See ibid., Art. 9(2-4).
102 Ibid., Art. 13.

sustainable development. While most of these identified elements are relevant to the hazardous waste problem, controversy between different states and other stakeholders prevented their (further) inclusion. On a number of elements, such as the principle of integration and the polluter pays principle, there is clear disagreement on how to proceed. The most tangible innovative contribution of the Basel Convention regime to international sustainable development law lies in advancing the notion of environmentally sound management. While initially the meaning and implications of ESM remained quite vague, gradually they gained concreteness, in particular through the 1999 Ministerial Declaration and COP decision discussed above. The Basel Convention's emphasis on prior informed consent is another area in which it could provide useful insights for other parts of sustainable development law.

4. Concluding Observations: Implications for the Progressive Development of International Sustainable Development Law

A comparison between the two regimes in terms of material incorporation of elements of the emerging law of sustainable development reveals significant differences between the two regimes. These are summarised in Tables 1 and 2 below.

Table 1: Towards the Progressive Development of International Sustainable Law: General Principles

General Elements of Sustainable Development Law	*The Climate Change Regime*	*The Basel Convention Regime*
principles of international economic relations	- unilateral policies should not be disguised restrictions on trade [Art. 3(5) of the FCCC] - domestic policies in developed countries that affect exports of developing countries should be avoided [Art. 4(8) of FCCC]	- *no references*

General Elements of Sustainable Development Law	*The Climate Change Regime*	*The Basel Convention Regime*
duty to cooperate	- to promote a supportive and open international economic system [Art. 3(5) of the FCCC]; - to conserve and enhance sinks and reservoirs [Art. 4(1)d of FCCC]; - to enhance the individual and combined effectiveness of policies [KP Arts. 2(1)(b) and 10(e)]; - in technology development and transfer [Art 4(1)c of the FCCC, 10(c) of KP] - in adaptation [Art. 4(1)e of the FCCC] - in research, public awareness, education and information [Art. 5 & 6 of the FCCC] - in improving endogenous capacities and capabilities [Art. 2(1)b and 10(e) of KF];	- to improve and achieve the ESM of wastes [Art. 10(1)] - to prevent and handle illegal traffic [Art. 9] - in monitoring the effects of the management of hazardous wastes on human health and the environment [Art. 10(2b)] - in technology development and improvement [Art. [Art. 10(2c)] - in transfer of technology and management systems [Art. 10(2d)] - in assisting developing countries in implementing Basel Art. 4(2a-d) [Art. 10(3)]
right to development	- emissions and energy will increase as a result of the legitimate need of developing countries to develop [preambular para 22 of FCCC] - the obligation to enact measures is subject to whether such measures are appropriate and/or whether they will lead to high social and economic costs [FCCC preambular para 10] - Implementation of the convention will need to take into account development priorities [FCCC preambular para 21, Art. 10 of KP]; - Is also mentioned in relation to developed countries [Art. 4(2)a of FCCC].	- *no references*

General Elements of Sustainable Development Law	*The Climate Change Regime*	*The Basel Convention Regime*
integration principle	- climate measures integrated in national development policies [Preambular para 21, FCCC 3(4)]	- 1999 COP decision on ESM encourages integration of policies of ESM of hazardous wastes in national environmental management and sustainable development plans
precautionary principle	- cited but not adequately defined [Art. 3(3) of the FCCC]	- *no references*
inter- and intra-generational equity	- inter-generational included in FCCC Preamble and Art.3(1) - intra-generational equity emphasised in several paragraphs that call on developed countries to take the special interests of different countries into account [Art. 4(8) of FCCC]	- *no references*
common but differentiated obligations	- included in FCCC Art. 3(1) and KP Art. 10(a) - includes the principle of leadership by developed countries in terms of reducing emissions, including sinks and help via technology transfer and financial assistance [Art 4(2)a of FCCC]; - such leadership should not lead to unilateral measures that can be a disguised restriction on trade [Art. 3(5 of FCCC] - The situation of vulnerable countries and of those whose economies are vulnerable because of policies of developed countries needs to be taken into account [Art. 3(2) of FCCC, 4(8)] - The situation of LDCs and Economies in Transition is also taken into account in different articles [Art. 4(9) and 12[5)]	- important principle throughout the regime; most stringent obligations apply to developed countries - particular position and needs of developing countries are stressed in several provisions [e.g. Art. 10(3 and 4, 11(1); several COP decisions]

Table 2: Towards the Progressive Development of International Sustainable Development Law: Specific Principles

Specific Elements of Sustainable Development Law	*The Climate Change Regime*	*The Basel Regime*
duty not to cause harm	- responsibility that activities within jurisdiction or control do not cause damage [preambular para 8 and Art. 3(3) of FCCC, Art. 2(3) of KPFCCC] - minimise adverse effects of policies on other countries [Art. 4.8 & 4.9 of FCCC]	- obligations to prevent harm to human health [e.g. Art. 4(1c and f), Art. 4(11), Art. 13(3d]
human rights	- *no references*	- *no references*
sovereignty over natural resources	- limited sovereignty [preambular para 8 and 9 of FCCC]	- respect for the full sovereignty over land and sea territory underlies the main Basel arrangements [Art. 4] - sovereignty brings duties to prevent damage, to monitor and punish [Art. 4]
common heritage and the common concern of humankind	- climate change is seen as a common concern of humankind [Preambular para 1 of FCCC]	- *no references*
polluter pays principle	- *no references*	- *contradictory references* [e.g. Art. 12]
environmental impact assessment	- recommended as a possible measure and if appropriate; especially in relation to the projects implemented under the financial mechanisms [Art. 4(1) f of FCCC]	- information has to be provided on the effects on human health and the environment of a proposed transboundary movement of hazardous waste [art. 4(1f)]
public participation and access to information	- See FCCC Art. 5 and Art. 10.e of the Protocol;	- *scant references*
good governance including democratic accountability.	- *no direct references*	- *no references*

From the examination of the climate change regime, various elements of international sustainable development emerge clearly. Although there is no hierarchy

in the way the principles and the text are presented, it is clear that the goal is the promotion of sustainable development and that sustainable development is seen both as a right and as a duty. The ambiguity regarding the content of sustainable development is reduced in the Kyoto Protocol, which clearly puts sustainable development above economic development and cost-effectiveness. Even though the Kyoto Protocol is internally consistent in its use of sustainable development, this does not reduce the confusion caused by the Convention. The Protocol does not erase or re-write the Convention. Thus, in interpreting the content of sustainable development, one must look at both the Convention and the Protocol together.

The Basel Convention regime embodies the spirit of sustainable development thinking, and in a number of places elaborates specific aspects of the concept. It does, however, hardly use the term itself. Instead, a central place is given to the idea of environmentally sound management, which as suggested in the 1999 Ministerial Declaration on the subject is supposed to give shape to the parties' commitment to sustainable development. Thus, here too, in interpreting the content of sustainable development, one must consider the Basel Convention and all legal instruments related to it (the ban decision and amendment, the Liability Protocol, other COP decisions and Ministerial Declarations) in an integrated manner.

The above analysis of the climate change and Basel Convention regimes reveals that a number of aspects of the emerging international law of sustainable development are gaining strength and clarity. In any case the duty to cooperate, the integration principle, and the principle of common but differentiated responsibilities (with both regimes imposing the most stringent obligations on developed states), feature clearly in both regimes and should give rise to relevant state practice in support of strengthening their status in international environmental law. At the level of more specific elements of the emerging international law of sustainable development, the idea that sovereignty over natural resources brings rights and duties is clearly supported by both regimes. In addition, the no harm principle and environmental impact assessment are applied to some extent in both regimes.

The two regimes also introduce or elaborate some relatively new elements of the concept of sustainable development. Straightforward are sustained use and environmentally sound management of natural resources from the Basel regime. More complicated and perhaps confusing are the following aspects: that sustainable development for developing countries can only be possible, inter alia, in the context of linkages with other (environmental and other) regimes, technology transfer, financial assistance and capacity building; that

sustainable development is not an objective concept, but one over which states have sovereignty – in other words (and within certain limits) states decide for themselves what is sustainable and what is not; and that the precautionary principle is subject to the cost-effectiveness principle in the climate change convention.

Key controversial issues that appear in both regimes are how the principle of cost-effectiveness relates to the principle of sustainable development, and which has precedence if any. Another common controversy is whether sustained economic growth is necessary for sustainable development, or whether we need to switch from the path of sustained economic growth to that of sustainable development.

For the process of the progressive development of international sustainable development law, the precedents of the climate change and Basel Convention regimes provide some interesting insights as well. For, despite fierce North-South, state-private sector and other controversy over the road ahead, and within a relatively short period of time, both regimes were (at least formally on paper) further elaborated through protocols or amendment. Non-governmental actors played a key role in facilitating such changes. So did the active attitude of the respective FCCC and Basel Conferences of the Parties. Supported by the explicit articles on periodic or continuous review, amendments and annexes incorporated in the treaty texts,[103] these fora could bring major improvements to the original FCCC and Basel instrument.

Now the next challenge is, firstly, to make these paper changes effective by reaching the required number of ratifications for entry into force, most notably of the Kyoto Protocol and the Basel ban amendment. It is hoped and expected that in this regard the instruments involved will fare better than Part XI of the 1982 United Nations Convention on the Law of the Sea (concerning the deep sea-bed as common heritage of mankind), which was created in a perhaps similar sphere of controversy but afterwards blocked the entry into force of the Convention was blocked until 1994.[104]

103 Basel Convention Arts. 4(13) and 15(5 and 7), FCCC Arts. 15 and 16.

104 In 1994 an agreement was reached on a revision of part XI, which paved the way for the Convention's entry into force. See e.g. A. Cassese, *International Law,* Oxford University Press, Oxford, 2001, pp. 62-63.

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PART III

SUSTAINABLE DEVELOPMENT: THE EVOLUTION OF REGIONAL AND NATIONAL EXPERIENCE

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INTRODUCTORY NOTE BY THE EDITORS TO PART III

"Think globally, act locally" is a widely acknowledged wisdom when it comes to the implementation of sustainable development. Hence, the third Part of this book is devoted to a review of the evolution of pertinent regional and national experience. It includes seven chapters dealing with such experience of the European Union, of the East African Community, of the Asia-Pacific region, of three Latin American countries, of one Central European country, and of one Asian country.

Alistair Rieu-Clarke reviews the EC Water Framework Directive (WFD) of 2002, a comprehensive instrument which seeks to ensure the long-term sustainable use of all EU waters. Following the prominent incorporation of sustainable development in general EU law, he assesses its move from principle to practice in this particular area. The author concludes that the WFD is a useful example of an attempt to operationalize the principle of sustainable use, introducing innovative methods, such as a river basin approach and an integrated approach to pollution. However, disappointingly, he finds a clear commitment by Member States to achieve "good" status in all EU waters still missing, justifying his call for continued political and public pressure towards that end. *Elisabeth Bastida* discusses the way Argentina, Chile and Peru have integrated environmental and social management in their mining legislation. In the highly competitive mining sector it proves to be far from easy to accommodate sustainability concerns, but through the imposition of environmental impact- and of social impact assessments, progress could be made, most notably in Peru. She concludes that much still remains to be done, especially by shifting emphasis

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from restoration to prevention, by ensuring an integrated approach (which should include meaningful community participation) and by strengthening compliance mechanisms. *Roda Mushkat* examines the principle of public participation from an Asia-Pacific perspective. She analyses pertinent practice and points out that non-State entities such as NGOs and business have increasingly secured participation rights in international legal governance, a process that is further enhanced by moves to assert democratic participatory rights in general. *Wilbert Kaahwa* draws attention to efforts at sustainable development in the East African Community, comprising Kenya, Uganda and Tanzania, suggesting that due to geographical circumstances (e.g. Lake Victoria Basin) as well as the need of poor countries to pool scarce enforcement resources, regional co-operation probably offers better prospects for the implementation of sustainable development than efforts undertaken independently by individual countries.

Shyami Puvimanasinghe investigates to what extent the international law relating to sustainable development had an impact on public interest litigation, human rights and the environment in Sri Lanka, with cross-references to relevant regional legislative and adjudicative practice in the South Asian Association for Regional Co-operation (SAARC). She demonstrates that while international law relating to sustainable development had a positive influence upon domestic legislation, its actual implementation still lacks conviction. However, public interest litigation in the countries concerned has, nonetheless, afforded relief to some complainants, thereby promoting sustainable development, due to a considerable degree of openness of the courts towards sustainable development. *Maria Magdalena Kenig-Witkowska* recalls how sustainable development became gradually accepted in Polish policy and law, in response to the 1992 Earth Summit. However, in her view the socio-economic dimension of sustainable development is still subordinate to the preservation of nature. Furthermore, she explains that in a former communist country, such as Poland, sustainable development is still a far cry for most of the political leadership, while the public at large is still suspicious of anything which comes from "the rulers".

22

SUSTAINABLE USE AND THE EC WATER FRAMEWORK DIRECTIVE: FROM PRINCIPLE TO PRACTICE?

Alistair S. Rieu-Clarke

1. Introduction

On 22nd December 2000 the Water Framework Directive (WFD) entered into force for all Member States of the European Community (EC).[1] The main objective of the WFD is to ensure the long-term sustainable use of all EU waters.[2] The WFD attempts to provide both the criteria for determining *what* constitutes sustainable use, and the mechanisms for determining *how* the principle of sustainable use should be turned into practice. Given that the WFD covers all uses within all EU waters, the potential influence of this cross-sectoral piece of EU legislation should not be underestimated.

Adoption of the WFD was deemed imperative in order to improve the state of Europe's environment in general. While EU countries only abstract around 1/5 of their renewable freshwater resource, which is generally considered a sustainable level, unsustainable trends in particular areas remain.[3] From a quantitative viewpoint, groundwater continues to suffer from overexploitation,

1 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, 2000 OJ (L 327) 1.

2 *Id.*, Article 1.

3 European Environment Agency and United Nations Environment Programme, 'Water Stress in Europe – Can the Challenge Be Met?', (Nov. 21, 2001) <http://www.eea.eu.int/>. *See also* European Environment Agency, European Rivers and Lakes: Assessment of their Environmental State (London, Earthscan Publications Ltd. 1994).

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causing saltwater intrusion in coastal areas and the loss of wetlands.[4] From a qualitative viewpoint, high concentrations of nitrate and pesticides, mainly from agricultural uses, remain a major threat to groundwater resources within Europe.[5] For surface water, reductions in the use of organic matter discharges, phosphate-free detergents and wastewater treatment have all contributed to improving the quality of Europe's rivers and lakes. However, excessive nitrate concentrations within surface water remain a problem throughout Europe.[6] Moreover, while significant water use efficiency gains have occurred within the industrial sector, greater progress needs to be made within the agricultural and domestic sectors.[7]

Adoption of the WFD was also seen as a means of improving existing EU water law and policy. EU water law and policy dates back over 25 years.[8] Early policy took a sectoral approach, focusing on setting water quality requirements for particular water uses, or limiting the discharge of certain pollutants.[9] A review of EU water policy took place in 1988 with the result being a second

4 *Europe's Environment: The Second Assessment* 179-202 (Oxford, Elsevier Science Ltd 1998).

5 *Id.*

6 European Environment Agency, *Europe's Environment – The Dobris Assessment*, 179 (London, Earthscan Publications 1995).

7 Proposal for a Sixth Environmental Action Programme, *supra* note 3, at 45.

8 *See* Commission Proposal for a Council Directive establishing a framework for Community action in the field of water policy, COM (97) 49 final, 1997 (C184) 20.

9 Council Directive 75/440/EEC, 1975 O.J. (L 194) 26 (Surface Water Directive) – Surface water intended for the abstraction of drinking water must comply with certain quality parameters set out in the Directive; Council Directive 76/160/EEC, 1976 O.J. (L 31) 1 (Bathing Water Directive) – Member States must ensure that all necessary measures are taken in order that the quality of bathing water complies with certain limit values set out in the Directive; Council Directive 78/659/EEC, 1978 O.J. (L 222) 1 (Fish Water Directive) – Member States must establish programmes to reduce pollution and ensure that freshwaters capable of supporting fish comply with certain limit values set out in the Directive; Council Directive 79/923/EEC, 1979 O.J. (L 281) 47 (Shellfish Directive) –Member States must establish programmes to reduce pollution in designated areas in accordance with limit values for the protection of shellfish set out in the Directive; Council Directive 80/778/EEC, 1980 O.J. (L 229) 11 (Water for Human Consumption Directive) – water intended for human consumption must meet mandatory minimum standards; Council Directive 76/464/EEC, 1976 O.J. (L 129) 23 (Dangerous Substances Directive) – Member States must take measures intended ultimately to eliminate pollution of water by certain substances, and seek to reduce certain other substances; Council Directive 80/68/EEC, 1980 O.J. (L 20) 43 (Groundwater Directive) – Member States must take necessary measures to prevent the discharge into groundwater of certain substances and limit the discharge into groundwater of other substances.

wave of legislation.[10] Considerable legislative activity therefore occurred over a period of two decades, although the EU's piecemeal approach to water legislation meant that by 1996, EU water law and policy suffered from a lack coherence and co-ordination. In 1996 the Commission therefore called for the adoption of a framework directive designed to more efficiently and effectively implement EC water law and policy.[11]

The purpose of this chapter is to assess the EU's attempt, through the adoption of the EC WFD, to move the concept of sustainable use from *principle* to *practice*. The chapter will initially determine what is meant by the 'sustainable use' of water resources and identify key elements considered fundamental to its implementation. The chapter will then analyse the key provisions of the WFD in order to assess the extent to which the WFD has moved the concept of sustainable use from principle to practice.

2. Sustainable Use Within the Context of Water Resources

All types of water resources are renewable, although recharge rates differ. On average, water present in rivers is renewed every sixteen days; while renewal periods for groundwater can reach hundreds of thousands of years.[12] In basic terms, the challenge of sustainable use is to ensure that human uses of a particular water resource do not endanger the natural recharge rates of that water resource.[13] Based on the nature of water resources and the need to promote

10 Council Directive 91/271/EEC, 1991 O.J. (L 135) 40 (Urban Waste Water Treatment Directive) – Member States must ensure that all agglomerations are provided with collecting systems, and all collecting systems satisfy basic requirements contained within the Directive; Council Directive 91/676/EEC, 1991 O.J. (L 375) 1 (Nitrates Directive) – Member States are required to designate waters which were affected, or could be affected by nitrate pollution, and establish a code or codes of good agricultural practice; Directive 96/61/EC, 1996 O.J. (L 257) 26 (Integrated Pollution Prevention and Control Directive) – sets out an authorisation system whereby a permit lays down limit values for emissions to air, land and water.

11 Communication from the Commission on the European Community Water Policy, COM (96) 59, 21st Feb. 1996.

12 Shiklomanov, I.A., 'Appraisal and Assessment of World Water Resources', 25 Water International 11 (2000).

13 'Sustainable use' is defined in the 1992 Convention on Biological Diversity as meaning 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations (Convention on Biological

sustainable use, a number of key elements to a strategy for ensuring sustainable use of water resources have been identified. These elements include: (i) a river basin approach; (ii) the integration of economic, social and environmental needs; (iii) an ecosystemic approach; (iv) treating water as an economic good; (v) continuous water resource assessment; and (vi) public participation.[14]

2.1 A River Basin Approach

River basins form a natural and indivisible unit and should therefore be managed accordingly.[15] Waters within a river basin form part of an interconnected system that tend to flow towards a single outlet.[16] The need to manage the system at a river basin level is therefore premised on the fact that any impact on any part of the river basin may effect the entire river basin system.

Diversity, June 5, 1992, *reprinted in* 31 I.L.M. 822 (1992) (entered into force Dec. 29, 1993)). 'Sustainable Use', in focussing on the rate and way that a natural resource is used, has a narrower definition to 'sustainable development.' 'Sustainable development' is defined in the Brundtland Report as, 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs (WCED, *Our Common Future* (Oxford, Oxford University Press 1987), at 43). The definition of 'sustainable development' therefore not only encompasses the need to regulate the rate and way a natural resource is used, but also involves determining the allocation of costs and benefits deriving from natural resource use. *See also* Pinto, M.C.W., 'Legal Context: Concepts, principles standards and institutions, ' *in* Weiss, F., Denters, E. & Waart, P, de., *International Economic Law with a Human Face* 13 (London, Kluwer Law International 1998), at 16-17.

14 *See* Chapter 18 of Agenda 21: A Programme of Action for Sustainable Development, June 13, 1992, UN Doc. A/Conf/151/26/Rev.1; Dublin Statement on Water and Sustainable Development, *reprinted in* 22 Environmental Policy and Law 54 (1992); UN Commission on Sustainable Development, 'Report of the Secretary-General – Strategic Approaches to Freshwater Management, ' 6th Sess., UN Doc. E/CN.17/1998/2 (1998); World Water Vision, 'Commission Report – A Water Secure World', (Nov. 21, 2001), <http://watervision.cdinet.com/commreport.htm>; UN Commission on Sustainable Development, 'Report of the Secretary-General – Water: A Key Resource for Sustainable Development', Org. Sess., UN Doc. E.CN.17/2001/PC17 (2001).

15 *See* Agenda 21, *supra* note 14; Dublin Statement, *supra* note 14; Helsinki Rules on Uses of the Waters of International Rivers, *reprinted in* Garretson, A.H., et al. (eds), *The Law of International Drainage Basins,* 779 (New York, Dobbs Ferry 1967); Teclaff, L., *The River Basin in History and Law* (The Hague, Martinus & Nijhoff 1967).

16 Teclaff, *supra* note 15.

2.2 Integration of Economic, Social and Environmental Needs

In order to ensure the sustainable use of water resources, economic, social and environmental needs must be integrated within the water resource decision-making process.[17] Integration is imperative to the sustainable use of water resources because economic, social and environmental factors are inextricably linked.

2.3 An Ecosystemic Approach

Ecosystem protection involves recognising and safeguarding the function of water within both aquatic and terrestrial ecosystems.[18] Water resources provide a number of interconnected goods and services, which have in the past been undervalued. Such goods and services include providing habitats for fish, mitigating floods, assimilating and diluting wastes, and maintaining biodiversity.[19] Protecting ecosystems includes considering the interrelationship between surface water and groundwater, water quantity and quality, living and non-living resources, and aquatic and terrestrial ecosystems. Moreover, effective pollution prevention and control programs should be introduced, with the aim of setting water quality standards, and where possible, controlling pollution at source.

2.4 Water as an Economic Good

Treating water as an economic good involves taking into account the full cost of utilising water resources, including the environmental costs.[20] In order to

17 Agenda 21, *supra* note 14, at para. 18.3.

18 *See* Tarlock, D., 'Safeguarding River Ecosystems in Times of Water Scarcity: Irreconcilable Interests?' Proceedings of an International Water Seminar, June 7-10, 1999, University of Dundee, Dundee, Scotland; Bruneé J. & Toope, S.J., 'Environmental Security and Freshwater Resources: Ecosystem Regime Building, ' 91 AJIL 26 (1997); Bruneé, J. & S.J. Toope, S.J., 'Environmental Security and Freshwater Resources: A Case for International Ecosystem Law, ' 5 YIEL 41 (1994); Nollkaemper, A., 'The River Rhine: From Equal Apportionment to Ecosystem Protection, ' 5 RECIEL 152 (1996).

19 Revenga, C., et al., *Pilot Analysis of Global Ecosystems – Freshwater Systems* (World Resources Institute, Washington D.C. 2000); World Resources Institute, et al., World Resources 2000-2001 – People and Ecosystems (Washington D.C., World Resources Institute 2000).

20 *See* Dublin Statement, *supra* note 14.

prevent wasteful uses and limit environmentally damaging uses of water resources, the full cost of utilising the water resource should be transferred to the user.[21] The obligation of the user to pay the full cost of using water resources should however be mitigated by the obligation to supply domestic users with clean water and sanitation services at an affordable price.

2.5 Continuous Water Resource Assessment

Continuous assessment constitutes the practical basis by which to implement the concept of sustainable use within the water resource context. Water resource assessment is defined as 'the continuing determination of sources, extent, dependability and quality of water resources and of the human activities that affect those resources.'[22] Water resource assessment requires the introduction of common methods of water resource assessment and the regular exchange of information between interested parties. There is also the need for the provision of institutional frameworks for the collection, storage, analysis, and dissemination of data and information.

2.6 Public Participation

A prerequisite to ensuring the sustainable use of water resources is the participation of all interested parties within the water resource decision-making process. Such participation is necessary in order to ensure that the greatest benefit is derived from the use of water resources. Interested parties also play a vital role in ensuring that a strategy for the sustainable use of water resources is effectively and efficiently implemented. Public participation involves providing all interested parties with effective access to information, decision-making procedures and judicial proceedings.

Having identified the meaning of 'sustainable use' within the water resource context, and the key elements of a strategy for the sustainable use of water resources, the purpose of the next section will be to consider the extent to which the WFD promotes the sustainable use of water resources.

21 Allan, A.J., 'Economic Instruments: What are they, why are they important, and why are they difficult to introduce?', Legal and Regulatory Issues, Conference Papers.

22 Agenda 21, *supra* note 14, at para. 18.23.

3. Analysis of the EC Water Framework Directive

3.1 Scope – A river basin approach?

The WFD covers surface waters, groundwater, transitional waters and coastal waters.[23] For the purpose of implementing the WFD, the latter waters must be divided into river basin districts.[24] River basins lying solely within the territory of one Member State must be assigned a 'competent authority', responsible for applying the rules of the WFD throughout the entire river basin. Where river basins are shared by Member States there is no obligation to assign a competent authority for the entire river basin, although the relevant Member States may do so if they wish. If Member States choose not to assign an international competent authority to the river basin, they are still obliged to ensure that the obligations under the WFD are at least co-ordinated throughout the entire river basin. Member States may use existing arrangements for such co-ordination, and/or designate an existing international competent authority. Existing arrangements that may be used for such purposes would include the International Commissions established under the 1994 Agreements on the Protection of the Meuse and Scheldt.[25]

Where rivers basins extend beyond the borders of the EU there is no obligation to adopt a river basin approach, although coordination with non-Member States is encouraged. Moreover, the relevant Member States are still obliged to implement the provisions of the WFD within their portion of the international river basin. Given the indivisibility of the river basin, will such an approach be possible? Would a Member State be responsible for implementing the obligations under the WFD even where it was hindered by the actions of an upstream non-Member State? Clearly it would be within a Member State's interest to encourage non-Member States to voluntarily implement the provisions of the WFD with regard to their shared water resources. However, what incentive would a non-Member State have to implement the costly provisions of the WFD? One possibility is that the non-Member State is seeking to join the EU. A prerequisite of joining the EU is that the applicant State's national legislation comply with EU legislation before that State may join. The recent

23 Article 1 of the WFD.

24 Article 3 of the WFD.

25 Agreements on the Protection of the Rivers Meuse and Scheldt, Apr. 26, 1994, *reprinted in* 34 ILM 851 (1995). Signed on April 26, 1994 by France, Netherlands, the Brussels Capital Region and the Walloon Region, and the Flemish Region, on Jan. 17, 1995.

enlargement of the EU meant that the 10 new Member States had to ensure that their national legislation was consistent with the requirements of the WFD before they could become members.[26] Bulgaria, Romania and Turkey also aspire to joining the EU.

A further influence of the WFD may be seen amongst existing international river basin arrangements between Member States and non-Member States, which may use the WFD as a guide for strengthening international cooperation within their particular basins.[27] An encouraging sign can be seen in the case of the Danube, where the riparian states have voluntarily agreed to implement the WFD as a means of cleaning up the Danube and the Black Sea.[28] If more non-Member States followed the example of the Danube the influence of the WFD, as can be seen by table 3.1, would be quite considerable.

26 Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia officially jointed the EU on May 1, 2004.

27 Existing international arrangements within Europe, include the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, *reprinted in* 31 I.L.M. 1312 (1992)(entered into force Oct. 6, 1996). The Convention obliges riparian parties to enter into bilateral and multilateral agreements, and establish joint bodies, for the purposes of preventing, controlling and reducing transboundary impact. The following States are contracting parties to the Convention: Albania, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, European Community. The Convention for the Protection of the River Rhine, Jan. 22, 1998, *reprinted at* (Nov. 21, 2001), <www. http://www.iksr.org/icpr/>. Signed by France, Luxembourg, Netherlands, Switzerland and the EU. The Convention on Co-operation for the Protection and Sustainable Use of the Danube River, June 29, 1994 (entered into force October 22, 1998), *reprinted at* (Nov. 22, 2001) <http://ksh.fgg.uni-lj.si/danube/envconv/>. The parties to the Danube Convention are: Austria, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Moldova, Romania, Slovak Republic, Slovenia, Ukraine and the EU. The Convention on the International Commission for the Protection of the Elbe, Oct. 8, 1990 (entered into force Aug. 13, 1993, *reprinted in* 75 International Environmental Law 293 (1991). The parties to the Elbe Convention are: Germany, Czech Republic and the EU. The Convention on the International Commission for the Oder River Protection, Apr. 11, 1996 (entered into force Apr. 28, 1999), *reprinted at* (Nov. 22, 2001) <http://www.europa.eu.int/eur-lex/en/lif/dat/1991/en_291A1123_01.html>. The parties to the convention are the Czech Republic, Germany, Poland and the EU.

28 *Revival Planned for the Black Sea and Danube River*, Environment News Service, Nov 2, 2001, (Nov. 22, 2001), <http://ens-news.com/ens/nov2001/2001L-11-02-03.html>.

Table 3.1: Potential influence of WFD on States

EU Member States (25)		*Accession States (3)*	*States sharing transboundary water resources with EU and Accession States (20)*	
Austria	Latvia	Bulgaria	Albania (Romania-Hungary-Austria-Germany-Bulgaria-Slovakia-Czech Republic-Slovenia-Italy-Poland-Greece)	Liechtenstein (Germany-France-Netherlands-Belgium-Austria-Italy)
Belgium	Lithuania	Romania	Armenia (Turkey)	Macedonia (Greece-Bulgaria)
Cyprus	Luxembourg	Turkey	Azerbaijan (Turkey)	Moldova (Romania-Hungary-Austria-Germany-Bulgaria-Slovakia-Czech Republic-Slovenia-Italy-Poland)
Czech Rep.	Malta		Belarus (Latvia-Lithuania-Estonia-Poland-Slovakia-Czech Republic)	Norway (Sweden-Finland)
Denmark	Netherlands		Bosnia & Herzegovina (Romania-Hungary-Austria-Germany-Bulgaria-Slovakia-Czech Republic-Slovenia-Italy)	Russia (Latvia-Lithuania-Norway-Finland-Turkey-Poland-Estonia)
Estonia	Poland		Croatia (Romania-Hungary-Austria-Germany-Bulgaria-Slovakia-Czech Republic-Slovenia-Italy)	Saudi Arabia (Turkey)
Finland	Portugal		Georgia (Turkey)	Switzerland (Romania-Hungary-Austria-Germany-Bulgaria-Slovakia-Czech Republic-Slovenia-Italy-Poland-France-
France	Slovakia		Iran (Turkey)	Syria (Turkey)
Germany	Slovenia		Iraq (Turkey)	Ukraine (Romania-Hungary-Austria-Germany-Bulgaria-Slovakia-Czech Republic-Slovenia-Italy-Poland)
Greece	Spain		Lebanon (Turkey)	Yugoslavia (Bulgaria-Greece-Macedonia-Romania-Hungary-Austria-Germany-Slovakia-Czech Republic-Slovenia-Italy)
Hungary	Sweden			
Ireland	U. Kingdom			
Italy				

3.2 Objective – Sustainable Use?

The most important obligation, and the one that will determine the success or failure of the WFD, is the obligation on Member States to achieve 'good' water

status in all EU waters by 2015.[29] 'Good' water status is the benchmark for determining the sustainable use of water resources within the EU. In general, the status of a water body will be designated as 'good' when the level of human impacts are such as not to effect the long-term availability of the water resource.[30] The criteria for determining what constitutes 'good' status is assessed on the basis of detailed qualitative and quantitative factors, such as the abundance of aquatic flora and fauna, the level of salinity, the quantity and dynamics of water flow, nutrient concentrations, and so on.[31]

While achieving 'good' water status throughout the EU is fundamental to a strategy for the sustainable use of EU water resources, the success of the objective may be hampered by the possibility of Member States relying on a number of derogations.

For artificial and heavily modified bodies of surface water there is no obligation to achieve good water status by 2015. Additionally, the designation of a body of surface water as artificial or heavily modified is at the discretion of the Member States and subject only to certain broad criteria that place social and economic interests before environmental considerations.[32]

29 Article 4 of the WFD.

30 Annex V of the WFD.

31 Annex V of the WFD provides detailed criteria for assessing the status of water resources. Surface waters, transitional waters and coastal waters must achieve both 'good' ecological and chemical status. For surface water to achieve 'good' ecological status three indicators are used: biological (the presence and composition of particular organisms); hydromorphological (conditions of flow and physical structure of the surface water); and chemical and physicochemical (temperature, acidification, nutrient input, input of dangerous substances, and so on). For surface waters to achieve 'good' chemical status, it must comply with all the applicable quality standards contained within relevant EU legislation, for example the Bathing Water Directive (supra note 9) and the Drinking Water Directive (supra note 9). In order for groundwater to achieve 'good' water status it must meet the criteria for 'good' quantitative status and 'good' chemical status. 'Good' quantitative status will be achieved when the annual rate of abstraction does not jeopardise the long-term availability of the water resource. To achieve 'good' chemical status, the chemical composition of the groundwater must be such that the concentration of pollutants does not exhibit the effect of saline and other intrusion, and is compliant with all relevant EU water quality legislation.

32 Article 4(3) of the WFD stipulates that Member States may designate a body of surface water as artificial or heavily modified, when:

- the changes to the hydromorphological characteristics of that body which would be necessary for achieving good ecological status would have significance adverse effects on:
- the wider environment;
- navigation, including port facilities, or recreation;

Member States may determine that the necessary improvements cannot *reasonably* be carried out by 2015 because the scale of improvements required can only be achieved in phases exceeding the timescale for reasons of technical feasibility; completing improvement on time would be disproportionately expensive; or natural conditions prevent timely improvement. If Member States meet the latter conditions then they may apply for an extension for a maximum of twenty-one years.[33]

Exceptions to the obligation to achieve good water status by 2015 may also be claimed when bodies of water are so affected by human activity or their natural condition is such that achievement of the objective would not be feasible or would be disproportionately expensive. In addition, the environmental and socio-economic needs served by such human activity must be incapable of being achieved by other means.[34] This exception, rather than seeking to reconcile the environmental and socio-economic needs, appears to offer leniency to the most 'unsustainable' water resources within Europe. A similar exception may be adopted based on natural circumstance or force majuere events that are exceptional or could not reasonably be foreseen.

A final exception to the obligation to achieve good water status by 2015 may be sought where failure to meet the condition is a result of 'new modifications to the physical characteristics of a surface water body or alterations to the levels of groundwater'. In such circumstances, practical steps must be taken to mitigate the adverse impacts and the reasons for the modifications or alterations be justified by overriding public interest and the benefits of achieving good water status are outweighed by benefits to human health, to human safety or sustainable development. A Member State must also be unable to achieve the modifications by a significantly better environmental option. The needs of the environment are, therefore, also compromised within this exception by needs to human health, human safety and/or sustainable development. An interesting issue is raised by the use of the term 'sustainable development' within this

- activities for the purposes of which water is stored, such as drinking water supply, power generation or irrigation;
- water regulation, flood protection, land drainage, or
- other equally important sustainable human development activities.
- the beneficial objectives served by the artificial or modified characteristics of the water body cannot, for reasons of technical feasibility or disproportionate costs, reasonably be achieved by other means, which are a significantly better environmental option.

33 Article 4(4) of the WFD.

34 Article 4(5) of the WFD.

exception. Can a use of a water resource, not fitting the criteria for sustainable *use* under Article 4, still be justified on the basis that it meets the needs of sustainable development?

The number of exceptions to the main objective of the WFD is evidence of the reluctance of Member States in general to commit themselves to obligations that are perceived to be too onerous within the short-term. While the approach of establishing criteria for determining what constitutes 'sustainable use' is innovative, it is disappointing that such a bold and important step forward is tempered by the need to rely on what will ultimately be the political will of the Member States.

3.3 Mechanisms for ensuring Sustainable Use

While the objective to achieve 'good' water status may be considered as the most important substantive provision of the WFD, there are a number of important measures that constitute a strategy for ensuring the sustainable use of EU water resources. The strategy also seeks to improve coordination between existing EC legislation relating to water resources.

Water Pollution Strategy

A number of EC Directives deal with particular pollution problems.[35] Article 10 and Annex IX of the WFD are designed to co-ordinate such measures with a view to meeting the objectives of good water status by 2015. Moreover a combined approach is taken to pollution prevention and control, whereby both emission limit values and water quality standards are integrated. The combined approach ensures that environmental quality standards are established on a common basis throughout the EU, and then complemented and co-ordinated with emission limit controls for particular substances. Where environmental quality standards or objectives provided by existing EU legislation are not met, Member States are obliged to impose more stringent emission controls.

Article 10 and Annex IX of the Water Framework Directive go a long way to providing for a more integrated approach to water policy, based on the principle of prevention and precaution. This is an important shift from the piecemeal approach that has existed since the 1970's. The WFD will complement the Urban Waste Water Directive, the Nitrates Directive, and Integrated Pollution

35 Integrated Pollution Prevention and Control Directive, *supra* note 10; Urban Waste-Water Treatment Directive, *supra* note 10; and Nitrates Directive, *supra* note 10.

Prevention and Control Directive, while the Dangerous Substances Directive and the Directive on Certain Dangerous Substances, will be repealed.[36]

Implementing pollution prevention measures in the EU has proved to be a difficult task. The European Commission has launched infringement proceedings against a number of Member States.[37] Problems have also been seen in reaching agreement on the Dangerous Substances Directive and its subsequent daughter directives.[38] In regard to the Dangerous Substances Directive, Member States identified 170 dangerous substances that need to be legislated against. However, after a period of twenty years, provision for the control of only 17 had been agreed.[39] A further 33 "priority substances" have subsequently been added to Annex 10 of the WFD by a 2001 Decision of the European Parliament and Council.[40]

It is hoped that the new combined approach contained in the WFD, which makes the requirement of environmental limit values and environmental quality objectives legally binding for the first time, will provide much needed strength to EU policy in this area.

Economic Instruments

The original proposal from the Commission stipulated that by 2010 'Member States shall ensure full cost recovery for all costs for services provided for water uses overall and by economic sectors, broken down at least into households,

36 Article 21 of the WFD.

37 *See for example,* Ends Environmental Daily, 'Commission sounds alarm over EU nitrates law,' Friday, Oct. 3, 1997 (Feb. 5, 2000) <http://www.ends.co.uk/subscribers/envdaily/articles/97100301.htm>; Ends Environmental Daily, 'EU court cases announced on nitrates, waste,' Monday, Jan. 5, 1999 (Feb. 5, 2000) <http://www.ends.co.uk/subscribers/envdaily/articles/99012503.htm>.

38 Council Directive on Mercury Discharges 82/176/EEC, 1982 O.J. (L 81) 29; Council Directive on Cadmium Discharges 83/513/EEC, 1983 O.J. (L 291) 1; Council Directive on Mercury 84/156/EEC, 1984 O.J. (L 74) 49; Council Directive on Hexachlorocyclohexane Discharges 84/491/EEC, 1984 (L 274) 11; Council Directive on Dangerous Substance Discharges 86/280/EEC, 1986 (L 181) 16.

39 *See* Ends Environment Daily, 'Draft EU Water Law to Challenge SMEs,' Monday Sept. 29, 1997, (Feb. 5, 2000) <http://www.ends.co.uk/subscribers/envdaily/articles/97092901.htm>.

40 Decision No. 2455/2001/EC of the European Parliament and the Council of 20 Nov. 2001 establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC, 2001 (L 331) 1).

industry and agriculture.'[41] By the adoption of the WFD, the provision had been weakened to read: 'Member States *shall take account* of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis …and in accordance with the polluter pays principle.'[42] Member States are further obliged to ensure by 2010 that water pricing policies provide adequate incentives for users to use water resources efficiently, and water uses are desegregated into at least industry, households and agriculture for the recover of costs.[43] Member States may however be exempt from water pricing provisions, if such an exemption does not compromise the achievement of the objectives of the Directive. While for some, the WFD provisions on economic instruments may not go far enough, they do mark a first step in introducing detailed economic instruments at a regional level to promote more efficient water use.

3.4 Implementation and Compliance

River Basin Management Plans

For each river basin lying solely within a Member State's territory, that State must produce a river basin management plan. The river basin management plan must contain various details of the river basin including, a general description of its characteristics, a summary of significant pressures and impact of human

41 Article 12 of Commission Proposal *supra* note 8.

42 Article 9 of the WFD. Annex III stipulates that:
The economic analysis shall contain enough information in sufficient detail (taking account of the costs associated with collection of the relevant data) in order to:
- make the relevant calculations necessary for taking into account under Article 9 the principle of recovery of the costs of water services, taking account of long term forecasts of supply and demand for water in the River Basin District and, where necessary:
  - estimates of the volume, prices and costs associated with water services, and
  - estimates of relevant investment including forecasts of such investments;
- make judgements about the most cost effective combination of measures in respect of water uses to be included in the programme of measures under Article 11 based on estimates of the potential costs of such measures.

43 Article 9 of the WFD. The Commission has subsequently adopted a Communication on water pricing, *see* Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee – Pricing Policies for enhancing the sustainability of water resources, COM(2000) 477 final, 26th, July 2000. The Communication identifies water pricing as playing a key role in 'sustainable water policies'.

activity on the status of surface water and groundwater,[44] a list of environmental objectives adopted pursuant to the WFD, a summary of the economic analysis of water use, and a summary of the programme or programmes of measures adopted.[45]

For international river basins within the EU, Member States shall co-operate with the aim of producing a single international river basin management plan. There is, therefore, no duty for Member States to actually produce an international river basin plan. In the event that Member States do not produce an international river basin plan they are under an obligation to produce a plan covering the part of the international river basin falling within their territory. Where an international river basin district extends beyond the boundaries of the Community, Member States should endeavour to produce a single river basin management plan, but where that is not possible, the plan shall at least cover the portion of the international river basin lying within the Member State's territory.

The obligation to produce such a detailed river basin management plan may prove to be an important mechanism for ensuring that Member States' obligations under the WFD are implemented. Co-ordinating the production of all individual river basin management plans will also be extremely beneficial to the Commission in providing a comprehensive and coherent overview of the status of EU water resources, present and future pressures thereon, and the extent and effectiveness of legislation implemented.

Monitoring

Within six years of the adoption of the WFD, Member States must establish programmes for monitoring the status of surface water and groundwater within each river basin.[46] The detailed requirements contained in Annex V will ensure

44 Article 5 and Annex III of the WFD obliges Member States to conduct an analysis of the characteristics of the river basin and a review of the impact of human activity on the status of surface waters and on groundwater.

45 The programme of measures should contain 'basic measures' and 'supplementary measures'. 'Basic measures' are defined as 'the minimum requirements to be complied with' in order to achieve the objectives set out in the WFD and other relevant EU legislation. Where the 'basic measures' are not sufficient to achieve 'good' water status, 'supplementary measures' must be adopted. These 'supplementary measures' may include, legislative instruments, administrative instruments, economic and fiscal instruments, negotiated environmental agreements, emission controls, codes of good practice and abstraction controls.

46 Article 8 of the WFD.

that a coherent and comprehensive monitoring system will be introduced throughout the EU.

Reporting
Reporting requirements will also be rationalised. Member States are required to send copies of the river basin management plans, and subsequent updates, to the Commission and any other Member States concerned within three months of their publication.[47] Member States must also submit a summary report on the characteristic of the river basin, and an interim report describing progress in the implementation of the planned measures must be published within three years of the publication of the river basin management, or its subsequent reviews.

Public Participation
Interested parties are afforded a limited role in implementing the WFD. Member States are under an obligation to publish and make available for comment information on the adoption of their river basin management plans, draft copies of the plans and, upon request, background documents concerning the plan.[48] Member States are not directly obliged to actively involve interested parties in the implementation of the WFD, although such involvement is encouraged.

4. Conclusions

The WFD contains a number of important innovations at the EU level that may provide useful tools for promoting the sustainable use of European water

47 Article 15 of the WFD.

48 Article 14(1) provides that:
Member States shall ensure that, for each River Basin District, they publish and make available for comments to the public including users:
- a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;
- an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;
- draft copies of the River Basin Management Plan, at least one year before the beginning of the period to which the Plan refers.

Upon request access shall be given to background documents and information used for the development of the draft River Basin Management Plan.

resources. Such innovations include the integration of surface water and groundwater, the integration of water quantity and water quality issues, a combined approach to pollution prevention, and the introduction of an EU water pricing policy. The WFD is also a useful example of an attempt to operationalise the principle of sustainable use. Is the WFD, however, a good example? Does the WFD provide the tools for *ensuring* the sustainable use of EU water resources? An answer to the latter questions involves recourse to the key elements of a strategy for ensuring sustainable use of water resources discussed at the start of the chapter.

Does the WFD ensure a river basin approach? A river basin approach is adopted within the EU, and is encouraged between EU and non-Member States. To go any further would be to act outside the remit of the founding treaties.

Are economic, social and environmental factors integrated? Amongst other provisions an integrated approach can be seen through the obligation on Member States to produce a comprehensive river basin management plans covering the characteristics of the river basin, the environmental impact of all human uses on the status of the waters, and an economic analysis of water use.

Does the WFD protect ecosystems? In recognising the interrelationship between different water bodies, and in the criteria for 'good' water status (qualitative and quantitative), the WFD goes a long way down the road to an ecosystemic approach. However, the WFD fails fully to reconcile the environmental needs of freshwater systems, with economic and social needs. Through some of the exceptions to the main objective of good water status, priority is given to economic and social needs.

Is water treated as an economic good within the WFD? To some extent the WFD treats water resources as an economic good, although there is no obligation on Member States to adopt full cost recovery, only a recommendation. However, the adoption of an EC pricing policy Communication by the Commission is evidence of their commitment to encourage Member States internalise the environmental costs of water resource use, and pass all appropriate costs on to the user.

Does the WFD provide the mechanisms for continuous water resources assessment? The detailed provisions contained within the Annex of the WFD, and the reporting requirements of the Member States, provide useful tools for implementing a monitoring programme that should provide a comprehensive assessment of the sustainable use of water resources.

Is public participation recognised within the WFD? To some extent interested parties are given the means to participate within the implementation of the WFD. Members States must publish certain information, and the active

involvement of all interested parties in the implementation of the WFD is encouraged. However, the provisions fall short of securing full and effective engagement of all stakeholders within the implementation process.

In conclusion, the WFD provides a tangible example of a regional law which seeks to take the concept of sustainable use, a key component of sustainable development, from principle to practice within a particular context. The introduction of a number of innovative approaches, such as a river basin approach and a combined approach to pollution, should be applauded as a positive step towards the sustainable use of EU water resources. It is, however, disappointing that a clear commitment by Member States to achieve 'good' status in all EU waters is lacking. The result is that compliance with the main objective of the WFD will perhaps rely more on uncertain political and public pressure than clear legal commitments.

23

INTEGRATING SUSTAINABILITY INTO MINING LAW: THE EXPERIENCE OF SOME LATIN AMERICAN COUNTRIES

Elizabeth Bastida[*]

The integration of the concept and tools for environmental and social management of mineral development into legal frameworks for mining is posing new challenges and proving to be a complex task for law and policy making in the mining sector. In the context of developing economies, which are in dire need of alternatives to foster development, a major challenge lies in reconciling short-term demands for competitiveness in order to attract investment, with the longer-term objectives of environmental protection and social development. The purpose of this chapter is to offer an insight into existing practices followed by selected Latin American countries that have been highly successful in attracting investment in recent years, with a view to meet such a challenge.

The chapter reveals that efforts being undertaken strive to accommodate sustainability concerns within highly competitive legal frameworks for mining, by emphasising the concept of legal certainty and the incorporation of environ-

* This chapter was prepared under the auspices of the Mining, Minerals and Sustainable Development (MMSD) project. MMSD was an independent two-year project of research and consultation seeking to understand how the mining and minerals sector can contribute to the global transition to sustainable development. MMSD was managed by the International Institute for Environment and Development (IIED) and was commissioned by the World Business Council for Sustainable Development. The final report was launched on 1st May 2002 and it is available at www.iied.org/mmsd. Comments and suggestions by Prof. Thomas Wälde, Dr. Arthur Warden, Dr. Danièle Barberis, Ms. Cecilia Gonzales, Mr. Tony Sanford, Ms. Janeth Warden and Dr. Alistair Rieu-Clarke are gratefully acknowledged. Any errors and inaccuracies remain the author's sole responsibility.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 575-605.*

mental (and eventually social) regulation, and public participation mechanisms on a gradual basis. With regard to legal tools, the agenda is mainly environment-driven, through the adoption of compulsory Environmental Impact Assessments as a core environmental management tool. Moreover, developments for the assessment of the social impacts of mining, as well as enhanced mechanisms for public involvement are slowly being introduced, with Peru providing a leading example. Notwithstanding the positive nature of these developments, much more needs to be done in order to shift the emphasis from restoration to prevention, strengthen mechanisms for compliance, accommodate inconsistent mineral law provisions, integrate the full mine life cycle into environmental and social management tools, fully assess socio-economic impacts, improve access to information and ensure meaningful community participation, in order to move forward toward a more mature and integrated system for the development of mineral resources in a sustainable manner.

1. Introduction

From the late 1980's onwards, the main driving force behind legal reform in the minerals sector has been the need to establish competitive conditions to attract private capital investment, within a context of global liberalisation and market-based systems for the allocation of resources.[1] Generally speaking, law reform has aimed at expanding market economies, establishing a climate of stability and predictability in order to provide the conditions conducive to business activity and to increase foreign investment in the economy.[2] In the minerals sector, although differing widely from country to country, some general

1 Mining is a set of operations aimed at the exploration, discovery and extraction of minerals of economic value. In large-scale mining – on which this chapter will focus – large capital investment requirements, coupled with attendant risks much higher than for other industries, has led to an industry structure dominated by very large international mining companies capable of spreading risks over geographic and commodity areas. *See* Bosson, R. and Varon, B., *The Mining Industry and the Developing Countries* (The World Bank: Oxford University Press, 1977).

2 *See* a. Seidman, A., Seidman, R. and Wälde, T. 'Building Sound National Legal Frameworks for Development and Social Change"; b. Webb, D., "Legal System Reform and Private Sector Development in Developing Countries", and c. Shihata, I., "Preface. Good Governance and the Role of Law in Economic Development", in Seidman, Seidman, and Wälde (eds.) *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (London: Kluwer Law International, 1999) at p. 3, p. 33 and xvii-xxvi, respectively.

trends have been evident in developing countries. These trends include a move towards reducing equity requirements for governments and nationals, decreasing taxation levels,[3] replacing outdated laws, improving the efficiency of the administrative process through streamlined application and approval procedures, reducing conditions open to the exclusive discretion of governments, improving title management, strengthening security of tenure and enhancing the transferability of mining rights.[4]

The process of reform has been particularly dynamic and profound in many Latin American countries, and has been a critical factor in determining the major success of the region in driving global exploration expenditures.[5] This process has meant a substantial departure from previous law and policies shaped in the context of the New International Economic Order and the strong assertion of the principle of permanent sovereignty over natural resources.[6] These provided the grounds for forced-upon negotiations and large-scale nationalisations, as

3 Barberis, D., *Negotiating Mining Agreements: Past, Present and Future Trends* (London: Kluwer Law International, 1998).

4 *See* a. Otto, J., "Foreword: The Changing Regulatory Framework for Mining Ventures", (1996) *Journal of Energy & Natural Resources Law*, vol. 14 N° 3, at p. 251. *See* also b. Bastida, E., "A Review of the Concept of Security of Mineral Tenure: Issues and Challenges", (2001) *Journal of Energy and Natural Resources Law*, Volume 19, N° 1, 31-43.

5 Sanchez Albavera, F., Ortiz, G. and Moussa, N., *Mining in Latin America in the Late 1990s* (Santiago: CEPAL/ECLAC Natural Resources and Infrastructure Division, 2001). Exploration expenditures in the region have increased from less than U$S 200 million per year by the end of the 1980s (basically concentrated in Chile), to U$S 1, 170 million by 1997, equating 29% of world investment. Although global exploration investment has slumped thereafter as a result of the Asian financial crisis that later affected other countries, and lower metal prices, the Latin American region has remained the most favoured location from 1998, by keeping a similar proportion of total expenditures (29%). By 2001, spending in the region amounted to U$S 576 million. From 1990 to 1997, mining investment (including exploration) in Argentina, Brazil, Chile, Mexico and Peru reached U$S 17, 379 million, 51% in Chile, 12% in Peru, and 10% in Argentina. In these three countries, investment was much higher during the 1990s than in previous decades. These figures have been reproduced from the annual survey of the exploration budgets of the world's main mining companies carried out by the Metals Economic Group. *See* also Moon, C., "Mineral Exploration 2001 – a Global Review", *Mining Journal* Volume 338 N° 8674, London, March 1, 2002, pp. 4-6.

6 The principle of permanent sovereignty over natural resources was introduced in the United Nations Assembly by initiative of Latin American countries, especially Chile,

well as the creation of State enterprises in Latin America.[7] Amongst other more general factors as changing perceptions on the role of the private sector and the market, the drop of commodity prices in the 80's combined with constraints to afford the service of foreign debt, and reduction in the flow of funds towards the region made difficult for State enterprises to carry on with their business. Therefore, export-oriented mineral projects turned into an attractive option to generate foreign exchange to pay for essential imports and to service debts. Further, by encouraging private investment, governments expected to stimulate economic growth and thereby increase employment and bolster regional development.[8]

Chile took the lead and set up the basis for the reform of the mining sector in the early 1980s far ahead of the rest of the countries in the region. Accelerated development of mineral resources and a focus on private investment to undertake mineral development were the key economic foundations of the reform.[9] Throughout the 1990s, most Latin American countries have promoted policies aimed at the fostering of an enabling environment for private mining development and the enhancement of regional mining competitiveness as reflected in regional instruments relating to the mining sector, and a wave of reform of the legal frameworks for mining.[10] In line with international trends,

in the early 1950s. It was meant to express the widespread perception of inequitable distribution of benefits and wealth, vis-à-vis the United States. *See* Schrijver, N., *Sovereignty over Natural Resources. Balancing Rights and Duties* (Cambridge, Cambridge University Press, 1997), at p. 36. At the core of the principle was the recognition of the effective power of a State to control and dispose of its natural wealth and resources for the benefit of its own people.

7 Full nationalisation of foreign copper companies whose capital was transferred to the State-owned copper corporation (Codelco in its Spanish acronym) in Chile, and of Cerro de Pasco Corporation in Peru (1974) are notable examples in this regard.

8 Wälde, T., *Investment Policies and Investment Promotion in the Minerals Industries* (Dundee: CEPMLP Professional Paper PP2, 1992).

9 It is important to note that the World Bank has proposed the Chilean Mining Code as a model for the reform of mining laws throughout the Latin American region. In this sense, the Peruvian Mining Law, the Bolivian Mining Code, and the modifications to the Argentine Mining Code are all inspired more or less by the "Chilean Model". This regime has even been proposed as a model beyond Latin America, and some of its concepts have been adopted in the reforms introduced, *inter alia*, in Madagascar, Mongolia and China. *See* Naito, K., Remy, F. and Williams, J., *A Comparative Review of Legal and Fiscal Frameworks for Exploration and Mining: Best Practices* (London: The Mining Journal, 2001).

10 *See* a. Economic Commission for Latin America and the Caribbean (ECLAC), "La Havanna Declaration", Proceedings of the Regional Seminar on the Modernisation of

the return from a model of State intervention to the traditional model of mineral tenure by strengthening private mining rights and security of tenure, streamlining procedures and minimising State interference have been the thrust of reform efforts throughout the region. This model reflects the view of traditional development regimes, which concentrate on controlling the allocation of resources in order to promote economic growth.[11]

During the same period, a second driver of legal reform in the sector has been the rising environmental awareness of the consequences of development, bringing in the idea that the environment has to be systematically considered in economic and political decision-making at the policy, planning and management levels. In most Latin American countries, the environmental agenda had remained a low priority faced as they were with their political and economic crises throughout the 1980s.[12] Only since the 1990s have trends and developments in international law, increasing concerns for the negative impacts of mining raised by booming activity, the privatisation of State mining companies,[13] practices (and requirements) brought by international organisations involved in legal reform, as well as the same objective to provide clear, stable and predictable rules of the game for private investment provided the context and the impetus for the emergence of environmental regulation in the region.[14]

the Mining Legislation in Latin America and the Caribbean Region, November 14-16, 1994. *See* also b. the Declaration of Santiago issued by the Mines Ministers of the Americas Annual Conference ("Conferencia Anual de Ministros de Minería de las Américas", "CAMMA") in December 1996, gathering the conclusions of the first annual conference held in Santiago de Chile on 15 May 1996. *See* also c. The World Bank, *A Mining Strategy for Latin America and The Caribbean* (Washington D.C.: The World Bank, 1996) at xviii.

11 *See* International Institute for Environment and Development, *National Strategies for Sustainable Development: Experience, Challenges and Dilemmas*, 6 November 1998, available at http://www.poptel.org.uk/nssd/index1.html (last visited 9 April 2002).

12 *See* MMSD – Regional Partner in South America, *Draft Regional Report South America for MMSD*, Chapter 2, January 2002 at www.mmsd-la.org, page 19.

13 A notable counter-example to the trend of privatisation of State mining companies is Codelco (Chile), the first copper producer world-wide. It is 100% State-owned.

14 In Peru, *see* Pulgar Vidal, M., "Las Regulaciones Ambientales para la Actividad Minera en una Política de Fomento a las Inversiones en el Perú", in *Consideraciones de un Régimen Jurídico Ambiental para la Minería en la Argentina*, Estudio analítico Nº5 – *1995, Chapter 6*, available at http://www.farn.org.ar/docs/p04/publicaciones4_f.html. As expressed by the Chilean Copper Commission, the process of enacting environmental regulations "has been a response to an international preoccupation ever greater for the environmental issues, expressed in the agendas of international organisms as the United Nations and the World Bank", http://www.cochilco.gov.cl/home/eng/frameset-sus-

Both the objective of articulating legal systems that reflect environmental concerns, together with a pressing need to draft competitive legal frameworks for investment represent a typical pattern of legal reform in the sector.

Over the years, the expansion of the activity has been coupled with growing disenchantment, not only with the environmental, but also with the socio-economic impacts and the benefits that mining was purported to bring about, particularly in local communities where projects take place.[15] The integration of the environment in decision-making processes is only but one aspect working towards the sustainability of development.[16] There is increasing consensus in the mining sector on the need to develop policy frameworks that ensure that mineral wealth is captured and creates lasting benefits for local communities and the broader population, and that investment turns into opportunities for sustainable development.[17] As such, sustainable development seeks to integrate enviromental and development concerns "to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs".[18] It proposes an emerging framework involving an integrative approach to human development, considering social, economic and environmental objectives. All in all, sustainable development entails a rethinking of development as has been understood so far, focusing primarily on economic growth.

In general terms, the Latin American region lacks a comprehensive vision of sustainable development embracing all its aspects, despite the fact there have

tentab.htm (last visited 9 April 2002).

15 Local communities demands may range from information on the project, through to partnership, or even be an outright objection to the mineral development, irrespective of governmental decision and regulations or authorizations given to the company. A number of projects as Yanacocha, Antamina and Tambogrande in Peru (where mining land-use often competes with agricultural lands owned by native or rural communities and small landholders) portray these conflicts. *See* Gonzales Guerra, M.C., *Community Relations in Mineral Development Projects*, Dissertation submitted for the Degree of Master of Laws in Natural Resources Law and Policy at the University of Dundee (Dundee, 2001). *See* a critical appraisal of investment policies and a proposal for a sustainable development strategy in the mining region of Antofagasta in Chile in Cademartori, J., "Impacts of foreign investment on sustainable development in a Chilean mining region", 2002 *Natural Resources Forum*, 26, 27-44.

16 *See* in general terms MMSD, *Breaking New Grounds* (2002), available at www.iied.org/mmsd, p.336.

17 *Ibid*, at p. 24.

18 World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), at p. 43.

been significant developments in terms of environmental legislation and democratisation.[19] This chapter draws on some of these aspects. It deals with the integration of the concept and tools for environmental and social management of mineral development, including the provision of appropriate mechanisms for public involvement, taking into consideration the particular questions raised at every stage in the mine life cycle (exploration, development, mining, rehabilitation, post-mining), as they are instrumental for the development of mineral resources in a sustainable manner. For the purposes of this chapter "sustainability" will be understood in this more restricted sense.[20] Far from intending to be exhaustive, the aim of this chapter is to offer the reader an insight into existing practices and major challenges involved in integrating sustainability into traditional, investment-driven, legal frameworks for mining.

The chapter focuses on Argentina, Chile and Peru. These countries have succeeded in drafting regimes for attracting investment, and are faced with the challenge to improve, strengthen or introduce environmental and social regulation and public participation mechanisms -and also provide a more comprehensive vision together with instruments for sustainability-. Moreover, mining (in the case of Chile and Peru) is, or has the potential to be (as in the case of Argentina), a key contributor to the respective economies.[21]

19 *See* MMSD – Regional Partner in South America, *supra* note 12, Chapter 3, at pp. 26 and 32.

20 *See* some further elaboration on the concept of sustainable development and in mining in Section II *infra*. The economic dimension of sustainability, as well as issues of economic and social distribution, as described above, remain outside the scope of the chapter. Questions of land-use and indigenous peoples, as well as access to justice (within the analysis of public participation mechanisms) have not been included for analysis in this chapter. For a comprehensive overview of the status of sustainable development policies in the Latin American region, *see* the thorough report prepared for the project "Mining and Minerals of South America in the transition to sustainable development" as a part of the MMSD project, *supra* note 12. *See* also the detailed analysis on public participation, with a focus on indigenous peoples, prepared by Lila Barrera-Hernández, "The Legal Framework for Indigenous Peoples' and Other Public's Participation in Latin America: The Cases of Argentina, Colombia and Peru", in Zillman, D., Lucas, A. and Pring, G. (eds.), *Human Rights in Natural Resource Development – Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002), pp. 589-628.

21 In Chile, mining is the single most important economic and productive activity in Chile. In 1998, it provided roughly over 8% of the GDP and 43% of the total value of exports. *See* Astorga, T., *The Mining Sector of Chile*, http://www.minmineria.cl/downloads/3doc_1.doc (last visited 9 April 2002). Peru's minerals production accounts for about 5% of the GDP. Approximately 47% of its total export revenues come from the minerals

In order to accomplish its task, Section II will introduce, although briefly, some basic concepts of a workable framework for sustainability in mining. It intends to identify some criteria to guide the analysis of the specific aspects of sustainability relevant for this chapter. Section III will look at the incorporation of sustainability into constitutional and legal frameworks in the countries cited, and will also sound out regional trends. It will revise the scope, enforcement mechanisms and provisions regarding social impact assessments and public involvement provided by the main regulatory instruments (basically, the Environmental Impact Assessment), and the relationship between mineral law and environmental regulations. It will also suggest a few challenges ahead. Finally, Section IV will present a set of conclusions on the fundamental issues involved.

2. A workable framework for sustainability in mining

The Berlin Guidelines

The sustainable development of a natural resource that is depletable as it is mined has often been seen as an oxymoron. Furthermore, the traditional manner in which mining has been carried out for centuries has tended to emphasise short-term gains, with no consideration for the negative impacts on the environment and communities where the project takes place, not only during operations, but also beyond mine closure. Increasing awareness of the economic, social and environmental impacts of development, coupled with technological advance, highlight the idea that, if well managed, mining can have a key role to play in creating lasting benefits for local communities and the broader population. Although a model of sustainable minerals development is far from well defined, there is an understanding that it involves at least the following dimensions:[22]

- The environmental dimension emphasises that, for yielding sustainable results, mineral development has to safeguard the natural environment and

industry. *See* World Bank, *supra* note 10 c., p. 5. In contrast to Chile and Peru, mining of metallic and industrial minerals in Argentina accounted for less than 0, 1% of GDP by 1996. However, exploration investment has boomed since 1993. By 1998 there were approximately 83 foreign mining companies operating in the country, conducting intensive exploration efforts. *See* Dirección de Inversiones y Normativa Minera, *Actividad Exploratoria en la Argentina* (November 1999).

22 Eggert, R., "Sustainable Development and the Mineral Industry", in Otto, J and Cordes, J. (eds.), *Sustainable Development and the Future of Mineral Investment* (Paris: United Nations Environment Program, 2000) at 2-2 and 2-3.

the stock of natural resources, to protect life-support systems and the biodiversity of nature;

- The social dimension underscores that development can be sustainable in social and cultural terms if there is a fair distribution of benefits and costs of mining, and provided all the relevant actors, including local communities affected by a mining project, are involved, and their views are taken into account in decision-making through appropriate processes for participation and dialogue;
- The economic dimension highlights the role of creating and sustaining mineral wealth in maximising human living standards. An important issue is substitution, and in this sense depletion of a resource could be compatible with sustainable development if the interest from the revenues generated from mining are reinvested in building human and social capital, or in other sustainable activities.[23]

Mining in the context of sustainable development must integrate sustainability criteria into all the phases of the mining project from exploration to development, operation, and extraction, closure and even beyond. The incorporation of closure and post-closure phases into the mine life cycle entails a significant shift in thinking. The usual practice consisted of abandoning the mine as soon as it ended its productive cycle, passing the burden of environmental and social disruption on to the communities where projects are located, and future generations (or, otherwise, closing remote mining towns together with the mines). Closure should be planned from the outset of the project, ensuring that the land and structures can be restored for alternative uses after the mine closes, and that an alternative economic base has been developed.

One of the greatest challenges facing the sector is working towards effective governance, which requires some redefinition of roles, responsibilities and the introduction of new instruments for change.[24] Governments have a crucial role to play in designing and enforcing a solid framework for the effective utilisation and management of mineral resources in ways that balance environ-

23 On 'soft' and 'hard' views of sustainable development *vis-à-vis* the extent of substitution of different forms of capital (natural, manufactured, human, social, financial), *see* MMSD, *supra* note 16, at p. 22.

24 *See* MMSD, *supra* note 16, at p. 336. The World Bank launched the Extractive Industries Review, aimed at producing a set of recommendations to guide involvement of the World Bank Group in the sectors of oil, gas and mining. See http://www.eireview.org/ (last visited 15 May 2002).

mental, social and economic interests so as to ensure investment turns into opportunities for development. At present, while a few countries world-wide have partly defined a framework to address some sustainability aspects, in most of them these concepts remain embryonic.[25]

There are existing sources of governance guidance for mineral resources development that should be taken into account.[26] Agenda 21, the Action Plan of the Rio Conference, does not contain any specific chapter dealing with the minerals sector, although a host of provisions are of direct or indirect relevance thereto.[27] The "Berlin Guidelines" provide one of the most useful guidance for mining sector governance in the context of sustainable development.[28] Drafted in 1991 as the outcome of the Round Table Conference organised by the United Nations and the German Foundation for International Development, they served as a basis for the first edition of the 1994 Environmental Guidelines for Mining Operations prepared by the UN Department of Economic and Social Development and its Commission for Sustainable Development, and the United Nations Environment Programme (UNEP) at the request of a number of countries looking for environmental guidance. The second edition of the Guidelines (2002) reflected the changes occurring within the mining sector and with sustainable development particularly in the evolution of legal, fiscal and regulatory policies, and a growing awareness for developing tools to manage the social impacts of mining. The Berlin Guidelines provide a model, rather than a blueprint, for sound and sustainable management of mineral development, and should be amended and improved according to the specific needs of each country.[29]

The Berlin Guidelines provide some criteria that are relevant for the analysis conducted in this paper, as they acknowledge the need to:[30]

25 Otto, J., "Institutional Frameworks: Process and Implementation" in Otto and Cordes (eds.), *supra* note 22.

26 There is, though, a need to coordinate existing efforts so as to avoid the proliferation of competing and overlapping schemes and criteria. *See* MMSD, *supra* note 16, 353-355.

27 *See* Pring, G., Otto, J. and Naito, K., "Trends in International Environmental Law Affecting the Minerals Industry", 17 *Journal of Energy and Natural Resources Law*, Volumes 1 and 2, 39-55 (Part I) and 151-177 (Part II), 1999. *See* also Pring, G., *International Law and Mineral Resources* (UNCTAD, 2000).

28 *Berlin II Guidelines for Mining and Sustainable Development* ("Berlin Guidelines") (United Nations, 2002), available at http://www.mineralresourcesforum.org/Berlin/index.htm.

29 The Global and Regional Reports elaborated by the MMSD provide invaluable governance guidelines in the sector. *See supra* note 16.

30 *See* Fundamental Principles for the Mining Sector, in Berlin Guidelines, *supra* note 28, at p. 4. Please note that this paper focuses on the integration of the concept and tools

- *recognise environmental management as high priority, notably during the licensing process and through the development and implementation of environmental management systems. These should include early and comprehensive environmental impact assessments, pollution control and other preventive and mitigative measures* (among other measures and procedures)*;*
- *recognise the importance of socio-economic impact assessments and social planning in mining operations from the earliest stages of project development;*
- *ensure participation of and dialogue with the affected community and other directly interested parties on the environmental and social aspects of all phases of mining activities;*
- *encourage long term mining investment by having clear environmental standards with stable and predictable environmental criteria and procedures.*

Consistently, the Berlin Guidelines state that *if sustainable development is defined as the integration of social, economic and environmental considerations, then a mining project that is developed, operated and closed in an environmentally and socially acceptable manner could be seen as contributing to sustainable development*.[31]

The next section explores the efforts undertaken by Argentina, Chile and Peru to achieve the goal of integrating sustainability into their legal frameworks for mining. For that purpose, it starts by examining regional initiatives in the sector and basic provisions in constitutional frameworks. Later, it focuses on the analysis of the main regulatory instrument to integrate sustainability (basically, the Environmental Impact Assessment, "EIA"), and looks at its scope of application, phases of the activity that are covered thereby, and enforcement mechanisms. It also seeks to identify the method and extent to which social (or socio-economic) impact assessments and opportunities for public involvement are recognised under legislation. Finally, it examines the interfaces between the licensing process to acquire mining rights and environmental regulation, and suggests a few challenges ahead.

for the environmental and social management of mineral development, including the including the provision of appropriate mechanisms for public involvement, as mentioned *supra* in section I.

31 *See* Berlin Guidelines, *supra* note 28, at p. 5.

3. Trends towards the integration of sustainability

3.1 Regional initiatives and constitutional frameworks

Latin American countries have embraced the challenge of sustainable development, as acknowledged in the 1994 Summit of the Americas, and reinforced in the action plan approved in the 1996 Declaration of Santa Cruz de la Sierra.[32] These expressly recognise the task of creating an environmentally responsible and socially sensitive minerals and metals industry, bearing in mind the key role of mining in the development of the Americas.[33] They also emphasise the countries' efforts towards the implementation of sustainable development as related to economic activities, and highlight the need to incorporate sustainable development concepts into the design and formulation of public policies from the very outset. Consistently, they promote the reform and modernisation of national laws, as appropriate, to reflect sustainable development concepts, and the strengthening and development of national mechanisms for effective enforcement of applicable international and national laws and provisions.[34] Ratification by Argentina, Peru and Chile of core international instruments embracing sustainable development reflects their commitment to such a goal.[35]

Moreover, there is a clear trend towards the incorporation of the right to a "healthy" and "balanced" environment, suitable for "human development", together with public participation rights, in virtually every Constitution in Latin America. This is coupled with the enactment of subsequent regulations aimed

32 1996 Declaration of Santa Cruz de la Sierra. Plan of Action for the Sustainable Development of the Americas signed and approved by the elected heads of state and government of the Americas at the Hemispheric Summit of the Americas on Sustainable Development held in Bolivia on December 7-8, 1996, *See* http://www.oas.org/usde/summit/bolivia%20declaration.htm. The high level of adherence of the countries of the Southern Cone to international environmental agreements has been highlighed. *See* Contributions Formulated at the Preparatory Meeting of the Southern Cone for the World Summit on Sustainable Development Inclusion in a Latin American and Caribbean Regional Platform, in http://www.eclac.org/ (last visited 25 September 2001).

33 Action Plan, Initiative II.5.

34 *Ibid*, 10. g. *See* Barrera-Hernández, *supra* note 20, at p. 590. *See* also Novoa, L., "Sustainable Development and its Relationship with Mining and the Law", 1997 *Rocky Mountain Mineral Law Foundation* (RMMLF), 7-19.

35 For example, all the three countries are parties to the 1992 Convention on Biological Diversity, 5 June 1992, 31 ILM 818 (1992); 1972 Convention for the Protection of the

at the integration of the environmental dimension into decision making. In this regard:

The *1853 Constitution of Argentina* (as reformed in 1994) has adopted the concept of "human development" and the principle of intergenerational equity in section 41 which grants any inhabitant the right to enjoy a healthy and balanced environment, suitable for human development, so that productive activities meet the needs of the present without compromising the needs of future generations to meet their own needs. Such provision is also a source of obligations both for individuals (who *have the duty to preserve the environment),* and for the State which *will provide for the protection of this right, the rational utilisation of natural resources, the preservation of natural and cultural heritage, and biological diversity, and environmental information and education…*[36] Consistently, section 75 N° 19 that the Congress shall provide for human development and progress with social justice.

The *1993 Political Constitution of Peru* recognises human protection and respect for human dignity as the supreme goals of society and the State. Section 2, 22 thereof sets forth that "*every person has the right…to enjoy a balanced environment suitable for the development of life*, " while section 67 stipulates that the State will establish the national environmental policy, and it will promote *sustainable use of its natural resources*. In order to implement this constitutional provision, the 1997 Organic Law of Sustainable Use of Natural

World Cultural and Natural Heritage, 16 November 1972, 11 ILM 1358 (1972); 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 2 February 1971, 11 ILM 963 (1972); the Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 19 ILM 11 (1980). Argentina and Peru are also parties to the Convention N° 169 concerning Indigenous and Tribal Peoples in Independent Countries adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, *entry into force* 5 September 1991. At a regional level, all the countries are parties to the American Convention on Human Rights ("San José de Costa Rica Covenant"), O.A.S. Treaty Series N° 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

36 The 1853 Constitución de la Nación Argentina as reformed in 1994 ("Argentinian Constitution") allows room to public participation in decision-making by adopting the mechanism of "citizen initiative" whereby citizens are allowed to propose and submit law proposals (section 39), and "citizen consultation" whereby a draft law can be subject to either binding or non-binding consultation.

Resources N° 26821 is aimed at "*promoting and regulating the sustainable use of renewable and non-renewable natural resources, by setting forth an adequate framework for encouraging investment, seeking a dynamic equilibrium between economic growth, the conservation of natural resources and the environment, and the integral development of the human being*".[37] Sections 2, 4 and 5 of the 1993 Political Constitution acknowledge the right to information, while the 1990 Code of the Environment and Natural Resources recognises the right of any person to participate in the definition of policies and the adoption of actions related to the environment and natural resources, at a national, regional and local level.[38] The 1997 Organic Law of Sustainable Use of Natural Resources also states that citizens have the right to be informed, and to participate in the definition and adoption of policies related to the conservation and sustainable use of natural resources.[39]

The *1980 Political Constitution of Chile* enshrines in Article 19 N° 8 the right to live in an environment free of pollution. By the same token, it stipulates the duty of the State to ensure that such a right is not affected, and to *observe* the preservation of nature. Such a formula, whereby environmental provisions are restricted to nature and pollution, has later been supplemented by a broader interpretation of what "environment" is, as the 1993 Law of Environmental Basis brings a "human dimension" and the concept of sustainable development, to the traditional environmentalist approach adopted by the Constitution.[40] This same norm provides for mechanisms on participation.[41]

Regional initiatives in the mining sector, such as the Mines Ministers of the Americas Annual Conference (CAMMA in its Spanish acronym) have echoed current concerns. The aim of the association has shifted from investment attraction as an overall aim in the 1996 Declaration of Santiago, towards promoting sustainable development in the Latin American region in the second

37 1993 *Constitución Política del Perú* (Peruvian Constitution). Organic Law of Sustainable Use of Natural Resources N° 26821, Official Gazette 26 June 1997, Section 2.

38 Environment and Natural Resources Code, Legislative Decree N° 613, 8 September 1990, Section VI, Preliminary Title.

39 Section 5. *See* also the Law of Citizen Rights of Participation and Control N° 26 300 that comprises, *inter alia*, the right of participation in Constitutional Reform and draft law initiatives, and the right of control on dismissal and removal of public officers.

40 1980 *Constitución Política de la República de Chile* ("Chilean Constitution"); Law of Environmental Bases N° 19 300, Official Gazette 9 March 1994. *See* Sapag, A., "Evolución del Derecho Ambiental Chileno" in *RMMLF* 2001.

41 *See infra* 3) (v).

conference held in Arequipa (1997). The 2000 Declaration of Vancouver contains a number of recommendations for the implementation of sustainable development.[42] These include supporting and strengthening community capacity to participate in the assessment of opportunities and challenges in mining projects, ensuring the full use of legal mechanisms for public participation; and considering mine closure, and a formal plan for closure, from the outset of each project in order to enable mining to contribute to sustainable development. Although these initiatives are not binding, they reflect the view that the region embraces the challenge of sustainability in the mining sector. Actual implementation is, however, somehow patchy and mainly focused on environmental aspects.

3.2 A central/sectoral approach to environmental regulation

Constitutional provisions have been implemented essentially by means of two main approaches, as they relate to mining: either by application of a general environmental law applicable to every productive activity ("central approach"), or by the enactment of specific sectoral provisions ("sectoral approach").

- Chile has adopted a central framework environmental law (the previously mentioned 1993 Law of Environmental Basis) which is therefore applicable to mining.
- Argentina has adopted a sectoral approach. Being a federal country, special emphasis has been placed on coordinating national and provincial powers regulating environmental matters in the mining sector. This has been done by enshrining environmental regulations in the all-embracing Mining Code, which is applicable nation-wide, thus achieving great uniformity among the provinces in the application of environmental regulations to the mining sector.[43] The Mining Code acts as a management framework for the dis-

42 1996 Declaration of Santiago, I Annual Conference of Mining Ministries of the Americas, Santiago, December 1996; 1997 Declaration of Arequipa, II Annual Conference of Mining Ministries of the Americas, Arequipa, December 1997; 2000 Declaration of Vancouver, V Annual Conference of Mining Ministries of the Americas, Vancouver, October 5 and 6, 2000, available at www.camma.org.

43 Argentinian Mining Code, Compiled Text, Decree N° 456/97, Official Gazette, May 30, 1997.

tribution of powers between federal and provincial governments,[44] not only for mineral tenure aspects, but also for environmental regulations.

- Peru had initially embraced a central approach by application of the 1990 Environment and Natural Resources Code.[45] However, firm opposition to this Code (which Chapter XII was devoted to the regulation of mineral resources) resulted in its modification, and the adoption of a sectoral approach.[46] Within this sectoral approach, recent developments suggest a move towards a single and coordinated system of EIA that, once regulated, would set forth a uniform process of EIAs in investment projects, and public participation mechanisms.[47] The 1991 Law for the Promotion of Investment in the Mining Sector abrogated the provisions on the Environmental Code relating to the mining industry, incorporating instead a specific set of environmental rules for mining investment.[48] Similar rules were also incorporated into the Single Revised Text of the General Law of Mining, which constitutes the core piece of environmental regulation for mining in Peru.[49] The Ministry has also formulated a set of non-binding management guidelines at a national level.

Consistent with these approaches, in Chile the law is administered by a central inter-ministerial environmental co-ordinating committee composed of all the ministries organised at the national level (National Environmental Commission, or Comisión Nacional del Medio Ambiente – CONAMA) plus regional commissions.[50] In Argentina, the competent authority is either the mining authority,

44 Di Paola, M. and Walsh, J., "Las Actividades de la Industria del Petróleo y el Gas y la Sustentabilidad", in Walsh et at (ed.), *Ambiente, Derecho y Sustentabilidad* (Buenos Aires: La Ley, 2000), at p. 153.

45 *See supra* note 38.

46 Gonzales, C., "Recent Development in Peru's Environmental Law and Policy: Its Impact on the Mining Industry", *The Dundee Yearbook of Natural Resources Law* (Dundee: Center for Energy, Petroleum & Mineral Law & Policy, First Edition, 1997), at p. 110.

47 Law 27446, National System of Environmental Impact Assessment, 20 April 2001 (which has not yet been regulated –May 2002-).

48 Law for the Promotion of Investment in the Mining Sector, Legislative Decree N° 708, Official Gazette 14 November, 1991.

49 Single Revised Text of the General Mining Law of Peru (Supreme Decree N° 014-92-EM, Official Gazette 4 June, 1992), which Title Fifteen is regulated by the Supreme Decree N° 016-93-EM, Regulations for the Environmental Protection of Mining and Metallurgical Activities, Official Gazette, 1 May 1993.

50 Also the Environmental Unit of the Secretary of Mining has some policy functions, *see* http://www.minmineria.cl/

as occurs most frequently, or the environmental authority, as opted for by each province. In Peru, jurisdiction belongs to the Ministry of Mines, who establishes its own regulations, with a potential increasingly strenghtened institutional role for the national environmental council (Consejo Nacional del Ambiente – CONAM).[51]

A persistent concern has been placed on finding mechanisms for building up appropriate environmental institutions while maintaining a climate of predictability and stability for private investment. Regional initiatives, governmental documents and specialised literature unanimously point to the need to coordinate and harmonise jurisdictional overlapping by relevant public agencies, and enhance coordination at a local level.[52]

3.3 The EIA as the main regulatory instrument to integrate sustainability

(i) Scope

The EIA is the most common procedure to assist the project proponent, government regulators and the public to predict and evaluate the potential impacts of a project on the environment, as well as, eventually, to identify alternatives and mitigation measures by using its conclusions as a tool in planning and decision-making. In order to increase the effectiveness of the EIA, other environmental management tools are often used, which can be integrated into the EIA. These include, *inter alia:*

a) Environmental Management Plans, that comprise methods and procedures whereby the company will achieve the environmental and social objectives and targets as identified in the EIA; and
b) Environmental Monitoring Programmes, that are intended to assess the environmental and social performance of the project, to demonstrate that the project complies with the objectives set out in the EIA process and with regulatory

51 *See* a. Danielson, L. "Environmental Impact Assessment for Natural Resource Projects in Latin America", *RMMLF* 1997, Paper 8, and b. Gonzales, C., *supra* note 46. *See* c. Law 26410 (22 December 1994), Creation of the CONAM and Regulations, Supreme Decree N° 022-2001-PCM, 8 March 2001. Law 27446 (*supra* note 47) sets forth that the coordinating agency of the national EIA system will be the CONAM, which role will be, among others, to coordinate sectoral agencies.

52 *See* e.g. the 2000 Declaration of Vancouver, *supra* note 42. *See* also MMSD – Regional Partner in South America, *supra* note 12, Chapter 3, at p. 33.

> requirements, and to provide the information required for periodic review, ensuring that environmental and social protection is optimised at all stages of the project.[53]

Argentina, Chile and Peru, as well as most other Latin American countries have adopted the EIA as the main regulatory instrument used to integrate sustainability. EIAs are rather well developed in local legal systems, being conceived as a process rather than a document and their goal is "continuous improvement", in the project's environmental performance, rather than just getting a permit. They treat the commitments arising therefrom as binding and enforceable.[54] In broad terms, the assessment of social impacts and the coordination of public involvement are all included in the EIA system.

All the countries under study require the elaboration of a report or study of environmental impacts, which generally speaking includes a description of the mining project and its environmental impacts, including social and/or cultural aspects, and actions to minimise, mitigate, control and/or eventually repair negative impacts. There is also a varying range of environmental management tools available (such as the Environmental Adjustment and Management Plan in Argentina; Mitigation Actions Plan, Reparation and/or Restoration Plan; Compensation Actions Plan and a Monitoring Plan in Chile). Monitoring plans are also available in Peru, where special emphasis has been placed on the adjustment and management of ongoing operations. The tool adopted for this is the Environmental Adjustment and Management Programme ("PAMA" in its Spanish acronym), applicable to on-going operations in the production and operational stage. PAMA can be the basis for a "stabilisation agreement" between the operator and the Ministery of Energy and Mines so as not to set further requirements on the operator as long as the approved programme is complied with.

Legal frameworks in the countries under study have a series of weaknesses, such as the absence of specific goals, measures and technical guidance for achieving pollution prevention in the different phases of mining.[55] They also lack, or have inadequate legal tools or policies to support pollution prevention

53 *See* Berlin Guidelines, *supra* note 28.

54 *See* Danielson *supra* note 51 a.

55 Environmental Law Institute, *Pollution Prevention and Mining: A Proposed Framework for the Americas*, January 2000, Research Report available at http://www.eli.org/, at page 50.

in critical areas such as closure planning, financial surety, economic incentives and public participation, as will be addressed *infra* in 3) iii) and v).[56]

(ii) Phases of the activity covered by the EIA

As explained before, any serious attempt to integrate sustainability requirements into a mining project must necessarily cover the whole life cycle of the project. This implies, on one hand, that for an EIA (and also socio-economic impact assessments) to have a legitimate position in the decision-making process, the issues and implications will need to be established during the concept phase, and particularly once exploration moves from prospecting to larger scale sampling methods. Good environmental and social management of exploration should include an Environmental Management Plan where land disturbance occurs.[57]

On the closure phase of the project, this approach implies that mine closure should be planned well in advance by means of physical and social rehabilitation programmes that ensure the return of all affected areas, as much as possible, to their optimum economic value.[58]

Some developments have been occurring regarding the regulation of different phases of the activity in the countries under study ever since the laws adopting the respective EIA systems were enacted.

- In Argentina, the EIA covers the prospecting, exploration, exploitation, development, extraction, storage and beneficiation phases, including those activities aimed at mine closure. They all require separate Environmental Impact Reports ("EIR"), and are reviewed separately for approval. Requirements for prospecting have been eased since the EIA system was put in place. As "prospecting" was defined neither under the Mining Code nor the environmental regulations, it was not clear what sort of prospecting was subject to the EIA process. The Supplementary Norms have specified that only prospecting work implying meaningful land disturbance requires an EIA. The regulation of the exploration phase is particularly important in Argentina, as it is estimated that approximately 75% of the territory remains unexplored.[59] For the closure phase, the operator must file another EIR, or an update or amendment of the existing one to cover it, including

56 *Ibid*.

57 *See* Berlin Guidelines, *supra* note 28.

58 *Ibid*.

59 Mining Undersecretariat, *10 Reasons to Invest in Argentina* (2001).

measures and actions aimed at avoiding environmental impacts after the closure of operations. Though the EIR must include post-closure monitoring, no formal closure plans are required, thus weakening the enforcement of these rules.

- In Chile, although "prospecting" has been included within the activities that require prior environmental impact assessment, as the term has not been defined it is still unclear what sort of prospecting is subject to EIA. By interpretation of the law, EIA would be applicable just to exploration work that can be harmful to the environment, which usually, but not necessarily, occurs in advanced stages of exploration, once a specific target has been identified.[60] Although there are a few general references to the closure phase throughout the law and its regulation, as well as in Mine Safety Regulations, no formal closure plans have been established, although there is a draft law on mine closure under discussion.[61]
- In Peru, since the enactment of the general environmental regulation for mining activities in 1993 and through to 1998, there were no environmental requirements for exploration.[62] As mining concessions in Peru comprise both exploration and exploitation activities (the "single concession system"), the Ministry of Energy and Mines just established regulations to file an EIS for the exploitation stage. Since 1998 it is necessary to file an Environmental Assessment ("EA"), applicable to exploration activities which create significant disturbance.[63] It requires the description of the project, activities to be conducted, effects, control and mitigation measures, and closure or temporary shutdown plans. As compared to the general Environmental

60 *See* Danielson *supra* note 51 a. *See* also a. Comité Nacional Pro Defensa de la Fauna y Flora, *Prevención de la Contaminación Minera en las Américas – Estudio de Caso Chileno*, in Environmental Law Institute, *supra* note 55, at p. 7. b. On this topic, *see* also an excellent piece of research prepared by Patricia González Zenteno, *Tratamiento Normativo de la Fase Minera Post Operacional en los Países Mineros Latinoamericanos y La Planificación del Cierre* (CIID: November 1999), available at http://www.idrc.ca/mpri/documents/cierreminas.html

61 Thus, it is the first productive sector attempting to comply with the full cycle of a project in Chile. *See* http://www.minmineria.cl/.

62 *See* Sociedad Peruana de Derecho Ambiental, *Prevención de la Contaminación Minera en las Américas. A Case Study Regarding Peru*, in Environmental Law Institute, *supra* note 55, pp. 9/10.

63 Activities must originate spills and require waste disposal action, and the disturbed area to build up more than 20 platforms over more than 10 has

Impact Studies, the EA requires shorter periods for approval, and there is no requirement for public hearings.[64]

Closure plans must be a part of an EIA or PAMA. Up to 2003, there was a specific non-binding document on the Guidelines for Mine Closure and Abandonment, while the Environmental Guidelines for PAMAs also include a chapter on the Closure Plan.[65] In 2003, the Law Regulating the closure of mines was promulgated.[66] This law establishes the obligation to file a mine closure plan after the authorisation of the PAMA or EIA and also includes a system of environmental surety.[67]

While the EIA mainly covers the exploitation and development phase, there have been significant developments towards refining the scope and application of environmental management tools during the exploration stage, and expanding it to the closure stage. In this regard, Peru has enacted specific regulations for the exploration phase, and guidelines for mine closure.

(iii) Enforcement mechanisms

The countries under study rely heavily on the traditional administrative (from warnings and fines to temporary and definite shutdown), civil and criminal mechanisms to enforce compliance. New approaches to enforcement, such as trusts, bonds or financial sureties to guarantee compliance have not been introduced yet, except for the environmental surety set up on Peru as part of a mine closure plan to enforce compliance therewith. In addition, the voluntary use by the mining sector of environmental management systems, such as ISO 14000, is just beginning.[68] Economic instruments, which can be used as an incentive to improve environmental management, have not yet been developed. An exception is provided by a special tax benefit set up to prevent and mitigate environmental impact -that will be deductible from income tax of up to 5% of operative costs of minerals extraction and treatment- under the Argentine Mining Investment Law N° 24196.

64 *See* Sociedad Peruana de Derecho Ambiental, *supra* note 62, at p. 11.
65 *Ibid. See* also Gonzales, C. *supra* note 46, at p. 115.
66 *See* 2003 Law Regulating Mine Closure No. 28 090, published in October 2003.
67 Articles 5, 6 and 7, Law 28 090.
68 *Ibid.,* at p. 31.

3.4 Socio-economic impact assessment as a part of the EIA

The socio-economic impacts are the outcome of the interaction between the project and the social environment where it takes place.[69] The Socio-Economic Impact Assessment ("SEIA") can be conducted either as a stand-alone document, or as a part of the EIA. In general terms, the SEIA comprises three elements: a socio-economic baseline; prediction and assessment of impacts, and mitigation and monitoring measures.[70] Although SEIAs have the potential to be the starting point for building up social monitoring programmes, they are rarely used in that wider capacity to manage the social impacts of mining throughout the life of the project.[71] Ideally, the findings arising therefrom should be used to put in place "Community Sustainable Plans" to provide a framework for relationships among interest groups (the community, the company, the government) for the life of the project and into post-closure.[72]

The assessment of socio-economic impacts is included as a part of EIAs in the countries under study. In Argentina, description and measures for mitigating the socio-economic and cultural aspects must be addressed in the initial environmental impact report.[73] Recent policy efforts have been aimed at building up social, economic, political and environmental indicators in order to improve the application of the environmental regulations, and determine the impact of large-scale projects in local communities.[74] A similar approach has been adopted by Chile, which requires the description of the socio-economic environment, life-styles, forms of social and community organisation and customs, especially in those communities protected by special laws.[75]

Like Argentina and Chile, Peru also requires the description of impacts on socio-economic resources.[76] But Peru has moved a step forward towards facilitating the application of the SEIA, as regulations in force recommend the operator to use a Community Relations Guide prepared by the Ministery of Energy and Mines (Division of Environmental Affairs). Such a Guide provides a set of guidelines for preparing a Social Impact Assessment and Community

69 *See* Berlin Guidelines, *supra* note 28.

70 Ministry of Energy and Mines – Dirección General de Asuntos Ambientales, *Guía de Relaciones Comunitarias* (Community Relations Guide), January 2001.

71 MMSD, *supra* note 16, pp. 225-6.

72 MMSD, *supra* note 16, at p. 227.

73 Supplementary Norms as approved by the Federal Mining Council, Annex III.

74 *See* Mining Undersecretariat, *supra* note 59, at p. 21.

75 Regulation of the EIA System N°30, Official Gazette, 3 April 1997, section f. 7.

76 *See* Single Revised Text, *supra* note 49.

Relations Plan, and other measures aimed at an appropriate management of the relationship of companies with communities.[77] The aim of the Social Impact Study is to analyse the effects that a project has over individuals, their relationships, economy and culture, and the measures to take in order to trigger the positive impacts -by taking measures to expand the effect of aspects such as local employment and acquisition of goods-, and minimise or eliminate the negative impacts. This is achieved by assessing and/or by modifying actions; and by compensating for impacts on third parties property rights (e.g. land-owners), and for damage or loss.[78]

Although such guidelines are not binding, they certainly provide some insights into the trend of further developments towards the enactment of implementation rules, and the increasing use of social management tools. In this sense, similar regulations in the hydrocarbons sector in Peru *instruct* the operator to use a special "Community Relations Guide" (that is based on the one used by the mining sector), as the document of reference for undertaking a Community Relations Plan. Further, this section of the EIA is denominated "Social Impact Study" in hydrocarbons activities.[79]

3.5 Access to information and public participation mechanisms

An essential role of public participation is to ensure that well-informed decisions are achieved, and that priorities and ultimately choices have been determined through democratic processes, involving all relevant actors. This requires public access to information, as well as adequate processes for participation and dialogue, in order to ensure that the public's views are adequately taken into consideration in the decision-making process. Providing information, identifying issues that concern local communities, and influencing decisions are thus important components of public participation. As such, public participation mechanisms should be put in place as early as possible, and to the extent possible during the scoping stage of the project in order to help identify potential impacts of concern to local communities that should be addressed, eventually in the EIA.[80]

77 *See* Community Relations Guide, *supra* note 70.
78 *Ibid.*, pp. 10 and 25/26.
79 Decree 003-2000, Official Gazette 28 January 2000
80 *See* Environmental Law Institute, *supra* note 55, p. 52.

Public participation mechanisms have emerged in most cases within the EIA system in the countries under study, and are mainly oriented to providing access to information, in a more or less limited way.

- In Argentina, environmental regulations applicable to mining at the national level require the enforcement authority to provide information to whoever requests it regarding the application of environmental provisions.[81] In turn, the provinces -that have retained the powers to regulate general environmental matters within their own jurisdictions- can introduce public participation mechanisms as long as these do not contradict national law. In this context, a few provincial constitutions and environmental framework statutes have provided scope for public hearings in development projects.[82] At least formally, there is no obligation in the public participation sytem to pay due regard to the comments of interested parties.[83]
- In Chile, law 19, 300 establishes citizen participation, setting forth the responsibility of national and regional environmental agencies to establish mechanisms to ensure the informed participation of the community in the assessment process of the Environmental Impact Study ("EIS") submitted thereto.[84] Participation under Chilean law basically consists of access to information, the publication of an abstract of the EIS in the official government gazette and in newspapers with a general circulation within 10 business days following the submission of the study being mandatory. Non-Governmental Organisations and individuals who can be affected directly by the project are allowed to learn about the EIS contents and the terms of documents, and to submit their objections or comments within 60 days following the publication on the EIA. If objections or observations submitted are not

81 *See* Argentinian Mining Code, *supra* note 43, section 268.

82 E.g., the provinces of Jujuy and Mendoza.

83 Recent development in the *El Desquite* project located in Esquel, a pristine area in Chubut Province, illustrate the need to hear and integrate community views well in advance of mining development. Following a NGO campaign and local community opposition against the use of cyanide leaching for the extraction of gold, the project is currently on hold until the EIA is elaborated and approved as well as the requirement of public hearings is complied with, as required under provincial law. Decision of the Esquel Court as confirmed by the relevant Court of Appeal (*see* Chubut North-West Court of Appeal*, Villivar, Silvana N. c/Provincia del Chubut y otros s/Amparo s/Incidente de Apelación*, 25 April 2003).

84 *See* Regulation of the EIA system, Title V on the Participation of the Community in the EIA Process, *supra* note 75.

duly considered or weighed in the qualifying resolution approving the EIS, action may be brought challenging the resolution.

Although it is positive that the law incorporates a mechanism to include the observations of those affected by the project, the approach has a few shortcomings, being rather late in the project timetable. It has been further argued that the means of publication can prevent isolated communities from getting timely access to this information.

- Peru has implemented both a mechanism of information within the EIA by means of publications in the official gazette and local newspapers, and public hearings.[85] Some procedural aspects of public hearings have notably improved since the system was emplaced. While initially they were centralised in Lima, it is now compulsory that they be held in a location close to the project.[86] Executive summaries of the project are distributed among the participants, the project results are disclosed, and questions can be raised, although in written format. Comments have to be taken into account in the decision-making process. There are still shortcomings in the timing and notifications that must be overcome.[87] Importantly, the previously referred Community Relations Guide recognises the weaknesses of public hearings as a means of building up consensus or providing solutions to particular problems, as well as a starting point for communication with those affected by the project. The Guide stresses the need to initiate a process of consultation in earlier phases of the project.

  The recent law 27446 creating a national system of EIA contains a few relevant provisions to public participation, as intends to guarantee both formal opportunities for community participation during the EIA process, as well as non-formal ones. These should be promoted by the project proponent in order to incorporate the perceptions and opinions of those communities that could be affected by the project.

To sum up, mechanisms for meaningful participation in the countries under study are still at the formative stage. So far, opportunities for public participation are designed for project approval and within the EIA process, rather than

85 Reference Mining Plan (Plan Referencial de Minería), www.mem.gob.pe/wmem/publica/dgm/plan-referen2000-2009/planreferencial.pdf&e=747, p. 53.

86 Reglamento de Participación Ciudadana en el Procedimiento de Aprobación de los Estudios Ambientales Presentados al Ministerio de Energía y Minas (Resolución Ministerial N° 728-99-EM/VMM).

87 *See* Barrera, *supra* note 20, p. 620 and ss.

as a consensus-building tool throughout the project. Although Peru has further enhanced public hearings procedures, there are still procedural obstacles in getting access to information, and in the implementation of further action. Moreover, experience has shown that even in cases where public hearings have been implemented, effective participation is hampered if it is not accompanied by accessible information and capacity-building programmes. There are still important gaps regarding timing, what information, and to what extent participation will have an impact on the decision-making process.[88] Much still needs to be done in order to provide for meaningful and effective mechanisms for access to information and consensus-building with the affected community, as well as the enhancement of institutional capabilities to guarantee the effectiveness of such participation.

3.6 Interfaces between Mineral Law and Environmental Regulation

An important question when integrating sustainability is whether environmental regulations will be incorporated within the process to obtain mineral rights, as adopted in Venezuela, or whether the environmental process is completely independent from the mineral licensing process. The latter is the approach adopted by Argentina, Chile and Peru.[89] Thus the regime and procedure for acquiring, transferring, maintaining and cancelling mining rights, defining the rights and obligations of the right holder and powers of government officers, which are governed by mining laws,[90] are separated from the regulation or conditions for the use of such a resource, including environmental regulation. As in most Latin American countries, in Argentina, Chile and Peru mineral resources are vested in the State domain pursuant to their relevant Constitutions.[91] Following Latin American tradition, these countries have all adopted a concession system whereby a mining claim is granted to the first applicant, provided certain requirements are met. As to the legal nature of mineral rights

88 *See* MMSD – Regional Partner in South America, *supra* note 12, at p. 29.

89 *See* Naito, Remy and Williams, *supra* note 9.

90 Argentinian Mining Code, *supra* note 43 ("AMC"). Chilean Organic Constitutional Law of Mining Concessions N° 18, 097 (1982); Chilean Mining Code, Law N° 18, 248, Official Gazette, October 13, 1983 ("ChMC"). Single Revised Text of the General Mining Law of Peru, *supra* note 49 ("PML").

91 In Argentina, being a federal country, minerals are vested in the Provinces' eminent domain ("*dominio originario*") (Argentinian Constitution, as reformed in 1994, section 124). Chilean Constitution, section 19 N° 24; Peruvian Constitution, section 66.

granted under the concession system, exploitation concessions have all the attributes of real property rights and as such, they are freely transferrable and mortgageable, and are protected by constitutional guarantees.[92]

The separation of environmental regulation from mineral rights procedures is considered as a best practice in terms of a competitive regime for private investment, as mining rights can be pledged or mortgaged while raising funds for the mining project, without being subject to the uncertainties and delays derived from the approval of environmental plans.[93] Compliance with environmental regulations is a prerequisite for the *operation* of mining rights, but not for the *acquisition* thereof. Likewise, failure to meet certain *operating* obligations is punished by administrative sanctions, rather than by constituting grounds for cancelling a mining right.[94]

Even though the countries under analysis treat mining licensing and environmental permitting as separate regimes, there might be interfaces between the law stipulating the property regime of the resource, and the regulations providing conditions and restrictions for its sustainable use. A number of questions can be raised here.

A first, remarkable impact of environmental provisions on conventional regimes of mineral law involves increasing restrictions on the operation of property rights based on public interest reasons. As with any other property right, the use and enjoyment of private mining rights must be in accordance and within the limits of the laws that regulate their operation.[95] Thus, the law may harmonise and subordinate such use and enjoyment – on a reasonable basis- to the interest of society.[96] This is an expression of the doctrine of the "social function of the property" that is embedded in the San José de Costa Rica Covenant which has been signed and ratified by all the three countries under

92 AMC, section 12; Organic Constitutional Law of Mining Concession of Chile, section 6; PML: section 10.

93 *Ibid.*

94 Williams, J., "Worldwide Observations on the Latin American Mining Law Model", in *Proceedings of the Dundee Annual Mining Seminar*, June 2001. In Chile, where mining is subject to the general environmental regime, it is thought that exceptional benefits traditionally enshrined in mining legislation should disappear, ideally and in the long run, and be governed by the common regime in force in each country for other economic activities. *See* Ossa Bulnes, J.L., "Mining Legislations in Latin America: Reform and Modernisation", in 1997 *RMMLF*, at p. 1-5.

95 Argentinian Constitution, section 14; Peruvian Constitution, section 70; Chilean Organic Constitutional Law, section 7.

96 AMC, section 282; ChMC, section 116; PML, section 48.

study.[97] As an example, Section 19 N° 24 2nd paragraph of the Chilean Constitution expressly authorises the setting of limitations and obligations derived from the social function of property, which comprises that required for the "conservation of the environmental heritage". Those rules provide a reasonably clear framework for the environmental (and social) regulation of mining rights and the interpretation of restrictions on ways to use or manage mineral resources.

This view is also reflected in the previously cited Organic Law of Sustainable Use of Resources enacted in Peru, aimed at providing a normative framework that spells out the restrictions for the operation of resources rights as established by sectoral laws.[98] Pursuant to this law, natural resources shall be used in a sustainable manner, which in the case of non-renewable resources consists of their efficient exploitation under the principle of substitution of net values or gains, either avoiding or mitigating the negative impact on other surrounding resources and the environment.[99]

In more practical terms, there is a need to accommodate some uncoordinated provisions between mineral law and environmental regulation. Depending on each country, environmental obligations at the end of exploration rights, or the "abandonment" of mineral rights (as stipulated in the Argentinian Mining Code), need some sort of harmonisation in the light of a common sustainability goal. Also, as for starting with exploration work the relevant EIA must have been approved, such a procedure can take a substantial time from the limited exploration term set out under the Mining Code. A great deal of concern in Chile has been focused on the interfaces between environmental assessment and exploration permits, the duration of which is for two years, extendible for a further two years, and the chances of delaying the commencement of exploration within that tight schedule while awaiting the environmental assessment approval.

In some cases there is also room for synergies between legal tools used by the applicable mineral and environmental laws. A good example is provided by the informal side-use of the EIA in some provincial jurisdictions in Argentina

97 American Convention on Human Rights, San Jose de Costa Rica Covenant.

98 Such a view is reinforced whether the changing dynamic of the relationship between landowners and mine rights holders is taken into account (a matter that has been left outside the scope of this study). *See* Bastida, E., "Competitive Land-Uses in Some Selected Countries in Latin-America: Towards a Relative Precedence of Mining Land Use?", *The Dundee Yearbook of Natural Resources Law* (Dundee: Centre for Energy, Petroleum & Mineral Law & Policy, First Edition, 1997). *See* more recent developments in Peru in Gonzales, C, *supra* note 15.

99 *See* Organic Law of Sustainable Use of Natural Resources, *supra* note 37, section 28.

as a tool to assess the compensations due to the landowner for the mining use of the surface land.[100]

3.7 Integrating sustainability: a few challenges ahead

There will be projects where mining land-use can be incompatible with other uses of land (protected areas, urban settlements, aboriginal lands). Sustainable development proposes an integrated approach to land use planning that recognises competing interests and attempts to negotiate the most appropriate course of action, taking into account the ecological and social limits of the area. It will be the job of the law to interpret the balances between conflicting values and principles in different areas of law on a case-by-case basis, as well as to develop new frameworks for decision making for integrated land use that comprises adequate negotiation, mediation and arbitration procedures, and compensation mechanisms to balance all the affected interests.[101]

This suggests a challenging potential role for mineral law, as well as a significant shift in thinking on the principle of precedence of mining land-use embedded in traditional mineral law (on the assumption that mining is a more valuable use of land). This principle informs the Argentinian Mining Code, and has evolved both in Chile and Peru, which rely on market mechanisms for the allocation of land-use.[102]

4. Conclusions

It has been said that a "first generation" of legal reform in the mining sector in recent years has been aimed at setting the conditions for an enabling environment to meet investor's needs. Now governments are faced with the challenges posed by a "second generation" of legal reform aimed at developing legal and institutional structures that balance the rights and duties of investors, governments, local communities and all those affected by mining, and ensures that investment turns into opportunities for sustainable development.[103] A proper

100 Krom, B., *La Minería Sustentable del Milenio* (Buenos Aires: Editorial Estudio, 2000).

101 *See* MMSD, *supra* note 16, at p. 167.

102 *See* Bastida, *supra* note 98.

103 *See* an agenda for a "second generation" of legal and institutional reform in the mining sector in MMSD, *supra* note 16, pp. 344 and ss.

framework for managing sustainable development, including the recognition of environmental and socio-economic impact assessments from the earliest stages of project development and beyond closure, that ensure access to information, participation and dialogue with the affected community and other directly interested parties on the environmental and social aspects of all phases of mining activities, in a context of mineral investment promotion, become an important element of such a second generation legal reform.

Far from intending to be exhaustive, this chapter aims at providing an insight into existing practices and major challenges in incorporating those aspects of sustainable development into legal frameworks for mining in Argentina, Chile and Peru. Although far from comprehensively implemented, common efforts are being undertaken in Argentina, Chile and Peru, with the aims of accomodating sustainability concerns within highly competitive legal frameworks for mining. These efforts are characterised by placing emphasis upon the concept of legal certainty and the incorporation of environmental (and social) regulation, and public participation mechanisms on a gradual basis.

As for legal tools, the agenda has been mainly environment-driven, with the adoption of compulsory EIAs as a core environmental management tool. Implementation norms have evolved further, and the integration of the full mine life cycle into environmental management systems is gaining regulatory attention, exploration and closure plans having been incorporated in Peru in recent years. In addition, developments for the assessment of the social impacts of mining, as well as enhanced mechanisms for public participation are slowly being introduced, with Peru moving forward at a faster pace.

Notwithstanding the positive nature of these developments, the integration of sustainability into legal frameworks for mining is still in the formative stages. Much more needs to be done in order to shift the emphasis from restoration to pollution prevention, to integrate the full mine life cycle into environmental and social management systems, and to enhance the EIA administration and accommodate inconsistent mineral law provisions. There are important gaps to be filled in order to strengthen mechanisms for compliance by introducing financial sureties and closure guarantees, and adopting a mixture of regulatory and economic instruments, and negotiated voluntary agreements. Moreover, a major task lies ahead in ensuring the full recognition of the assessment of social impacts from the early stages of the project onwards, as well as meaningful access to information and community participation.

The integration of the concept and tools for environmental and social management of mineral development, including the provision of appropriate mechanisms for public involvement within legal frameworks for mining are

certainly posing new challenges (conceptual, institutional and practical). They create an intricate task for law and policy making in the mining sector. Environmental and social regulation underlies the idea of placing limitations or conditions on the exploitation and management of mineral resources, and stresses the fulfillment of local needs; an approach that in many ways is at odds with the manner in which mining has traditionally been regulated. The question is even more challenging in the context of developing economies, which are in desperate need of alternatives to foster economic and social development. Often it is a sense of urgency for rapid earnings and economic development, a need for foreign exchange to service debt, the idea that tighter environmental regulation might discourage investment, plus a lack of financial resources, technical skills, and political will which undermines initiative and cohesion, and lead to poor implementation of sustainable development-related laws.

Answers to the question of integration of sustainability are context-based, and thus determined by the legal tradition, political, economic, social and cultural background, and political will of each country.[104] To balance the equation between short-term demands for competitiveness to attract investment, with the longer-term objectives of sustainability in developing economies is perhaps the most challenging task ahead on the road towards a more mature and integrated system for the development of mineral resources in a sustainable manner.

104 Boer, B., "Implementation of international sustainability imperatives at a national level", in Ginther, K.; Denters, E. and de Waart, P. (eds.), *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Publishers, 1995), at p. 112.

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THE PRINCIPLE OF PUBLIC PARTICIPATION: AN ASIA-PACIFIC PERSPECTIVE

Roda Mushkat

1. The International Framework

That the contemporary international legal arena is no longer the exclusive domain of states needs little elaboration or argument,[1] even if questions may persist regarding the status[2] and role of the various non-State actors.[3] Whether

1 In fact, to a large extent scholarly discussion seems to have shifted from the mapping of the new international landscape to the post-stage of addressing challenges posed by the emerging system, such as issues of accountability of nongovernmental actors and the legitimacy of the norms created by them. See e.g., Edith Brown Weiss, 'The Rise or the Fall of International Law' (2000) 69 *Fordham Law Review* 345, 357-360.

2 Questioning the status of such entities as 'subjects' or 'objects' of international law, especially in light of procedural disabilities experienced by non-state personalities in enforcing their rights or protecting their interests. The preferred 'neutral' term appears to be 'participants.' See Rosalyn Higgins, 'Participants in the International Legal System' in *Problems & Process International Law and How We Use it* (Oxford: Clarendon Press, 1994), pp. 39-55. Included are: international institutions, non-governmental organisations, individuals, indigenous peoples and other local communities, as well as research institutions, technology experts, natural and social scientists, transnational business enterprises, and other groups interested in and/or advocating on behalf of various issues and constituencies.

3 It is debated, for example, whether the rise of powerful transnational private actors, playing seemingly important roles in international affairs signals the 'decline of the state system and the birth of a new international structure' or in fact a useful means for legitimising the 'joint and coordinated arrogation of new state powers through the creation of new public international law.' See Kal Raustiala, 'The "Participatory Revolu-

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 607-630.*

attributed to the all-encompassing 'globalisation' process, to the 'democratisation and deregulation' of international law, or to the general 'extension of international law into commerce, human rights, and the environment, which impinge directly on the everyday lives of people and companies'[4] – it is evident that non-state entities are claiming and increasingly receiving participation rights in international legal governance.[5]

Perhaps more than in other fields of international law,[6] international environmental law has embraced the principle of non-state participation and has provided concrete channels for its realisation.[7] Several justifications may be adduced. At the broad theoretical level lies the perception of international law as a dynamic decision-making process reflecting legitimate claims and values of a variety of actors and hence requiring the input of these actors.[8] Such an inclusive approach is particularly appropriate with respect to the environment,

tion" in International Environmental Law' (1997) *The Harvard Environmental Law Review* 537, 585-6.

4 See discussion of the various factors in Philippe Sands, 'Turtles and Torturers: The Transformation of International Law' (2001) 33 *NYU Journal of International Law & Policy* 527, 537-543.

5 See generally Karsten Nowrot, 'Legal Consequences of Globalisation: The Status of Non-Governmental organizations Under International Law' (1999) 6 *Indiana Journal of Global Legal Studies* 579-645; Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 *Michigan Journal of International* Law 183. On the increased participatory role of NGOs in international environmental law, see Raustiala (note 3 above).

6 Note however the significant role performed by NGOs in the areas of international labour law and international human rights law. See generally Alex Geert Castermans *et al* (eds.), *The Role of Non-governmental Organizations in the Promotion and Protection of Human Rights* (Leiden: Stichting NJCM-Boekerij, 1991).

7 See Raustiala (note 3 above). For more recent developments see Jacqueline Peel, 'Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organisation' (2001) 12 *Colorado Journal of International Environmental Law & Policy* 47.

8 See Owen J Lynch/Gregory Maggio, *Human Rights, Environment and Economic Development: Existing and Emerging Standards in International Law and Global Society* (1998), at http://www.ciel.org/Publications/olpaper3.html, Chapter II (reprising the view associated with the New Haven (policy-oriented) School which depicts international law as a 'process of making decisions in conformity with the expectations of appropriateness of those who are politically relevant;' and commending it as reflecting contemporary international realities more accurately (than the "classical statist approach")).

given that the transnational scope of problems falling in this domain[9] render states incapable of effective action. In fact, as contended by Philippe Sands, states have displayed an unwillingness to act as 'guardians of the environment', thus creating the space and role for other, more suitable actors, like NGOs.[10]

Another normative justification for the incorporation of all stakeholders in environmental governance, both international and national, is grounded in prevailing democratic tenets.[11] It is not, however, just confined to the notion that governing must be done with the consent of the governed, in the sense of participatory rights in the electoral process.[12] Rather, and especially in the environmental context, emphasis is placed on entitlements such as the rights of access to information, environmental impact assessment, participation in decision-making on environmental issues, legal redress and effective remedies in case of environmental damage.[13] The underlying idea is that democratic decision-making will lead to environmentally friendly policies.[14] Creating legal gateways for participation would arguably also equalise the distribution of environmental costs and benefits, allowing marginalized groups (e.g., women, the dispossessed, and communities closely dependent upon natural resources

9 Such as global warming, ozone depletion, over-fishing, deforestation, marine pollution, and illegal trade in endangered species of flora and fauna.

10 Philippe Sands, 'Enforcing Environment Security' in Sands (ed), *Greening International Law* (London: Earthscan Publications, 1993), p. 50, 56.

11 For a recent discussion on the 'entitlement to democratic governance' from an international law perspective see Gregory H Fox, Brad R Roth (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000).

12 For a critical examination of the view of democracy as entailing primarily a right to participate in the selection of national governments see Susan Marks, 'International Law, Democracy and the End of History' in *Democratic Governance and international Law, ibid*, pp. 532-566, 558 (highlighting conceptions of democracy as the 'right to participate directly in decision-making affecting one;' a 'process of connecting people with their government through civil society;' and as a range of rights that 'actually enable participation in public life on a footing of equality').

13 See Sands (note 4 above), 539-40. For a concretised discussion of these so-called 'procedural' rights see Philippe Sands and Jacob Werksman, 'Procedural Aspects of International Law in the Field of Sustainable Development: Citizens' Rights' in Konrad Ginther, Erik Denters, Paul JIM de Waart (eds.), *Sustainable Development and Good Governance* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1995), pp. 178-204.

14 See Michael R Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan E Boyle & Michael R Anderson, *Human Rights Approaches to Environmental Protection* (Oxford: Oxford University Press, 1996), pp. 1, 9.

for their livelihood) to be included in the social determination of environmental change.[15]

Moreover, such entitlements are mandated under the interrelated and mutually reinforcing principle of 'good governance' (defined as a governance that is, amongst other things, participatory, transparent and accountable as well as effective, responsive, equitable and advancing the rule of law[16]) which itself is widely seen as a core element of sustainable development. Thus, 'accessible information means more transparency, broader participation and more effective decision-making. Broad participation contributes both to the exchange of information needed for effective decision-making and for the legitimacy of those decisions. Legitimacy, in turn, means effective implementation and encourages further participation.'[17] Participatory and decentralised government is also expected to be more equitable in empowering vulnerable and disadvantaged groups.

On a more pragmatic plane, public participation has been projected as 'a key element in improved environmental management.'[18] The involvement of major community sectors,[19] in particular, is regarded as essential in achieving the goal of sustainable development.[20] Highlighted are the special knowledge,

15 See *ibid*. The author, however, draws attention to reservations regarding polities that, notwithstanding their participatory and accountable nature, may 'opt for short-term affluence rather than long-term environmental protection.' *Ibid*, p. 10.

16 See UNDP Governance Policy Paper, *Good Governance and Sustainable Development* (1997), at http://magnet.undp.org/policy/chapter1.htm (visited 27 October 2001). See also ESCAP (Economic and Social Commission for Asia and the Pacific) Human Settlements, *What is Good Governance?* At http://www.unescap.org/huset/gg/governance.htm (visited 27 October 2001). For a scholarly discussion of the concept and its relationship to sustainable development see *Sustainable Development and Good Governance*, (note 13 above). On the particular issue of 'public participation' in the context of good governance see: Amado S Tolentino, 'Good Governance Through Popular Participation in sustainable Development,' *ibid*, pp. 137-149.

17 UNDP paper, *ibid*.

18 See UNEP, *GEO-2000 Global Environment Outlook*, Chapter 3: policy responses – global and regional synthesis, at http://www.grida.no/geo2000/english/0141.htm (visited 29 September 2001).

19 Including women, children and youth, indigenous people, NGOs, local authorities, workers and trade unions, business and industry, scientists and technologists, and farmers.

20 See *Agenda 21: Programme of Action for Sustainable Development*, UN Doc. A/CONF.151/26/Rev.1, 14 June 1992, *repr in* Stanley Johnson, *The Earth Summit: The UN Conference on Environment and Development* (1993), pp 125-508 (hereafter: Agenda

skills and resources possessed by the different groups whose mobilisation should increase considerably the effectiveness of governmental initiatives.

Public participation (through NGOs) is also seen as beneficial at all levels – formulation, implementation, and enforcement – of international decision-making affecting the global environment. Several contentions have been advanced[21] with respect to the ability of non-state actors to 'conceptualise problems and solutions without borders;'[22] their 'luxury of being able to focus on a single concern (such as the environment);'[23] and their arguable representation of public opinion on environmental issues.[24] It is further asserted that active NGO participation actually enhances the abilities of states to regulate global environmental accords[25] and contributes to the more effective implementation and enforcement of environmental conventions.[26]

Nor are the above justifications and rationalisations only a matter of pragmatic policy-making. Respective international obligations pertaining to public participation are prescribed in authoritative international instruments. While some of these instruments may be characterised as "soft law" or "non-law" for their lack of legal binding and enforceability, they are not without legal effect or

21), Chapter 23.2: 'One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need for individuals, groups, and organisations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work.'

21 See Peel (note 7 above), 71-73. The writer also discusses the 'drawbacks of NGO involvement in the international fora' (73-74), and offers 'suggestions for sensible regulations on NGO involvement in international fora' (74-76).

22 *Ibid*, 71.

23 *Loc.cit.*

24 *Ibid*, 72.

25 See Kal Raustiala, 'States, NGOs, and International Environmental Institutions' (1997) 41 *International Studies Quarterly* 719-40. Among the benefits garnered by states through NGO participation are: additional sources of environmental data; the participation of expertly staffed organisations that devote considerable effort to policy research and development; the preparation and presentation of information, evaluations, and legal opinions, usually free of charge; a maximisation of the policy options available to states courtesy of the vast network of data sources employed by NGOs; and cost effectiveness.

26 See *ibid*. See also Edith Brown Weiss & Harold Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Accords* (MIT Press, 1997).

normative force. Indeed, soft law instruments can create 'sincere and deeply held expectations of compliance' with norms contained therein,[27] and may even exert greater influence on a state's conduct than a 'hard law' norm.[28] They impact on national legislatures and national legislation as 'reference models which anticipate internationally-grounded state obligations emerging in the near future.'[29]

They can moreover properly claim a normative status as an element of the process of judicial reasoning by both international and municipal judges. Accordingly, they may effectively be taken into account in evaluating the legality with regard to international law of any internal administrative action that may have detrimental effects on the environment beyond national boundaries, as well as an authoritative guide to the interpretation of generally or vaguely formulated international obligations.[30] In fact, as Christine Chinkin illustrates, 'normative standards articulated through soft forms are relied upon by a variety of actors in both domestic and international fora,'[31] with the proponents not

27 See Dinah Shelton, 'Law, Non-Law and the Problem of "Soft Law"' in Dinah Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press, 2000), pp. 1, 17. See also Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development. Past Achievement and Future Challenges* (Oxford: Oxford University Press, 1999), p 30 (maintaining that 'in terms of the strength of expectation of compliance, there is not necessary distinction between the categories of "hard" and "soft" law;' rather the 'real difference between hard and soft law lies in the processes by which the rule is articulated and in the consequences of its breach').

28 Findings of a project on 'The Implementation and Effectiveness of International Environmental Commitments' suggest that while compliance with "soft"/non-binding agreements has been lower than compliance with legally-binding agreements, the former often have higher *effect* on behaviour. See David G Victor, 'The Use and Effectiveness of Non-binding Instruments in the Management of Complex International Environmental Problems' *ASIL Proceedings 1997*, 241-250. See also Edith Brown Weiss, 'Conclusions: Understanding Compliance with Soft Law' in Shelton (ed.), *Commitment and Compliance* (note 27 above), pp. 535-553, 536 (validating the hypothesis that 'in general the same factors are at play and the pathways through which compliance takes place are the same' in respect to both soft and hard instruments; while noting that in some cases a non-binding instrument 'may evoke better compliance than would a binding one').

29 Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 420, 434.

30 See *ibid*, 435.

31 See Christine Chinkin, 'Normative Development in the International Legal System' in Shelton (ed.), *Commitment and Compliance* (note 27 above), pp 21, 36.

always differentiating between hard and soft obligations but drawing upon 'all available instruments across the continuum of legality to present as full a picture as possible of appropriate expectations.'[32]

Finally, even international 'source traditionalists' – who resist expansion of international law-making modes beyond treaties and custom – would be unable to deny the 'evidentiary' role of 'soft law' instruments in supplying the necessary statement of legal obligation (*opinio juris*) to evidence the existing or emergent customary rule (as well as assisting in establishing the content of the norm).[33] In a similar vein, the process of drafting and voting of non-binding normative instruments may be considered a 'form of state practice.'[34]
It is in light of the above reflections and yardsticks that the status in international law of the principle of public participation should be evaluated. Specifically, the principle has been reiterated for the last two decades by a variety of international organisations as well as incorporated in internationally binding instruments. As early as 1982, the *World Charter for Nature*[35] has stipulated that

32 See *ibid*, pp. 36-7 (citing as an example the practice of the International Tribunal for War Crimes in the Former Yugoslavia in drawing on a wide variety of non-binding as well as binding instruments in its moulding of international criminal law). Note also the reliance (as part of a submission that an obligation to carry out Environmental Impact Assessment was established under customary international law) by the Government of New Zealand in its pleadings before the International Court of Justice in the *Nuclear Tests Case* (1995) on a host of instruments (e.g., the Rio Declaration, the 1978 UNEP Draft Principles of Conduct, the 1989 World Bank Operational Directive, formally binding agreements such as the 1992 Convention on Biological Diversity, as well as a treatise on the subject) without drawing distinctions regarding their enforceability or normative status. See *Request for an Examination of the Situation in Accordance with Para. 63 of the Court's 1974 Judgment in the Case Concerning Nuclear Tests (New Zealand v France) Case*, written pleadings at http://www.icj-cij.org/icjwww/i.PDF, pp. 43-48.

33 See Dinah Shelton (note 27 above), p. 1. Note the observation by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that resolutions 'can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.' 1996 *ICJ Rep.* 226 at 254 (para. 70).

34 See Shelton, *ibid*. Commonly referred to in this connection is the judgment in the *Nicaragua Case* in which General Assembly resolutions prohibiting use of force and illegal intervention were given weight as evidence of both state practice and *opinio juris*. *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, Merits, 1986 *ICJ Rep.* 14 at paras. 183-6.

35 UN G.A Res. 37/7 (Annex), UN Doc. A/RES/37/51, *reprinted in* (1982) 22 *International Legal Materials* 455.

> All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation (Principle 23).[36]

The principle has been thereafter restated in several declarations,[37] leading up to its most pronounced affirmation in the 1992 Rio Declaration on Environment and Development:[38]

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided (Principle 10).

36 See also Principle 16: 'All planning shall include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities; all of these elements *shall be disclosed to the public by appropriate means in time to permit effective consultation and participation*, (emphasis supplied).

37 See references for example to the 1987 Tokyo Declaration of the World Commission on Environment and Development, Principle 5 ('Greater public participation and free access to relevant information should be promoted in decision-making processes touching on environment and development issues'); the 1991 Hague Recommendation on International Environmental Law, principles I.3d, IV.7.a-c ('In developing environmental policies at the national and international levels, states should apply inter alia: the right of access for the public to and the duty of states to provide information relating to environmental impacts and risks and related health hazards;' Equal and full access to information, for individuals and institutions, must be recognised as a prerequisite to implementing certain fundamental rights'); and the 1995 IUCN Draft Covenant on Environment and Development, Article 12.3 ('All persons, without being required to prove an interest, have the right to seek, receive, and disseminate information on activities or measures adversely affecting or likely to affect the environment and the right to participate in relevant decision-making processes') – at http://www.earcharter.org/report/survey/survey29.htm.

38 UN Doc. A/CONF.151/26, *reprinted in* (1992) 31 *International Legal Materials* 874

Special emphasis is placed on ensuring full participation of politically disadvantageous groups such as women,[39] youth[40] and indigenous people.[41]

Being located within an important international instrument that was 'negotiated in detail by a large and representative number of delegations,'[42] the principle of public participation joins other major principles, encapsulated in the Rio Declaration, that have been taken to reflect the 'current consensus of values

39 Principle 20: 'Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.' See also the 1995 Fourth World Conference on women (FWCW) Platform for Action on Women and the Environment (at http://www.un.org/womenwatch/daw/beijing/platform/environ.htm), Section K, para. 251, stating that 'sustainable development will be an elusive goal unless women's contribution to environmental management is recognised and supported; para. 253 (actions to be taken by governments at all levels) a. Ensure opportunities for women, including indigenous women, to participate in environmental decision-making at all levels, including as managers, designers and planners, and as implementers and evaluators of environmental projects; the 1995 Copenhagen Declaration of the World Summit of Social Development, Principle 26.o: 'Recognize that empowering people, particularly women, to strengthen their own capacities is a main objective of development and its principal resource. Empowerment requires the full participation of people in the formulation, implementation and evaluation of decisions determining the functioning and well-being of our societies.'

40 Principle 21: 'The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure better future for all.'

41 Principle 22: 'Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.' See also the 1994 Declaration on the Rights of Indigenous Peoples, E/CN.4/SUB.2/1994/2/Add.1 (1994) which recognises, amongst other environment related indigenous rights, the right to prevent and seek redress for (a)ny action which has the aim or effect of dispossessing them of their lands, territories or resources' (article 7(b)).

42 See Ileana Porras, 'The Rio Declaration: A New Basis for International Cooperation' in Philippe Sands (ed.), *Greening International Law* (note 10 above), pp. 20, 21. As noted by Sands, the Rio Declaration 'draws upon and reflects principles previously adopted in many international environmental agreements and other instruments, and as such is bound to influence developments in international environmental law. Elements of it reflect, at least in part, customary international law.' Philippe Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in Winfried Lang (ed.), *Sustainable Development and International Law* (London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1995, pp. 53, 57.

and priorities in environment and development.'[43] Arguably, notwithstanding the soft/non-binding nature of the Rio Declaration, Principle 10 itself might be regarded as having a fairly 'hard' normative content. Such an assertion is furthermore supported by its incorporation in subsequent treaties.

Thus, the public participation imperative is contained in provisions of the widely subscribed 1992 UN Convention on Biological Diversity,[44] the 1992 UN Framework Convention on Climate Change,[45] the 1994 UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification.[46] Obligations to provide information to the public are also included in UN-ECE (UN Economic Commission for Europe) conventions such as the 1991 Convention on Environmental Impact Assessment in a Transboundary Context ('the Espoo Convention')[47] and the 1992 Convention on

43 *Ibid*.

44 *Reprinted in* (1992) 31 *International Legal Materials* 818 (entered into force on 29 December 1993; 182 parties, as of October 2001). Article 14 ('Impact Assessment and Minimizing Adverse Impacts').1: 'Each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for *public participation* in such procedures' (emphasis supplied).

45 *Reprinted in* (1992) 31 *International Legal Materials* 848 (entered into force on 21 March 1994; 186 ratifications, as of October 2001). Art 4 ('Commitments').1…All Parties…shall (i)…Promote and cooperate in education, training and public awareness related to climate change and *encourage the widest participation in this process, including that of non-governmental organizations*' (emphasis supplied); Article 12 ('Communication of Information Related to Implementation').10…and without prejudice to the ability of any Party to make public its communication at any time, the secretariat shall make communications by Parties under this Article publicly available at the time they are submitted to the Conference of the Parties.'

46 *Reprinted in* (1994) 33 *International legal Materials* 1328 (entered into force on 26 December 1996; 176 parties, as of October 2001). Article 3 ('Principles'): 'In order to achieve the objective of this Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following: (a) the Parties should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are *taken with the participation of populations and local communities* and that an enabling environment is created at higher levels to facilitate action at national and local levels' (emphasis supplied).

47 Entered into force on 10 September 1997 (30 parties, as of 1 August 2001), at http://www.unece.org/env/eia (visited 10 November 2001). Article 3 ('notification').8: 'The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments

the Transboundary Effects of Industrial Accidents.[48] Likewise, 'an increasing number of international environmental agreements impose positive obligations on states to take measures to improve public education and awareness on environmental matters, and to give due publicity to matters of environmental importance.'[49]

Yet, by far the most comprehensive transmutation of Rio Principle 10 into a treaty form is evidenced in the UN-ECE 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention').[50] Hailed as the 'most ambitious venture in environmental democracy undertaken under the auspices of the United Nations'[51] – as well as a 'new kind of environmental agreement (that) links environmental rights and human rights'[52] – the Aarhus Convention sets the following 'objective:'

or objections on the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.'

48 Signed on 18 March 1992 (26 parties as of 26 October 2001), at http://www.unece.org/env/teia (visited on 10 November 2001). Article 9 ('Information to, and participation of the public'): '1. The Parties shall ensure that adequate information is given to the public in areas capable of being affected by an industrial accident arising out of a hazardous activity…2. The Party of origin shall…give the public in the areas capable of being affected opportunity to participate in relevant procedures with the aim of making known its views and concerns on prevention and preparedness measures…'

49 See Sands & Werksman (note 13 above), p. 185 (citing *inter alis* the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Article 9(2); 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Article 10(4)).

50 Concluded in Aarhus, Denmark, 25 June 1998 (entered into force on 30 October 2001; 40 signatories; 17 parties, as of 30 October 2001). See ECE/CEP/43 at http://www.unece.org/env/pp/ctreaty.htm (visited on 10 November 2001). Note that the treaty is open for signature to all state members of the ECE as well as states having consultative status with the ECE, and by regional economic integration organisations constituted by state members of the ECE. In fact, as indicated in a press release issued by the UNECE on 29 October 2001, the Convention is 'open to accession by countries from throughout the world.' See UNECE Press Release, Geneva, 29 October 2001, 'Environmental Rights Not A Luxury' at http://www.unece.org/press/pr2001/01env15e.htm (visited on 10 November 2001).

51 See Press Release, *ibid*.

52 *Ibid*.

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention (Article 1).[53]

To be sure, neither the democracy/environment relationship nor the environmental rights/human rights nexus are 'new' phenomena.[54] Particularly noteworthy in relation to the human rights linkage are the 1994 Draft Principles on Human Rights and the Environment adopted by the UN Commission on Human Rights, Sub-Commission on Prevention of discrimination and Protection of Minorities.[55] Thus,

> All persons have the right to information concerning the environment. This includes information, howsoever complied, on actions or courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available without undue financial burden to the applicant. (Principle 15)

> All persons have the right to active, free and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions. (Principle 18)

> All persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm. (Principle 20)

53 For its operative provisions see Article 3 ('general provisions'), Article 4 ('access to environmental information'), Article 5 (collection and dissemination of environmental information), Article 6 ('public participation in decisions on specific activities'), Article 7 ('public participation concerning plans, programmes and policies relating to the environment'); Article 8 ('public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments'), and Article 9 ('access to justice').

54 See, in connection with the former, notes 11-17 above and the respective text.

55 See Final Report of the Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994), Part III.

The 1994 Draft, however, is not a binding instrument, hence the heightened significance of the Aarhus Convention which has now infused the rights outlined above with a substantive and concrete legal status.[56] While ratifications of the Convention have been somewhat limited,[57] it is anticipated, based on the wide support demonstrated, that other states will follow suit.[58] It has been further suggested by the UN Secretary General that, being open to accession by non-ECE countries, the Aarhus Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights (and the application of principle 10 of the Rio Declaration).'[59]

In fact, to a large extent European States have been subjected, since the mid-80s to an extensive legal regime governing access to information and public partici-

56 It may be instructive to note the Declaration made by the UK upon signature, drawing a distinction between the 'right' of every person 'to live in an environment adequate to his or her health and well-being' – which it contends expresses an '*aspiration* which motivated the negotiation of (the) Convention and which is shared fully by the United Kingdom' – and the '*legal rights* which each party undertakes to guarantee,' namely the 'rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of (the) Convention' (emphasis supplied). *Reprinted in* http://www.unece.org/env/pp/ctreaty.htm.

57 The Convention has been signed by all member states of the European Union, as well as the EU itself. However, ratifications have been confined mainly to East European and Central Asian countries. It should be noted however that given that several of these countries have only recently introduced democratic systems, ratification of the Aarhus Convention with its emphasis on principles of transparency, accountability and involvement of civil society, is of enhanced importance.

58 Slow ratification by Western European countries has been explained with reference to the advanced nature of the Convention which necessitates legislative adjustments and improvements even by the more established democracies. See for example Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council Providing for Public Participation in Respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment and Amending Council Directives 85/337/EEC*(re environmental impact assessments – EIAs) *and 96/61/EC*, COM(2000) 839 final, Brussels, 18.01.2001 (available at http://wwwduropa.eu.int/comm/environment/ – visited on 15 November 2001) – aimed at aligning Community law with the Aarhus Convention prior to ratification of the Convention by the Community.

59 See Kofi A Annan, 'Forward' in Stephen Stec & Susan Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (New York, Geneva: United Nations, 2000). It may also be noted that under Article 3.7 of the Aarhus Convention, the parties are under obligation to 'promote the application of the principles of (the) Convention in international environmental decision-making and within the framework of international organisations in matters relating to the environment.'

pation in environmental decision-making. Relevant legislation include the 1990 EC Directive on the Freedom of Access to Information on the Environment,[60] eco-labelling schemes,[61] and the Council Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment ('the EIA Directive'), which makes provision for consulting and informing the public.[62] At present, in anticipation of the ratification of the Aarhus Convention by the European Community, a unifying Directive is being considered by the European Commission[63] containing progressive provisions which would bolster public participation in all aspects of environmental decision-making as well as ensure that the public concerned has access to legal procedures that enable it to challenge the legality of relevant acts, thus giving 'teeth to the (enhanced) public participation rights' in accordance with the Aarhus Convention.[64]

Such considerations should also give rise to the legitimate expectation that, upon ratification of the Aarhus Convention, current constraints upon the general public right to proceed directly to the European Court of Justice against Community institutions that allegedly contravene Community environmental laws, would be relaxed.[65] In particular, an acceptance of the Convention's premise – that the 'right of every person of present and future generations to live in

60 Council Directive 90/313/EEC of 7 June 1990 (entitling 'any natural or legal person, anywhere in the EC to information relating to the environment without having to show an interest, at a charge not exceeding a reasonable cost upon request' – see discussion in Sands & Werksman, , note 13 above, pp. 181-183).

61 Council Regulation No 880/92/EEC of 23 March 1992 on a Community Eco-Label Award Scheme. See Sands & Werksman, *ibid*, pp. 186-7.

62 Council Directive 85/337/EEC of 5 July 1985, amended by Council Directive 97/11/EC (OJ L 73, 14.3.1997, p.5), articles 6, 8, 9. That the Directive confers enforceable individual rights has been recently confirmed by the House of Lords in *Berkeley v Secretary of State for the Environment and Others* (2000) 3 *WLR* 420, 430H (per Lord Hoffmann: 'The directly enforceable right of the citizen…is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however, misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues').

63 See note 58 above.

64 See *ibid*, section 6.2.5 'Access to justice' proposing the necessary modifications for the implementation of Article 9 of the Aarhus Convention.

65 See discussion in Peel (note 7 above), 59-61. The author cites as an illustration barriers such as the 'closed class' criterion that are especially difficult to overcome in the environmental context, the recent case of *Greenpeace International & Ors v Commission of the European Communities* (1998). See *ibid*, 49-54.

an environment adequate to his or her well-being' hinges on access to procedures to vindicate this right – should impel the European Court of Justice to 'reconsider its use of the "direct and individual concern" standing criteria in environmental matters.' Arguably, moves along these lines would be consistent with a contemporary trend towards enhancing access to international remedies for non-governmental actors.[66]

Similar developments are mirrored on the other side of the Atlantic. Thus, for example, citizens' access to judicial and administrative proceedings in line with Rio Principle 10 are aptly reflected in the 1994 North American Agreement on Environmental Cooperation (NAAEC) signed by Canada, Mexico and the US ('NAFTA environmental side-agreement').[67] Of particular significance has been the Citizen's Submission Process, established under the by the NAAEC Commission on Environmental Cooperation, which provides private parties a key role in promoting compliance with international law.[68]

How receptive countries in the Asian region are to such amplification of Principle 10 will be considered in the following part of this chapter.

2. Regional Perceptions

There is little doubt that, at the rhetorical and 'soft law' level, the principle of 'public participation' is firmly endorsed in the Asia-Pacific region. Commitments to the realisation of the Rio Declaration/Agenda 21 in general and to Rio Principle 10 in particular – coupled with respective 'proposals for action' – have been consistently renewed, including most recently in regional conferences held as part of the preparatory process for the ("Rio+10") 2002 World Summit on Sustainable Development. Illustrative in this respect is the Report of the Regional Roundtable For East Asia and the Pacific Region (Kuala Lumpur,

66 See generally Peel, *ibid*; Sands & Werksman, (note 13 above).

67 Available at http://www.naaec.gc.ca/ (visited on 14 November 2001)

68 For a comprehensive analysis of the process, see John H Knox, 'A New Approach to Compliance with International Environmental Law: The Submissions procedure of the NAFTA Environmental Commission' (2001) 28 *Ecology Law Quarterly* 1-117. On the domestic front, by far the most effective implementation of citizens' rights is Ontario's environmental bill of rights, the 1993 Act Respective Environmental Rights in Ontario (S.O 1993, c. 28) which guarantees a wide range of participatory and access to justice rights.

Malaysia, 9-11 July 2001),[69] which highlighted 'public participation and governance' as one of the main priorities in the region, proclaiming that

> To ensure that the needs of the people are truly met, it is essential to involve the public in the entire process of policy development, including planning, implementation and monitoring of sustainable development strategies and action plans. Civil society must be considered active partners of governments in decision-making for sustainable development, even as they retain their essential role of advocacy.[70]

'Participation by major groups – in planning, policy-making, decision-making, and in monitoring and assessment processes – has been also identified as a key priority issue in the Stakeholders' Meeting for North-East Asia, held in Beijing (26 July 2001), and appropriate proposals adopted.[71] Clearly, the most specific recommendations have been formulated in the Regional Roundtable for Central & South Asia Report (Bishkek, Kyrgyzstan, 30 July-1 August 2001),[72] embracing prescriptions for 'meaningful involvement in policy formulation and implementation by representatives of the private sector, local authorities, NGOs, trade unions and other major groups.'[73] Furthermore, the 'need to guarantee free access to updated and reliable information' and provisions of the Aarhus Convention were cited as 'a laudable initiative' and as 'a possible basis for national legislation in the region.[74]

Yet, at the implementation level, efforts to democratise environmental decision-making in the Asia-Pacific region have been on the whole somewhat limited.[75] Governmental transparency and accountability to the public are not

69 See http://www.johannesburgsummit.org/web_pages/malaysia_rountable_report.htm (visited on 7 September 2001).

70 Ibid, para. 35.

71 See http://www.johannesburgsummit.org/web_pages/beijing_stakeholders_report.htm (visited on 7 September 2001).

72 Seehttp://www.johannesburgsummit.org/web_pages/central_asia_regional_cooperation.htm (visited on 7 September 2001).

73 *Ibid*, para. 58.

74 See *ibid*, paras. 61, 63.

75 The following general observations are based on detailed, documented, and yet unpublished research undertaken on the subject of 'International Environmental Law and "Asian Values": Legal Norms and Cultural Influences.' Countries covered included in Southeast Asia – the 10 ASEAN countries: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam; in Northeast Asia – China, Hong Kong, Japan, South Korea, Taiwan; in South Asia – Bangladesh, India, Nepal, Sri Lanka; and in the South Pacific – Australia and New Zealand. Needless to say, the immense (cultu-

always practiced.[76] Review of the exercise of official discretion in some regimes is minimal or even non-existent.[77] Impermeability to citizen input occasionally results in development and investment decisions that generally demonstrate little concern for social factors.[78]

The 'right to access to information' – which underpins effective and meaningful public participation[79] – has been given little formal recognition in the region, although some exceptions do exist.[80] By the same token, the people's right to be informed, even if acknowledged, might be severely curtailed, permitting the public to obtain only information that government officials are prepared to provide.[81] Yet, attempts are being made in a few countries to disclose general environmental data, including release of indicators pertaining to water or air quality.[82] Needless to say, such attempts at information disclosure fall short of the 'environmental information' to which the public is entitled under the

ral, political, economic, legal, and religious) diversity of the region renders any generalisation an almost impossible task.

76 Illustrations include the media clampdowns in Indonesia and Malaysia during the devastating forest fires that blackened Asia's skies in 1997; the guarded silence maintained by officials on potential harm to public health caused by China's worst ocean toxic spill.

77 China's decision with respect to the Three Gorges Dam on the Yangtze River is a case in point. Little consultation with the 'public' preceded the approval of the project by the National People's Congress in 1992, despite its expected devastating effect on the environment.

78 See for example the highly debated issue of land use for construction of golf courses in Japan.

79 See Neil A F Popovic, 'The Right to Participate in Decisions that Affect the Environment' (1993) 10 *Pace Environmental Law Review* 683, 684-5 (noting that while widespread public participation does not necessarily guarantee environmentally friendly decision-making, when reinforced by access to relevant information it enhances the likelihood of decisions that reflect the best information available and the needs and concerns of affected communities and their progeny).

80 Examples include Australia's Freedom of Information legislation, Japan's recent Law Concerning Access to Information Held by Administrative Organs (1999); and Korea's Law for Public Information 1996; The right to information was also upheld by the Indian courts.

81 See for example the Thai Enhancement and Conservation of National Environmental Quality Act 1992 (entrenching the 'people's right to be informed and to obtain information for the purposes of public participation in the enhancement and conservation of national environmental quality' but subjects it to an exception for 'officially-classified information').

82 Examples include China, Hong Kong, Japan, South Korea.

Aarhus Convention.[83] Failure in this regard, however, may be attributable in certain instances to the relatively weak information base and data analysis capabilities which hinder policy development, planning and programme implementation.

On the positive side, some scope for public participation has been afforded under EIA systems that form part of the regulatory infrastructure of many countries in the region. Relevant provisions, nonetheless, generally fail to clearly define the public's role in the process. Nor are procedures provided for rigorous public scrutiny of judicial review.

Active involvement of the public is further hampered by the lack of public interest laws. However, 'creative' judges in certain jurisdictions in the region may have paved the way for increased public interest litigation and for more extensive recourse to courts to challenge government (and businesses). Indeed, the region boasts some exceptional illustrations of liberalisation of the *locus standi* rules, as well as procedural and remedial flexibility.[84] An increasingly vigilant, albeit under-utilised, media has also helped to focus attention on environmental issues and raise public awareness.

Perhaps the most encouraging development with respect to public involvement has been the increased activity of NGOs in the region and improvement of linkages between these organisations and governmental institutions. NGOS have been instrumental in environmental education and awareness-raising among the public, played crucial advocacy roles through their environmental campaigns, and have helped design and implement environmental policies, programmes

83 Article 2.3 defines 'environmental information' to mean 'any information in written, visual, aural, electronic or any other material form on…the state of elements of the environment…factors…affecting or likely to affect the elements of the environment (including 'cost-benefit and other economic analyses and assumptions used in environmental decision-making')…the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment…'

84 Most noted are the innovative Indian and Philippine judiciaries (the latter for their contribution to international environmental jurisprudence in respect of the standing of 'generations yet unborn.' See *Minors Oposa v Secretary of the Environment and Natural Resources Fulgencio Factoran*, 30 July 1993, reprinted in (1994) 33 *International Legal Materials* 173).

and action plans.[85] Yet, notwithstanding their proliferation and enhanced networks – as well as their more vocal, aggressive, and constructive engagement with governments – NGOs in the region face structural and functional limitations, restricting their capacity to challenge governmental monopolies on environmental decision-making. It is also evident that although (domestic) ecological activism has become a routine and usually admissible form of dissent in many developing countries (for example, Indonesia, Malaysia and Thailand), NGOS are still viewed with suspicion and distrust for their perceived 'anti-development' positions. Nor is a 'reserved' attitude towards NGOs confined to the less developed countries.[86]

Insofar as participation of other 'major groups' in environmental governance is concerned, the regional scene is again mixed:

According to information provided by countries during the five-year review of the implementation of *Agenda 21*,[87] national plans of action to 'empower' women in environmental policy processes have been devised and are being implemented. Yet, notwithstanding the stated commitments by regional governments, it is fair to say that thus far actual implementation of national plans and women's involvement in environmental decision-making have been rather slight. This was also the overall conclusion of the governments that came together at the Special Session of the General Assembly entitled 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century' in June 2000.[88] Several factors have been identified as impairing equal and effective participation by women (especially at the grassroots level) in decision-making regarding

85 Notable examples of NGO-mobilised public participation in the region include India's highly committed and extremely active environmental NGOs, and the vibrant NGO movements operating in Indonesia, and the Philippines.

86 In Singapore, for example, despite having a 'right' to be heard and to contribute to consensus formation, legitimate interest groups are only likely to be accommodated if they are perceived as compatible with the 'national interest' – which is largely defined by reference to economic and developmental interests. See Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (Routledge, 1995), pp. 189, 211. In Japan, the implicit operational principle is that 'professional bureaucrats can best manage Japan' and hence there is 'scant place in this industrial-bureaucratic venture for environmental NGOs.' See Robert J Mason, 'Whither Japan's Environmental Movement? An Assessment of Problems and Prospects at the National Level' (1999) 72 *Pacific Affairs* 187, 196.

87 See generally at http://www.un.org/esa/agenda21/natlinfo/countr/…htm.#major groups.

88 See generally at http://www.un.org/womenwatch/daw/followup/finaloutcome.pdf.

sustainable development, including women's limited access to technical skills, resources and information.

With regard to indigenous people, support in the region for their rights (including in respect of natural and cultural resource management), as proclaimed under the 1993 Draft Declaration on the Rights of Indigenous Peoples,[89] has been pledged by a few governments.[90] More specific commitments – pertaining to the protection of knowledge and practices of indigenous communities that are relevant for conservation and sustainable use of biological diversity, as well as to the equitable sharing of benefits arising from the utilisation of such knowledge and practices – have been made under the 1992 Convention on Biological Diversity,[91] which is subscribed to by 24 of the region's countries. At the level of implementation, several initiatives have been reported to the UN Commission on Sustainable Development,[92] although it has been contended that only few national policies, programmes, projects, and even laws address in any effective manner what is regarded as a key issue concerning resource management by indigenous people, namely their 'tenurial rights.'[93]

By contrast, the central role played by business and industry in the efforts towards ecologically sustainable development has been aptly recognised by the region's countries, as reflected in governments' reports on various initiatives undertaken by the respective private sectors.[94] Initiatives cited range from

89 UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 46th Sess. UN Doc.E/CN.4/Sub.2/1994/30 (1994), reprinted in (1994) 34 *International Legal Materials* 541.

90 It may be noted that some Asian governments, most notably China's consider that the Draft Declaration is relevant only to States which were former European colonies and not within China or other Asian countries; whereas India has opposed the use of the term 'peoples' because of its self-determination implications. For a scholarly and comprehensive discussion of 'definitional problems' and other politically-coloured argumentation surrounding the concept of 'indigenous people' see: Benedict Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *American Journal of International Law* 414.

91 See note 44 above.

92 Including by Australia, New Zealand, Philippines and Thailand.

93 See Owen J Lynch, 'Comment on the Paper by Wolfgang Burhenne' in Winfried Lang (ed), *Sustainable Development and International Law* (note 42 above), pp. 213, 218.

94 See national reports on 'Institutional Aspects of Sustainable Development' submitted to the UN Commission on Sustainable Development in April 1997, http://www.un.org/esa/agenda21/natlinfo/countr/inst.htm.

providing leadership in the application of 'best practices' approaches, and devising policies on sustainable development issues, to corporate sponsorship of environmental activities/studies and voluntary reporting on environmental performance (environmental auditing). Some 'formal' moves to forging a State-private sector 'partnership' in environmental matters are also highlighted. Indeed, given the close link between business and government in the region, the former tends to exercise a fairly decisive impact on governments' policies and actions.

As may be gleaned from the above snapshot, full involvement of the major stakeholders in environmental decision-making and implementation has yet to be achieved in the region, although government responses to rising challenges from civil societies and calls for more transparent relations with the private sector vary greatly. According to a recent report by the Economic and Social Commission for Asia (ESCAP), in spite of democratic reforms in several countries, growing demands for participatory governance are often 'cavalierly ignored or countered.'[95]

Nor does the principle of stakeholder participation appear to have been embraced in any practically meaningful way at the regional organisational level. As observed by one scholar with respect, for example, to APEC (Asia-Pacific Economic Cooperation), the forum is 'almost seamless when it comes to civil society groups' (except perhaps for some business groups).[96] No institutional mechanisms are available within this – and, for that matter, any other key regional[97] – organisation for stakeholder/citizen input, whether in the creation

95 See ESCAP, 'Critical Environmental and Sustainable Development Issues in the Region and Measures for Promoting Sustainable Development, Including Partnership with Private Sector and Civil Society Groups' (May 2000), at http://www.unescap.org/mced2000/rrm5.htm.

96 See Lyuba Zarsky, 'Environmental Norms in the Asia-Pacific Economic Cooperation Forum' in Dinah Shelton (ed.), *Commitment and Compliance* (note 27 above), pp. 303, 324.

97 For instance, ASEAN, which has 'yet to set a track record of working with civil society organisations' (See ICSW briefing paper on 'Civil Society Organisations Engagement with ASEAN' at http://www.icsw.org/regions/asia_pacific/asean/civil-society-orgs.htm (visited on 24 November 2001).

of environmental norms or in pressing governments (or corporations) to be accountable for compliance with such norms.[98]

By the same token, NGO 'parallel summits' to the official APEC ministerial conferences have become a 'feature of APEC political landscape.'[99] A few (albeit rare) opportunities for presentation of recommendations by NGOs have also been afforded by ASEAN.[100] It may be further contended that recent moves at 'globalisation with a human face'[101] could impact on the Asian-Pacific region as well. Included in this context is the *Malmo Declaration* issued at the First Global Ministerial Environment Forum (29-31 May 2000),[102] which emphasised the importance of civil society in addressing environmental purpose and values, stressing in particular the critical role played by civil society in bringing emerging environmental issues to the attention of policy makers, raising public awareness and promoting transparency and non-corrupt activities in environmental decision-making.[103] At the regional level, the message has been reflected in the Ministerial Conference on Environment and Development in Asia and the Pacific (September 2000).[104] Identifying "empowerment" as one of the three key areas on which the architecture of a sustainable future is built, the Conference called for the inclusion of 'all peoples and stakeholders in the decision-making process; strengthening local government authorities, civil society and the private sector; and creating effective political will for national, regional and global action for sustainable development.'[105]

98 See *ibid*, pp. 325-327 (emphasising the importance of effective institutional channels for stakeholder participation in the context of compliance with ('soft') environmental norms).

99 See *ibid*, at p. 317.

100 See, e.g., 'Singapore Environment Council Presents NGOs Concerns About Southeast Asian Fires to ASEAN Senior Officials' (18 June 1998), at http://www.uni-freiburg.de/fireglob/iffn/country/sg/sg_1.htm (visited on 25 November 2001).

101 See in this connection UNDP, *Human Development Report, Globalisation with a Human Face*, at http://www.undp.org/hdro/report.html.

102 See at http://www.unep.org/malmo/malmo_ministerial.htm.

103 See *ibid*, paras. 14-16.

104 See ESCAP, 'Regional Message for the 10-Year Review of the Implementation of the Outcome of the United Nations Conference on Environment and Development' at http://www.unescap.org/mced2000/message.pdf (last visited on 25 November 2001).

105 *Ibid*, para. 17.

In fact, it has been suggested by the authors of a study on 'Civil Society and the Future of Environmental Governance in Asia,'[106] that the growth and effectiveness of Asian civil society – and the process of democratisation that nourish it – are likely to be the most significant force in the emergence and implementation of a new paradigm of ecologically sustainable and equitable development in Asia.[107] Specifically, Zarsky and Tay maintain that Asia's NGOs – who are 'already highly concerned about social and environmental impacts of globalisation' – will be 'increasingly linked in with a "global public policy network" which seeks a different, ethics-based approach to global market governance. As a result, there is likely to be increasing pressure on all governments to enact global standards and norms,'[108] and be more accountable on issues of environment and human rights as well as espouse a new approach to development that promotes equity.[109] In addition, governments in Asia will 'increasingly face contradictory external pressures', namely, to 'be competitive in global markets[110] yet raise their environmental and human rights standards.[111],[112] Finally, Zarsky and Tay anticipate that the 'both NGOs and business in Asia will continue to press for a greater role in policy making and that NGOs in particular will demand some form of a strategic stakeholder engagement model.'[113]

3. Concluding Observations

It can be legitimately concluded that – although, initially, a 'Western' contribution[114] to the Rio North/South 'compromise' – the principle of public partici-

106 See Lyuba Zarsky and Simon SC Tay, 'Civil Society and the Future of Environmental Governance in Asia' (April 2000), online at http://www.nautilus.org/papers/enviro/zarsky_tay.htm.

107 See *ibid*, p. 2.

108 *Loc.cit*.

109 See *ibid*, p. 12.

110 That is, pressured not to raise industry environment standards for fear of losing foreign investment and trade competitiveness.

111 That is, forced to accept higher standards set by North American or European States as conditions of market entry, or demanded by Western consumers via free markets.

112 Zarsky & Tay (note 106 above), p. 2.

113 *Ibid*, p. 20. See also analysis of the 'Strategic Stakeholder Engagement' model (which the authors regard as the 'most fulsome'), *ibid*, pp. 19-20.

114 See Peter Malanczuk, 'Sustainable Development: Some Critical Thoughts in the Light of the Rio Conference' in Ginthers et al. (eds.), *Sustainable Development and Good Governance* (note 13 above), pp. 23, 33.

pation as enunciated in the Rio Declaration has 'secured' a status of a principle of general international law.[115] Less certain, at least in the Asia-Pacific region, is the acceptance of the rights-based articulations of the principle, notwithstanding recognition in international legal (and non-legal) instruments and in the practice of states. Yet, classifying 'public participation' as a 'mere' principle need not detract from its growing normative impact or its practical implementation.

It is also evident that receptiveness to rights-based paradigms is increasing in the Asia-Pacific region as well.[116] Whether through people-initiated legal and social reforms, spurred by intense economic deprivation and environmental degradation, or by powerful displays of judicial embracing of human rights paths to environmental protection – the environment/rights nexus is striking roots in the region. The process is further enhanced by moves to assert democratic participatory rights in general.

Needless to say, the perceptions of human rights in the Asia-Pacific region (or elsewhere) are not static. Economic and social change within Asia states has triggered persistent demands on the political elites to deliver civil and political rights, as well as economic, social and cultural rights, to the citizenry. NGOs campaigning on rights (including environmental rights) issues have emerged in most Asian countries. Nor have governmental human rights agendas remained unaltered in the face of pressures exerted both from within or from without the region.

115 Contrast with Malanczuk's view *ibid*, p. 43.
116 See note 75 above.

25

TOWARDS SUSTAINABLE DEVELOPMENT IN THE EAST AFRICAN COMMUNITY

Wilbert T.K. Kaahwa

Introduction

For the purposes of this chapter the concept of "sustainable development" is used as denoting a process of structural change in socio-economic and ecological systems. Sustainable development is concerned with equity in the allocation of the benefits of development. As a concept of international law, it has evolved in a way that defines the competence of states to direct their own development. The 69th Conference of the International Law Association emphasised that "sustainable development is a matter of concern both to developing and industrialised countries and should be integrated into all relevant fields of policy in order to ensure the goals of environmental protection, development and human rights recognising the critical relevance of the gender dimension in all these areas …. with the aim of practical and effective implementation".[1] In relation to the management of natural resources, sustainable development provides a reference standard for determining the value of the exploitation of present day resources against the interests of posterity.

This chapter only examines the concepts' relevance for environmental protection, based on a number of fundamental declarations that place sustainable development under the aegis of international co-operation in international environmental law. These are the 1972 Stockholm Declaration of the United Nations Confer-

1 Resolution No 15/2000 of the 69th ILA Conference held on July 25th-29th, 2000, London.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 631-652.*

ence on the Human Environment and the 1992 Rio Declaration on Environment and Development. The 1972 Stockholm Declaration emphasised that "economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life".[2] The Rio Declaration:

- recognised that "states have the right to exploit their own resources pursuant to their own environmental and developmental policies";[3]
- states that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"[4] and that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process."[5]

The effect of these Declarations is to include in the area of sustainable development such issues as environmental protection, sustainable agriculture, renewable energy, sustainable utilisation of natural resources, the sovereign right to exploit natural resources.

Effective implementation of international environmental law appears not to have moved in tandem with the development of the concern for the overall protection of the environment. Much of international environmental law has developed through agreements and understandings at state level. Many of these agreements contain statements of commonly held objectives and practices, but not necessarily legal norms intended to create binding obligations which might give rise to causes of action. In this sense they should be viewed as 'soft law'.[6] This particular nature of international environmental law may adversely influence its effectiveness, thereby hampering the pursuit of sustainable development.

The situation is particularly grave in developing countries where resources and technological advancement are still relatively low. The ineffectiveness and drawbacks of the traditional enforcement of international environmental law will

2 Principle 8.
3 Principle 2.
4 Principle 3.
5 Principle 4.
6 Sands, P., Principles of International Environmental Law, Cambridge, Cambridge University Press, 2003, p. 46-47.

be examined, using case studies from Kenya, Uganda and Tanzania. The aim of this chapter is to establish whether the apparent ineffectiveness of international environmental law regimes may or may not be mitigated through the use of regional organisations such as the East African Community (hereinafter referred to as "EAC") to which those three countries belong. The rise of such organisations in the developing world has been rendered inevitable by the effects of globalisation, involving increased market freedoms and economic liberalisation.

1. General critique of international environmental law as a process towards achieving sustainable development

A common criticism of international environmental regimes is that "they lack teeth"; few of them are endowed with effective mechanisms to address non-compliance by states and other international parties; sanctions are rare and responses consist mostly of diplomatic negotiations. It is said that judicial redress is virtually unknown and whenever it is sought, cases are dismissed on jurisdictional and similar technical grounds.

Various reasons for this situation may be mentioned. In the first instance lack of effectiveness may be due to the very nature of international law. The international legal system, being a decentralised process, is founded essentially on consent. States may, therefore, observe international environmental law but will usually overlook its strict requirements on an issue regarded as vital to their interests[7] or consequent upon a previous balancing of such interests.

Secondly, the international system lacks a strong enforcement machinery. Although enforcement mechanisms exist at both the level of states and that of institutions[8] their role and effectiveness from an international perspective is afflicted by the said nature of the international legal system.

Thirdly, both states and institutions often lack sufficient logistical (financial and technological) resources to enforce obligations. Thus, states and environ-

7 Wallace, R.M.M. *International Law,* London, Sweet and Maxwell, Third Edition, 1997 pp. 3-4.

8 *Ibid,* pp. 3-4, 37-58.

mental institutions in Kenya, Uganda and Tanzania[9] lack municipal capabilities to abide by their respective international environmental law obligations.

Fourthly, at national level the dichotomy between environmental and developmental concerns is yet to be resolved. From a wider perspective Shaw states that "the correct balance between development and environmental protection is now one of the main challenges facing the international community and reflects the competing interests posed by the principle of state sovereignty on the one hand and the need for international co-operation on the other. It also raises the issue as to how far one takes into account the legacy for future generations of activities conducted at the present time or currently planned."[10] In fact, when faced with the need to integrate environment and development policies, many developing countries find themselves in a dilemma.

Research has shown that although the linkage between environment and development was recognized as far back as the Stockholm Conference, little progress has been made toward an actual integration of the environmental dimension in development policies and practises. Indeed, this would seem to have been one of the preoccupations of the development from the Stockholm Conference to the Rio Earth Summit of 1992. But UNEP's Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme)[11] still attests to the persistence of the developing countries' dialectical problem between the economy and the environment. At state level within the EAC region this problem has militated against the development of effective measures to address, for example, ecological sources of conflict, the management of water and other ecosystem resources, management of shared resources and the lack of bio-technologies.

The situation of a lack of effectiveness at the national level is not helped much by the United Nations Environmental Programme's (UNEP's) catalyctic role in the promotion and progressive development of international environmental

9 These countries are hereinafter collectively referred to as the EAC countries.

10 Shaw, M.N.: *International Law*, Cambridge University Press, Fourth Edition 1997, p. 57.

11 Adede, A.O. *International Environmental Law, Past lessons and future challenges,* Nairobi, Acts Press, 1994 pp. 1-2, 18-33. Okidi, C.O. *Environment and Development in Africa: Policy Initiatives,* Nairobi, Acts Press 1993, pp. 2-4, 25-26.

law. This is because progress under the Montevideo Programme[12] is adversely affected by such national problems. UNEP's problem in this area and in facilitating co-ordination among environmental conventions has been noted by the UN General Assembly.[13] UNEP has however, initiated action for the preparation of a programme (Montevideo III) for the development and periodic review of environmental law for the first decade of the twenty first century. Montevideo III, by seeking to achieve effective implementation of, compliance with and enforcement of environmental law and by providing some pointers and innovative approaches for future UNEP/national actions, could help EAC countries in dealing with environmental problems.

2. State of enforcement of international environmental law at state level in EAC countries

In this section a critical examination of the current state of enforcement of international environmental law at state level will be made from two viewpoints. In the first instance, the efficiency of the use made of the international legal system will be assessed. In the second instance, the impact of harmonisation of environmental policy and law will be examined.

2.1 Role of regional organisations in the management of the environment and of natural resources

'Regional organisations' have emerged as part of the evolution of modern state polities. Such entities have in the wake of international political pressures and, of late, globalisation found themselves institutionalised into some form of international co-operation.[14]

Political and mixed regional organisations have mandates covering a wide range of subjects. Economic examples of the former are the European Union and the

12 The Montevideo Programme is a strategic guidance document prepared by senior government experts in environmental law which was adopted by the Governing Council of UNEP first in 1982 and, in its revised form, in 1993.

13 Report of the Meeting of Senior Government Experts in Environmental Law Meeting held on October 23rd-27th, 2000 (UNEP/Env.Law/4/4).

14 *op. cit.* footnote 10 pp. 887-891, 893-908.

North American Free Trade Area, examples of the latter are the African Union and the Organisation of American States, while the Association of South East Asian Nations covers both economic and political subjects. All regional organisations seem to have always had a synergy in strategic visions and prospects (including cultural dimensions of economic and political integration) but especially economic perspectives (including financial and monetary harmonisation and trade conversion).

2.2 Interest of regional organisations in environmental management issues

It used to be fashionable to regard regional organisations as being primarily concerned with issues of economic development. Most scholars have, therefore, emphasised such organisations' functional roles. This is an approach that post-dates the earlier realist approach according to which international institutions were seen as a means to redressing world economic and political disorders. According to the functionalist approach regional organisations are a means towards viable co-operation. It is on this basis that writers such as Asante (1997) have regarded international organisations and regionalism merely in terms of their economic development strategies.[15] Functionally, such issues as infra-structural integration, policy harmonisation, market integration and cross border initiatives are seen as being only geared towards the creation of single market and investment areas, customs unions, free trade areas, common markets or other cornerstones of economic development.

The position is, however, rapidly changing, Quashigah, Debaillet and Adewoye (1997) assert that stretching interest of these organisations deeper into such areas as human rights, environmental management and constitutionalism has increasingly gained momentum.[16] The basic reason for this is that economic and other forms of development are now seen to be inevitably based on the existence of, among other cornerstones, good governance. The lack of good

15 Asante, S.K.B.: *Regionalism and Africa's Development,* London, Macmillan Press Ltd, 1997.

16 Quashigah, E.K.: *Human Rights and Integration,* Debaillet, G. et. al*: Regional Dimensions of Environmental Management and* Adewoye, O.*: Constitutionalism and Economic Integration* in Regional Integration and Co-operation in West Africa by Lavergne, R. (Ed.), *Ottawa,* IDRC, 199 pp. 259-302, 321 332.

governance as a *sine qua non* for development is what could give rise to the mismanagement of the environment. In any case, there is bound to be a symbiotic relationship between economic integration and environmental management. Trade liberalisation involves the movement of people, goods and services. Such movement may be accompanied by pollution, sanitary and phyto-sanitary abuses.

The European Union, for instance, recognises that in addition to economic integration as a principal pursuit there ought to be concern for sustainable development in respect of which the appropriate organs and institutions have to articulate environmental policies, transport policy and policies for agriculture and rural development. The basis for the programme was set out in June 1990 at the Community 'Summit' meeting in Dublin, which made the following commitments:

> "As Heads of State and Government of the European Community, we recognise our special responsibility for the environment both to our own citizens and to the wider world. We undertake to intensify our efforts to protect and enhance the natural environment of the Community itself and the world of which it is part. We intend that action by the Community and its Member States will be developed on a coordinated basis and on the principles of Sustainable development and preventive and precautionary action."

To meet these requirements, the action programme sets out a strategy with the ultimate aim of transforming the patterns of growth.[17] One must conclude, therefore, that regional organisations inevitably have a bearing on matters pertaining to environmental management as an aspect of sustainable development.

2.3 State mechanisms

a) Legislative basis

The EAC countries address environmental concerns through the enactment of statutes (and subsidiary legislation) and accession to relevant treaties.

17 For a full coverage on the European Union's strategy see Barras R. and Madhavan S.: *European Economic Integration and Sustainable development: Institutions, Issues and Policies,* London, McGraw Hill Book, Co 1996 pp. 203-228.

The statutes include those "key" statutes that specifically provide for the sustainable management of the environment, control of pollution, environmental restoration and establish co-ordinating, monitoring and supervisory bodies. In this regard they address such matters as institutional arrangements, environmental planning, environmental regulation, establishment of environmental standards, control of pollution, environmental restoration, judicial proceedings and international obligations.[18]

The EAC countries' legislative basis for environmental protection is also reflected in the "related" statutes on such matters as energy, fisheries, forestry, land tenure, mining and water utilisation which have an impact on the environment and sustainable utilisation of natural resources.[19]
The EAC countries pursue international co-operation in international environmental law through international agreements to which they are contracting parties including the following:

- the Geneva Convention on the Continental Shelf, 1958;
- the Convention on African Nature Conservation, 1968;
- the Ramsar Convention on Wetlands, 1971;
- the World Cultural and Natural Heritage Convention, 1972;
- the Convention on International Trade in Endangered Species, (CITES), 1973;
- the United Nations Convention on the Law of the Sea, 1982;
- the Basel Convention on Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, 1989;
- the Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes Within Africa, 1991;
- the United Nations Framework Convention on Climate Change, 1992;

18 These statutes are Kenya's Environment Management and Co-ordination Act, Uganda's National Environment Statute 14 of 1995 and Tanzania's National Environment Management Act, Cap 438.

19 Examples are: Kenya's Factories Act Cap 514, Fisheries Act Cap 378, Forests Act Cap 385, Grass Fires Act Cap 327, Mining Act Cap 306, Suppression of Weeds Act Cap 325 and Water Act Cap 372; Uganda's Factories Act Cap 198, Forests Act Cap 246, National Water and Sewerage Statute 1995, Plant Protection Act Cap 244 and Water Statute 1995; Tanzania's Fisheries Act 6 of 1970, Protection from Radiation Act 5 of 1983, Public Health (Sewerage and Drainage) Ordinance Cap 336, Waterworks Ordinance Cap 281 and Water Utilisation and Control Act 42 of 1974.

- the Convention on Biological Diversity, 1992;
- the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987;
- the UN Convention to Combat Desertification, 1994;
- the Vienna Convention for the Protection of the Ozone Layer, 1985; and
- the Lusaka Agreement on Co-operative Enforcement Operations, 1996 (directed at illegal trade in wild fauna and flora)

It is important to note that legislation relating to the international waters of Lake Victoria and the River Nile[20] also have a bearing on the legal framework.

b) Policy framework

The legislative basis has given rise to a discernible policy framework. The EAC countries have National Environmental Management Policies (NEMPs), National Policies for the Conservation and Management of Wetland Resources, Water Policies and Wildlife Policies which are developed, managed and reviewed by line Ministries. Under the National Environment Management Policies are National Environmental Action Programmes (NEAPs) which are managed by the semi-autonomous bodies i.e. National Environmental Management Authority (NEMA) of Uganda, National Environmental Directorate (NED) of Kenya and National Environmental Management Council (NEMC) of Tanzania.[21]

The creation of specific semi-autonomous bodies was geared towards enhancing state concern for the protection of the environment. These bodies are, in the main, charged with environmental management, control of pollution and environmental restoration. But since this mandate is inevitably development-related, these bodies should address such ancillary matters also as pertain to land resources and terrestrial eco-systems, agricultural resources, range-lands and livestock resources, forest resources, wildlife resources, water resources (including matters on fisheries, the water hyacinth and other invasive weeds and wetlands) bio-diversity, energy and climate change.

20 These include the 1929 and 1932 Nile Waters Agreements between the United Kingdom and Egypt and Sudan, the 1949 and 1953 Owen Falls Agreements between the United Kingdom and Egypt, the 1959 Agreement for the Full Utilisation of the Nile Waters between Egypt and Sudan and the Agreement Establishing the Kagera Basin Organisation, 1977 which aims at ensuring equitable entitlement of each riparian state to the use of the River Nile waters.

21 NED exists within the sectoral structure of government while both NEMA and NEMC are creatures of specific statutes i.e. Uganda's National Environment Statute 4 of 1995 and Tanzania's National Environment Management Council Statute respectively.

2.4 Assessment of the efficacy of state mechanisms

Most of the "related" statutes – having been enacted before environmental concerns gained prominence – are obsolete in content and purpose. According to the national environment agencies these statutes do not effectively cater for changed circumstances and cannot cope with growing challenges. Most of them are geared towards specific resource use and the inter-relationship between them is very weak. Most of their provisions are characterised by the EAC countries' previous drive towards utilisation of resources mainly for economic gain and human survival as opposed to the sustenance of the environment and natural resources.

Secondly, the legal framework is adversely affected by complex legal succession problems. Some treaties and agreements bearing on the environment and natural resources were concluded between the EAC countries colonial masters and other parties. Because the negotiation of these pre-independence agreements did not include the EAC countries as potential parties, they do not provide a co-operative framework to support today's national efforts. Following these countries' attainment of independence these pre-independence agreements, by their very nature, were assumed to fall within the exceptions to "the clean slate" general rule established by the Vienna Convention on the Succession of States in Respect of Treaties.[22] This is clearly the case with regard to those old water-courses agreements on the River Nile and Lake Victoria. In any case, this legal framework is short on the EAC countries' interests on such current international water law concepts as absolute territorial integrity and limited territorial sovereignty. This is because it does not address the succession issues. Only subsequently has International Environmental Law begun to emphasise ways to balance interests and to organise shared use of shared resources.
Thirdly, there are some intrinsic shortcomings of the EAC countries' follow-up on their commitment with respect to relevant global treaties. Some key conventions, for instance the 1997 Convention on the Non-Navigational Uses of International Watercourses have not been ratified. Furthermore, some of the provisions of the ratified key treaties have not been implemented in municipal

22 According to the "clean slate" rule the obligations maintained by a state's predecessor by way of multipartite or bipartite agreements are not automatically incumbent on a state; a state has the option of assuming the multipartite agreements of its predecessors without being required to do so. Exceptions to this rule are treaties establishing boundaries, territorial regimes and those imposing restrictions on a territory for the benefit of another state.

laws which makes their local implementation difficult. Some of the treaties, such as the UN Convention to Combat Desertification, 1994 are general in coverage and lack clear prescriptive commitments and explicit provisions on implementation. Other treaties and agreements are too weak in key areas. The table below shows the main international agreements and indicates their status for the EAC countries.

Global and African Treaties	*Kenya*	*Tanzania*	*Uganda*
1968 African Nature Conservation	12.05.78A	15.11.74R	30.11.77R
1971 Wetlands of International Importance	05.06.90A	15.12.80R	04.03.88S
1972 World Cultural and Natural Heritage	13.10.91S	02.08.77S	20.11.87S
1973 Trade in Endangered Species	13.12.78S	29.11.79S	18.07.91A
1979 Migratory Species of Wild Animals	Signed	23.04.99R	22.06.80S
1989 Transboundary Movement of Hazardous Wastes	Not signed	07.04.93A	25.08.99A
1991 Transboundary Movement of Hazardous Wastes (Africa)	Not signed	26.11.91S	05.08.99R
1992 Biological Diversity	26.07.94R	08.03.96R	08.06.93R
1992 Climate Change	12.06.92R	12.06.92R	13.06.92R
1994 Combating Desertification	14.10.94R	14.10.94S	21.11.94R
Nile Basin Treaties and Agreements	*Kenya*	*Tanzania*	*Uganda*
1929/1932 Nile Waters Agreement between UK/Egypt	Not member	Not member	Not member
1949/1953 Owen Falls Agreements between UK/Egypt	Not member	Not member	Not member
1959 Agreement for Full Utilisation of the Nile Waters	Not member	Not member	Not member
1967 HYDROMET	Member	Member	Member
1992 TECONILE	Observer	Member	Member
East African and Lake Victoria Treaties and Agreements	*Kenya*	*Tanzania*	*Uganda*
1977 Kagera Basin Organisation	Not member	24.08.77A	19.05.81A
1985 East African Marine and Coastal Environment	11.09.90A	01.0.96S	Not member
1985 East African Protocol on Protected Areas	11.09.90A	01.03.96A	Not member
1994 Lake Victoria Fisheries Organisation	30.06.94S	23.05.95A	30.06.94S
1994 Tripartite Agreement of LVEMP	15.09.94S	15.09.94S	15.09.94S
1998 MOU for Cooperation on Environment Management	22.10.98S	22.10.98S	22.10.98S
1998 EAC Tripartite Agreement on Inland Waterway Transport	30.04.98S	30.04.98S	30.04.98S

S=Signed; R=Ratified; A=Acceded (LVEMP – Lake Victoria Environment Management Programme)[23]

Fourthly, policy implementation is hampered by a lack of adequate financing due to national budgetary constraints. This resulted in their inability to effectively address such environmental problems as the water hyacinth, protection of migratory species, growing industrial effluent, pollution from vessels, improper

23 Source: EAC Sida report on Institutional and Legal Arrangement for the Sustainable Department of Lake Victoria Basis – unpublished EAC document.

utilisation of wetlands and deforestation. Furthermore, inadequate financing prevents the EAC countries from providing for administrative requirements, capacity building and public awareness and participation in relevant environmental decision-making.

Fifthly, it is argued that the current state mechanisms on environmental protection do not take into account the EAC countries' current economic models. They do not address the effect of structural adjustment programmes on resource utilization, the ensurance of good governance based on clear constitutional tenets, the role of development partnerships and the involvement of all stakeholders including the local communities.[24]

Lastly, as in other similarly – placed developing countries there seems to be a gap between the EAC countries' constitutional order and the dictates of public interest with regard to the environment. It is only Uganda's constitution that accords the environment some recognition as a fundamental human right.[25] But even this falls short of an assured place in the context of public affairs. The constitution only empowers parliament to make laws governing environmental management.[26] It has been argued that "this is tantamount to laying down only a minimum foundation for the enshrinment of environmental protection in the constitutional order".[27]

3. Enforcement of international environmental law in the East African community

The findings above help establishing the comparative advantages of law enforcement through the EAC countries' regional efforts at development.

24 This subject has been addressed in extens by Okoth Ogendo H.W.O. et. al under the title "Judicial dimensions of Environmental Governance" in *Governing the Environment* by Okoth Ogendo H.W.O. and Tumushabe G.W. (Eds), Nairobi, Acts Press. 1999, pp. 39-121.

25 Article 39 Uganda Constitution 1995.

26 Article 245 Uganda Constitution 1995.

27 *Op. cit* footnote 24 pp. 9-38.

3.1 The EAC

According to the Treaty for the Establishment of the EAC,[28] the Community will seek to strengthen the Partner States' co-operation in Political, Economic, Social and Cultural fields, Research and Technology, Defence, Security, Legal and Judicial affairs for their mutual benefit and fast balanced and sustainable development. A closer-examination of the provisions of the Treaty in respect of different areas of co-operation is a pointer towards sustainable development of the EAC region.[29] For that purpose, the partner states undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a common market, subsequently a Monetary Union and ultimately a Political Federation. As a foundation for these projections it should be noted that the EAC partner states bind themselves to the pursuit of good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights.[30]

EAC has, as its organs, the Summit of Heads of State, the Council of Ministers, the East African Court of Justice, the East African Legislative Assembly, a Co-ordination Committee, Sectoral Committees, a Secretariat and such other organs as may be established by the Summit. EAC Sectoral Committees include one on the Environment and Natural Resources whose mandate is to address all environmental and natural resources issues including:

- management matters; and
- prevention of illegal trade in, and movement of toxic chemicals, substances and hazardous wastes.

The Community's institutions for purposes of achieving its objectives include the Lake Victoria Fisheries Organisation (LVFO). This is a body whose role falls within co-operation in environmental protection and sustainable management of the fisheries on Lake Victoria and its catchment area.

28 The full text of the treaty, which came into force on July 7th, 2000, can be found on East African Community's website http//www.eac.int

29 The Treaty covers major areas of socio-economic and political development of the EAC region.

30 Article 6(d).

There also exists the related Sectoral Council of the Lake Victoria Development Programme and the Sectoral Committee of the Lake Victoria Development Programme.

3.2 EAC position on environmental protection and sustainable use of natural resources

The foundation for the EAC's interest and role regarding Environmental Protection and Sustainable Utilisation of Natural Resources is to be found in the EAC Development Strategy (1997-2000) and in the provisions of the EAC Treaty.

a) The development strategy

The East African Co-operation Development Strategy designates prioritiy areas of co-operation where the EAC countries need to harmonise and rationalise policies as a way towards achieving regional integration and economic development. With regard of the Environment and Natural Resources, the Development Strategy provides that, "for sustainable development to be achieved, there is need for careful management of natural resources and protection of the environment. Co-operation in this area will include environmental management and conservation of aquatic and terrestrial resources including fisheries, management of coastal and marine environment, control of illegal transboundary movement of hazardous wastes, combating desertification, management and conservation of forestry resources, environmental assessment programme, harmonisation of environmental policies, and joint action preparedness in case of environmental disaster such as oil spills".[31]

The successor East African Community Development Strategy (2001-2005), with regard to Co-operation in the Management of the Environment, provides that "Partner States recognise that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources." With this concern, Partner States are committed to co-operating in environmental and natural resource prevention activities. Much emphasis has however, been accorded to areas of common interest such as the Lake Victoria and its Basin and other shared natural resources i.e. the major watershed/catchment areas of Mt Elgon and Mt Kilimanjaro. Management

31 Paragraph 64 of the 1997-2000 Development Strategy.

programmes in these areas need to be harmonised by the Partner States in order to achieve the maximum benefits possible and to reverse environmental degradation. Institutions to manage resources exploitation need to be identified.

i) Co-operation in the Management of the Environment

Environmental management study to be made available to the EAC Secretariat and actions to be taken to preserve the environment of the Lake Region as recommended by the study during the planning period. The areas identified by the EAC Environmental Institutions such as Mt Kilimanjaro and Mt Elgon and the management programmes in those areas that need harmonisation should be included in the new development during the new phase of the development of EAC. Potentials of the coastal zone should be explored more comprehensively in this phase considering aspects of the environment, security and of the economic exploitation zones.

This is to harmonise:

- exchange of research findings in forest management in tree breeding;
- joint forest/bush fire surveillance and fighting programmes;
- joint positions as regards international forestry issues;
- cross-border protocols on trade in forest products;
- restoration of degraded common forest resources;
- formalisation of meetings between forest directors training and research heads of forest institutions and other interested stakeholders;
- conservation of forest endemic species, assessment documentation and sustainable use of medicine plants;
- joint pest and disease monitoring and management programmes;
- work on harmonisation of environmental regulations had been going on along with the environmental impact assessment system;
- partnership in capacity building in the sector; and
- exploitation of the potentials of coastal zones.

ii) Co-operation in sustainable development of the Lake Victoria Basin

The Lake Victoria Basin has been designated as a regional economic growth zone to be exploited jointly to maximise economic and social benefits while ensuring effective environmental management and protection.

The strategy in this area will be to:

- establish an institutional and legal framework that will co-ordinate the regional aspects of the activities of the different actors and interest groups in the Lake Victoria basin. Based on the outcome of the legal and institutional study;
- prepare and implement a comprehensive Development Strategy and an Action Plan for the sustainable development of Lake Victoria Basin that should focus on economic growth, reduction of poverty and protection of the environment. The completed and on-going studies should be incorporated in the comprehensive development strategy; and
- implement the Strategic Partnership Agreement between the Partner States and the Development Partners supporting sustainable development of the Lake Victoria Basin."[32]

b) The EAC Treaty

The Treaty elaborates in detail matters pertaining to:

- recognition that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a pre-requisite for sustainable development;[33]
- undertaking to co-operate in the management of the environment;[34]
- undertaking to co-operate and adopt common positions against illegal dumping of toxic chemicals, substances and hazardous wastes within the Community from either a Partner State or any third party;[35]
- undertaking to harmonise their legal and regulatory framework for the management, movement, utilisation and disposal of toxic substances;[36]
- undertaking to ratify or accede to international environmental conventions that are designed to improve environmental policies and management;[37]

32 Paragraph 4.3.4 of the 2001-2005 Development Strategy. On November 29th, 2003, a Protocol for the Sustainable Development of Lake Victoria Basin was signed; the purpose of this protocol is to establish a co-ordinated system for the development of the Lake Victoria Basin as an economic growth zone in the East African Community.

33 Article 111.

34 Article 112.

35 Article 113(1).

36 Article 113(2).

37 Article 113(3).

- taking concerted measures to foster co-operation in the joint and efficient management and the sustainable utilisation of natural resources within the Community for the mutual benefit of the Partner States.[38]

Both the strategy and the treaty underline optimal utilisation of resources in an equitable and sustainable manner and integrate the management of the environment.

3.3 Implementation of the strategy and of the treaty provisions

Research on the challenges in the implementation of both the strategy and the treaty has focused attention on such issues as the capability of EAC's institutional framework and the effectiveness of the projects and the programmes in hand. This can best be seen from six view points.

Principally, under the Treaty the EAC will create opportunities in such areas as:

- a wider economic and social sphere in which people and enterprises share economies of scale;
- policy harmonisation in addressing sectoral concerns including environmental management and sustainable utilisation of natural resources; and
- enhancement of financial leverage through the pooling of resources for joint programmes and projects.

Therefore, this gap where the EAC countries have in the past lacked an effective consultative forum for developing common approaches to environmental protection has been filled.

Secondly, the EAC as an international system would be better placed to liaise with other international agencies in pursuing environmental programmes. It would better focus on UNEP's projected intergovernmental negotiations for the development of, for instance, the following:

38 Article 114.

- an international legally binding instrument for implementing International Action on Certain Persistent Organic Pollutants;
- instruments within the framework of existing conventions hitherto developed under UNEP such as the adopted Protocol on Liability and Compensation for Damage resulting from Trans-boundary Movements of Hazardous Wastes,[39] the adopted Protocol on Bio-safety.[40]

Thirdly, the EAC is primarily aimed at overall development which in turn revolves around considerations of shared natural resources and a common ecosystem at a sub-regional level. Therefore, identification of difficulties that prevent each of the EAC countries from duly implementing international agreements or instruments is likely to be enhanced through a joint integration of environmental and developmental concerns. For example, studies on the problems that affect biodiversity management in the EAC countries and their neighbourhood have suggested that regional initiatives might be open to improvements. Regional co-operation in this regard could be achieved through common management strategies and priorities, joint training of managers and technicians, common approaches to research, block lobbying for funds to manage shared resources, harmonisation of policies and exchange of information and experiences.

Fourthly, implementation will be facilitated through the utilisation of work already undertaken through the UNEP/UNDP Joint Project on Environmental Law and Institutions. This is a pilot project funded by the Royal Dutch Government to work with selected countries in Africa towards the development of environmental law and institutions.[41] Its activities in Kenya, Uganda and Tanzania are essentially of a sub-regional character. A Memorandum of Understanding on Co-operation in Environmental Management was entered into by the EAC states in 1998 covering all themes of the project and related matters.[42]

39 Protocol to the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal.

40 Protocol to the Convention on Biological Diversity.

41 Under this Project, which began in 1995, UNEP, in co-operation with UNDP, FAO, World Bank, WHO and IUCN, provides systematic technical assistance to African countries (Burkina Faso, Kenya, Malawi, Mozambique, Sao Tome and Principe, Tanzania and Uganda).

42 The Memorandum provides inter-alia, for institutional arrangements, enforcement of environmental legislation, management of the Lake Victoria ecosystem, management of forest, wildlife, marine and other resources, pollution control and management.

The conclusion of the Memorandum included a commitment to the later development of an EAC protocol on environmental management under the auspices of the treaty. A regional approach based, *inter alia*, on such already existing work will facilitate:

- the development and harmonisation of environmental impact regulations;
- the development and harmonisation of laws relating to trans-boundary movement of hazardous wastes;
- the development and harmonisation of methodologies for the development of environmental standards;
- the development of a legal and institutional framework for the protection of the environment and sustainable utilisation of the Lake Victoria Basin, a shared resource; and
- harmonisation of national treaty practice.

Similarly, work initiated by UNEP under the Regional Seas Programme treats 'oceans' as fundamental units for the protection and development of environmental resources.

Fifthly, the pursuit of the themes of Montevideo III (enhancement of capacity building, prevention and mitigation of environmental damage, avoidance and settlement of international environmental disputes, harmonisation and co-ordination of activities, public participation, information technology and cross sectoral relationship) will require resources beyond national capability. This can, therefore, best be achieved through concerted regional efforts. Accordingly, if the EAC countries are to benefit from Montevideo III, they will have to expedite the implementation of their regional (EAC) strategy.

Lastly, the joint pursuit of environmental concerns under the treaty will enable EAC countries to address the harmonisation of related municipal legislation. This is a matter which, due to financial, administrative and technical problems (like lack of a common legislative mechanism and approach) has been intractable for these countries.

However, since the process of globalisation has been accompanied by rapid expansion of the internet and other applications of information technology, EAC's efforts could be accelerated through all the EAC countries' participation

in the Sustainable Development Networking Programme.[43] Such participation should enable the Community improve inter-connectivities in environmental integration.

There are, however, some challenges that may afflict the implementation of the treaty and the strategy. In the first instance, there is need to analyse the levels of implementation against the bench-mark of sustainable development. These include the following:

(a) national sovereignty, which has a bearing on globalization of economic activities, internationalisation of ecological problems and the transboundary flow of information;
(b) technological advancement which has given rise to industrial development;
(c) the role of international agreements especially key ones on the environment such as the 1979 Geneva Convention on Long Range Trans-Boundary Air Pollution and its 1988 Protocol Concerning the Control of Nitrogen Oxides or their Fluxes, the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; the sticking point is that the EAC Partner States still sign and ratify such agreements separately;
(d) biodiversity and biotechnology as seen in the context of "Our Common Future" as advanced by the World Commission on Environment and Development, 1987; and
(e) aspects of good governance including political and social stability, responsible leadership, democratic practices and the peaceful settlement of regional conflicts.

Secondly, the Partner States are now challenged to ensure a purposeful follow-up on the outcome of the World Summit on Sustainable Development which was held in Johannesburg, South Africa in 2002. The Summit adopted a Plan of Implementation which stresses the revitalization of the Commission on Sustainable Development, the utilisation of development partnerships and linkages, the need to focus the world's attention and direct action toward meeting challenges including environmental protection.

43 The Sustainable Development Networking Programme is a network of national development actors in over 40 developing countries, including Kenya. It addresses issues of sustainable development, including disaster relief, IT empowerment, gender empowerment etc.

The overall challenge to the EAC Partner States is how to integrate the principles of sustainable development into regional policies and programmes and how to reverse the loss of environmental resources. This would be their contribution to meeting the Millennium Development Goals as spelt out by the United Nations Development Programme.[44]

3.4 Enforcement in similarly-placed regional organisations

The situation in similarly placed regional organisations with regard to environmental protection is instructive. Lessons on harnessing efforts through a harmonised approach are to be learnt from the experience of both the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC).

Although both organisations pursue economic development as a central objective, their treaties provide for co-operation in the development of natural resources, energy and the environment.[45] This co-operation is regarded, in the case of COMESA, to be one of the ways of achieving the aims and objectives of the common market. In the case of SADC this form of co-operation forms part of the foundation for the reduction of economic dependence and for equitable regional integration.

Both COMESA and SADC have established institutional capacity for the pursuit of programmes on co-operation in environmental protection. Achievements in the territories of their member states, through concerted and harmonised efforts, point to the effectiveness of regionalism in the enforcement of international environmental law. This is exemplified by cross border projects that address co-operation in research, technology, training and utilization of common resources (including personnel) with regard to environmental management of shared resources e.g. river Zambezi, game reserves.

44 Human Development Report 2003, *The Millennium Development Goals: A Compact among Nations to End Human Poverty*, New York: United Nations, 2003.

45 Articles 4, 122-126 of the Treaty Establishing the Common Market for the Eastern and Southern Africa. Articles 5(g), 21(e) of the Treaty of the Southern African Development Community.

There are also lessons to be learnt from success stories of regional co-operation initiatives in the management of shared water bodies and their environmental aspects under such bodies as the Great Lakes Fisheries Commission and the Baltic Sea Co-operation.

Concluding remarks

Progress towards sustainable development is hampered by problems peculiar to developing countries. In environmental integration these problems are due to limitations of the law and policy mechanisms at state level. In order to expedite progress there is urgent need for further cooperation beyond national confines. Regional initiatives should be explored further.

26

PUBLIC INTEREST LITIGATION, HUMAN RIGHTS AND THE ENVIRONMENT IN THE EXPERIENCE OF SRI LANKA

Shyami Puvimanasinghe

1. Introduction

The objective of this chapter is to present a perspective on how the domestic jurisprudence of a developing country, Sri Lanka, with respect to public interest litigation, human rights and the environment relates to the broader context of the international law of sustainable development: principle and practice. The linkage of principle and practice is approached through considering how the international law relating to sustainable development touches the real lives of people and their environment, in a developing country setting. The relevance of international norms to human life, livelihood and the environment is exemplified by factual realities, legislation and case law in Sri Lanka, which could, by analogy, be perceived as a microcosm of the developing world. To optimise the linkage between precept and practice, greater interaction between international, regional and domestic laws and policies, and stronger ties between word and deed are an essential corollary. This is because the development process must involve action at all levels, especially the national and sub-national (for instance provincial and local) levels. Sustainability can be integrated into the development process only through concerted action at all levels.

Sustainable development has, by its very definition, a fundamental impact on development. The linkages between projects, processes and discourses of development on the one hand and, human rights and the environment on the other, are close, contingent and complex. Development can promote and protect

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 653-676.*

human rights and the environment; conversely it could affect them adversely. As sustainable development evolves into a concept involving predominantly the three-dimensional relationship of development, environment and human rights, it affords a context, and a platform for progress that is purportedly holistic.[1]

It is this author's perspective that jurisprudence and concerted action in the sphere of public interest litigation, human rights and the environment can help to alleviate to some extent, the cleavage between the principle, and practice of international law relating to sustainable development. They do within certain limits, help to create an enabling environment for the balancing of conflicting interests, and achieving a measure of justice and equity, the rule of law, good governance and democratic accountability, all intrinsically linked to the notion of sustainable development. In fact, it has been observed that equity is the hallmark of sustainable development, and that the achievement of sustainable and equitable development remains the greatest challenge facing the human race.[2] In order to place Sri Lankan jurisprudence in context, it is necessary to first consider international and regional jurisprudence.

2. International Law relating to Sustainable Development

From Stockholm to Rio and onward to Johannesburg, the international law relating to sustainable development has blossomed, at least in theory, and

1 A broad definition of sustainable development is provided by N. Schrijver in 'On the Eve of Rio+10: Development-the Neglected Dimension in the International Law of Sustainable Development', *Dies Natalis Lecture*, Institute of Social Studies, The Hague, 11th October 2001 and the ILA New Delhi Declaration of 2002, annexed to this book: "A comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations".

2 International Bank for Reconstruction and Development, *World Development Report* 1994, World Bank, Washington, p. 1; justice and equity, both inter and intra-generational, are the core concepts of sustainable development according to O. Schachter in 'Implementing the Right to Development: Programme of Action', S.R. Chowdhury, H.M.G. Denters and P. De Waart (eds.), *The Right to Development in International Law*, Martinus Nijhoff, Dordrecht, 1992, pp. 27-30.

continues to bloom. Popularly defined[3] as development that meets the needs of the present without compromising the ability of future generations to meet their needs, the following instruments in the international law relating to sustainable development are particularly pertinent in constructing a normative framework for approaching issues of economic development, human rights and the environment: The Stockholm Declaration on the Human Environment, 1972;[4] the World Charter for Nature, 1982;[5] the Report of the World Commission on Environment and Development, 1987;[6] the Proposed Legal Principles for Environmental Protection and Sustainable Development, by the WCED Experts Group on Environmental Law, 1987;[7] the Rio Declaration on Environment and Development, 1992[8] and Agenda 21, 1992; the Report on Human Rights, Environment and Development by the UN Special Rapporteur on Human Rights and the Environment, 1994;[9] the Draft International Covenant on Environment and Development, 1995 as subsequently revised;[10] the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1999[11] and the International Law Association's New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2002.[12]

3 World Commission on Environment and Development, *Our Common Future*, Oxford University Press, New York, 1987. See W. Lang (ed.), *Sustainable Development and International Law*, Graham and Trotman, London, 1995; A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford University Press, New York, 1999.

4 *UN Doc.* A/CONF. 48/14, Stockholm, 1972.

5 UNGA Res. 37/7, 28.10.1982.

6 WCED, *Our Common Future*, Oxford University Press, New York, 1987.

7 R.D. Munro, J.G. Lammers, (eds.), *Environmental Protection and Sustainable Development, Legal Principles and Recommendations*, Graham and Trotman, London, 1987.

8 *UN Doc.* A/Conf.1515/Rev. 1, 13 June 1992.

9 *Un Doc.* E/CN.4/1994/9.

10 Proposed by the International Union for the Conservation of Nature, 1995.

11 38 ILM 1999, 517. Also see F.Z. Ksentini, 'Human Rights, Environment and Development', in S. Lin and L. Kurukulasuriya (eds.), *UNEP's New Way Forward: Environmental Law and Sustainable Development*, United Nations Environment Program, Nairobi, 1995.

12 Resolution 2002/3 passed at the 70th Conference of the International Law Association held in New Delhi, India, April 2002. This Declaration is a follow-up to the ILA Seoul Declaration on the Progressive Development of Public International Law relating to a New International Economic Order, published in 33 *Netherlands International Law Review* 1986 pp. 326-333.

The core principles gleaned from these instruments, which are directly relevant in this context are as follows: The integration of environment and development; the fundamental human right to environment, centrality of human beings to the concerns of sustainable development and their entitlement to a healthy and productive life in harmony with nature; inter-generational equity and intra-generational equity; common but differentiated responsibilities; environmental standards and monitoring by states; environmental impact assessment; the precautionary principle; the polluter pays principle; procedural rights such as access to information, public participation in decision-making and access to justice; effective national environmental legislation including laws on liability and compensation for environmental victims; progressive development of the international law of sustainable development; international co-operation for sustainable development and its implementation, and effective participation of developing countries.

Sustainable development requires, to some extent, a blurring of the distinction between international law and national law, for the rhetoric to match reality[13] or at any rate, to be more realistic. Without implementation, sustainable development would be meaningless.[14] One writer lists several sets of implications for the implementation of sustainable development: a holistic approach; universal participation; regulation of access to resources; and orderly co-operation at the global, regional and community levels.[15] These in turn, mean a seminal role for law and organization at all levels because in a seemingly globalizing yet simultaneously fragmenting world, co-operation for our common future does not flow from natural instincts, personal, national regional or international. It has been rightly stated that sustainable development mandates a spirit of global partnership and co-operation,[16] requiring a revolution in international relations.

13 E.B. Weiss, 'The Emerging Structure of International Environmental Law', in N.J. Vig (ed.), *The Global Environment*, Earthscan, London, 1999, pp. 98-115.

14 For a document focussed on implementation, see *Declaration of The Hague on the Environment*, The Hague, 11 March 1989, ILM vol.28, (1989), pp.1308-1310.

15 M.C.W. Pinto, 'Reflections on the Term Sustainable Development and its Institutional Implications', in K. Ginther, E. Denters, P.J.I.M. de Waart (eds.), *Sustainable Development and Good Governance*, Martinus Nijhoff, Dordrecht, 1995, p. 76.

16 I.M. Porras, 'The Rio Declaration: A New Basis for International Co-operation', in P. Sands (ed.), *Greening International Law*, Earthscan, London, pp. 20-33. On the need for new attitudes and values, see also Commission on Global Governance, *Issues in Global Governance*, Kluwer Law International, London, 1995; K. Hossain, 'Sustainable Development: A Normative Framework for Evolving a More Just and Humane Inter-

It requires an ideology based on compromise, globalism and sharing, common interests and long-term perspectives.[17] This is a departure from a world constructed on binary oppositions, where logic dictated that to be pro-development was necessarily to be anti-environment and *vice-versa*,[18] towards a new way of understanding international relations.[19]

It is my perspective that these same changes are necessary at all levels-not only in international relations but also in international law; and at the regional, national and sub-national levels, as well as the institutional and personal levels. Numerous factors including the lack of commitment and implementation of financial and technological obligations by developed countries complimented by lack of capacity and commitment to long term objectives by developing countries, have made the practice of sustainable development lag behind the principle. All that has blossomed and bloomed in theory has not necessarily borne fruit in reality. It is in the light of the need for bridging this gap that regional and domestic jurisprudence become significant.

3. The Regional Jurisprudence of South Asia

In developing countries underdevelopment and the challenge of survival, obviously unequal access to resources, population growth, poverty and disease make the human dimension of problems of development, environment and economic transition, overt. Human dignity and human rights thus become central to the whole conception of sustainable development. Developing countries often lack stringent legislation for the protection of human rights and the environment, and the capacity and willingness for enforcement. Raising standards can have adverse economic consequences, posing a further dilemma for governments struggling to raise their heavy heads under the weight of international indebtedness.

national Economic Order', in S.R. Chowdhury, H.M.G. Denters, P.J.I.M. de Waart, *Right to Development in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1992, p. 259; and P. Peters, 'Sustainable Development with a Human Face?', in F. Weiss, E. Denters and P. de Waart, *International Economic Law with a Human Face*, Kluwer Law International, The Hague, 1998, p. 401.

17 I.M. Porras, *ibid.,* n. 16, p. 20-33.

18 *Ibid*., p. 23.

19 *Ibid*., p. 33.

The South Asian regional grouping as defined by the South Asian Association for Regional Cooperation (SAARC)[20] comprises seven countries, namely, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. In the South Asian region, jurisprudence in the sphere of public interest litigation, human rights and the environment has emerged largely in the context of judicial resolve with regard to the domestic implementation of sustainable development.[21] There is in South Asia, an evolving body of jurisprudence on sustainable development and its implementation. Stirred into motion by citizens and lawyers in the name of the public interest, courts in the region have, in recent years, resorted to certain measures to effect, greater adherence to the rule of law, socio-economic and environmental justice. These courts have not infrequently adopted innovative positions in dealing with the complexities of balancing economic development, human dignity and ecological integrity.[22]

20 *Charter of the South Asian Association for Regional Cooperation*, 1985. An Integrated Programme of Action for environmental protection was formulated within SAARC, in 1987. The Tenth SAARC Declaration, Colombo, 1998, in paragraph 55, states that the Heads of State or Government also emphasised the need for complementary action by organizations and institutions in the region in their efforts to protect the environment and achieve sustainable development in the region.

21 See M. Munasinghe, 'The Role of Law in Making Development more Sustainable'; D. Kaniaru, 'The Challenge for the Judiciary in the Application of General Principles of Environmental Law'; S. Silva, 'Contemporary Developments in National Laws in the Area of Sustainable Development with Special Reference to Asia', all in SACEP/UNEP/NORAD, *Report of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development* SACEP, Colombo, 1997; for a range of judgements from the region, see SACEP/UNEP/NORAD, *Compendium of Summaries of Judicial Decisions in Environment Related Cases (With Special Reference to South Asia),* SACEP, Colombo, 1997. For some views on the role of the judiciary in the developing country setting, see M.L. Marasinghe and W.E. Conklin (eds.), *Essays on Third World Perspectives in Jurisprudence,* Malayan Law Journal Pte. Ltd., Singapore, 1984; S. Puvimanasinghe, 'An Analysis of the Environmental Dimension of Public Nuisance, with particular reference to the Role of the Judiciary in Sri Lanka and India', 9 *Sri Lanka Journal of International Law* 1997, p. 143; S. Puvimanasinghe, Development, Environment and the Human Dimension: Reflections on the Role of Law and Policy in the Third World, with particular reference to South Asia, 12 *Sri Lanka Journal of International Law* 2000, p. 35.

22 In this context, Justice Krishna Aiyer of the Indian Supreme Court once stated:
"Public Nuisance because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law … Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems, not pompous and attractive, but in working condition and sufficient to meet the needs of the people, cannot

In the aftermath of Bhopal,[23] India became conscious of the need for meaningful regulation, and has since developed a far-reaching jurisprudence on sustainable development and its domestic implementation.[24] Most other countries in the region have been influenced by these developments, and acted in a somewhat similar manner. Their individual efforts looked at collectively, point to the evolution of a body of regional jurisprudence[25] on issues of development and environment, with an overt human rights dimension, all through the agency of citizen's involvement, legal representation in the public interest, and judicial innovation.[26] In view of the rather weak commitment to the relatively futuristic notion of sustainability on the part of politicians, especially in developing countries, the more resolute approach of judges, particularly of the higher judiciary, has been a catalyst in the sphere of legal development. Another reason for significant judicial influence is that developing countries including those of South Asia have comparatively less legislation, and certainly, less implementation because of varied and numerous realities and complexities.

be evaded if the Municipality is to justify its existence."

23 *Union Carbide Corporation v. Union of India* AIR 1990 (SC) 273. U. Baxi and T. Paul, *Mass Disasters and Multinational Liability: The Bhopal Case*, Bombay, 1986; S. Puvimanasinghe, 'The Bhopal Case: A Developing Country Perspective', 6 *Sri Lanka Journal of International Law*, 1994, p. 184. In what is often described as the world's worst industrial disaster, caused by a leakage of toxic gas from a pesticide plant in Bhopal India, over 2000 people died, and over 200, 000 were injured. Among the numerous results of the case, was the realisation by many that laws for the protection of human rights and the environment *vis-a-vis* economic activity must be made and implemented.

24 SACEP/UNEP/ NORAD, *Report of the Regional Symposium*; and SACEP/UNEP/ NORAD, *Compendium of Summaries op. cit*. n. 21; these publications also include some details of evolving jurisprudence from the Asia Pacific region, i.e., including South East Asia and the Pacific.

25 N.A. Robinson, in 'Principles of Environmental Justice: A Foundation for Dispute Prevention and Resolution', *SACEP/UNEP/NORAD Report of the Regional Symposium, ibid,* comments that the judiciary of South Asian nations, and their Supreme Courts in particular, today lead the world in defining and refining the jurisprudence of environmental justice.

26 Shades of judicial innovation have always been significant in this sphere. One of the most interesting examples from the United States, was in the dissenting judgment of Justice Douglas in *Sierra Club* v. *Morton,* when he made a plea for granting legal

The states of South Asia have invoked both legislative and judicial mechanisms,[27] and their experience can be informative for other developing countries.[28]

Among the legislative mechanisms are the following: Several constitutions in the region recognise an obligation of the State as well as citizens, to protect the environment.[29] The right to life is recognised in most constitutions[30] and has been interpreted by the judiciary to include the right to a clean and healthy environment; an adequate standard of living has been interpreted to include an environment adequate for the health and wellbeing of the people; legislation on environmental protection including provisions requiring environmental impact assessment for development projects;[31] statutory environmental pollution control by administrative agencies and environmental standards for the discharge of emissions and effluents; the use of public nuisance provisions for the protection of the environment.

As for judicial mechanisms, heightened sensitivity and concerted action in the judiciary, legal profession and civil society have helped to create an expanded

standing to natural objects like mountains. He was inspired by Christopher Stone's article 'Should trees have standing', *45 California Law Review 450.*

27 L. De Silva, 'The Impact of Economic Transition on Environmental Protection', paper presented at the Conference on *Transition, The Post Independence Changes and the Future: Critical Issues of Law and Justice in South Asia,* organised by the Faculty of Law, University of Colombo, July 1998; De Silva points out that the problem with the laws and institutions is the failure of the enforcement machinery. According to him, weak institutions coupled with a highly politicized bureaucracy makes enforcement a nightmare for the regulators, non-existent for affected victims and the eternal target of attack by industrialists. It is in this context that judicial intervention and citizen activism have, assumed importance in the region. De Silva also describes the environmental movement in developing countries as having its genesis in human rights, and comments that environmental activism in South Asia is almost always about survival. S. Atapattu, in 'Recent SAARC Initiatives in Eco-Legal Development', paper presented at the *SAARCLAW Conference* held in Colombo in October 1998, also deals comprehensively with regional developments in this context.

28 C.G. Weeramantry, 'Private international law and public international law" 34:2, *Rivista di diritto internazionale privato e processuale*, April-June 1998, pp. 313-324.

29 Constitution of Bangladesh article 16; India 48A and 51A(g); Nepal 26(4); Sri Lanka 27(14) and 28(f).

30 Bangladesh, article 2; India 21; Nepal 88; Pakistan 9.

31 Bangladesh, 1995; India, 1986; the Maldives, 1993; Nepal, 1997; Pakistan, 1977 and Sri Lanka, 1980.

notion of access to justice, public interest litigation, a degree of a shift from adversarial to inquisitorial judicial methods, a broad and purposive approach to statutory interpretation[32] and a measure of flexibility procedures with regard to adopted and redress granted. Judicial intervention has served to scrutinize governmental and private sector activities and abate administrative apathy. Significant measures include: the creative usage of directive principles of state policy; judicial recognition of the right to a healthy environment;[33] adequate standard of living has been interpreted to include an adequate quality of life and environment; in cases similar to that of *Juan Antonio Oposa* v. *The Honourable Fulgencio S. Factoran* in the Philippines, which recognised intergenerational equity and the right to a balanced and healthy ecology, conservation, and sustainable development,[34] the use of human rights provisions for environmental protection; the liberalisation of *locus standi* in writ applications and fundamental rights cases in such a way as to include any person genuinely concerned for the environment;[35] imposition on the state of a public trust obligation over natural resources;[36] absolute liability for accidents arising from ultra-hazardous activities;[37] application of the polluter pays and pre-

32 For instance in the Indian case of *Ratlam Municipality v. Vardichand* AIR 1980 (SC) 1622, statutes of ancient vintage like the Criminal Procedure Code, Penal Code and Municipalities Act, were read in a new light, taking into account the social justice orientation of the Indian Constitution, human rights and concern for the environment. The facts arose out of what Justice Krishna Aiyer described as a 'Third World Humanscape' of overpopulation, pollution, unplanned urbanization, abject poverty and dire need of basic amenities combined with official inaction and apathy, which created a miserable predicament for slum and shanty dwellers. The judge also refers to the need for the broader principle of access to justice necessitated by the conditions in developing countries, and to the need for judges to play an affirmative, pro-active role in order that rights don't become sterile.

33 For instance, India, *Rural Action Litigation and Entitlement Kendra, Dehra Dun v. State of Uttar Pradesh,* AIR 1988 (SC) 2187 and *M.C. Mehta v. Union of India* 1988, AIR (SC) 1037; Pakistan, *Shehla Zia v. Wapda* 1994 PLD SC 693; Bangladesh, *Mohiuddin Farooque v. Bangladesh et al* 1997 BLD 1.

34 Republic of the Philippines Supreme Court G. R. No. 101083 reproduced in 1 (3) *South Asian Environmental Law Reporter*, p. 113.

35 *M.C. Mehta v. Union of India* 1987 AIR 965 and the Sri Lankan case of *Environmental Foundation Limited v. the Land Commissioner et al*. 1 SAELR 53.

36 *M.C. Mehta v. Kamal Nath* 1997 1 SCC 388.

37 In the *Shriram gasleak case* (*M.C. Mehta v. Union of India*, AIR 1987 (SC) 1086), the ideas of cost internalization, polluter pays and absolute liability long preceded the Rio Declaration. A more recent case on the same lines is *Indian Council for Enviro- Legal Action v. Union of India* 1996 3 SCC 212.

cautionary principles;[38] promotion of sustainable development and good governance.[39]

4. Sri Lanka's Domestic Jurisprudence

The island's domestic jurisprudence in its modern formulation is clearly linked closely to international law in context. Moreover, the dynamic currents of sustainable development law, particularly in the setting of human rights, public interest litigation and the environment, in the domestic courts of the South Asian region, have influenced the ebb and flow of the waters of Sri Lankan jurisprudence, making fundamental changes to its course. With new motifs and designs woven into the fabric of domestic law, an interesting mosaic is apparently being created.

Before dealing with modern jurisprudence, it is appropriate to deal briefly with some basic factors of history and background which set the Sri Lankan context in this sphere. The Indian Ocean island of Sri Lanka, previously Ceylon, has a recorded history of over 2500 years. The ancient chronicles record that once when a King who ruled the country (Devanampiya Tissa, 247-207 B.C.) was on a hunting trip, the Arahat Mahinda, son of the Emperor Asoka of India, preached to him a sermon, which converted him to Buddhism, the religion which is followed today, by around 70% of the population. The most fundamental precepts of this philosophy include the quest for simplicity in living and equilibrium, moderation and the middle path. The following words are an excerpt from the sermon: "O great King, the birds of the air and the beasts have as equal a right to live as thou. The land belongs to the people and all living beings; thou art only the guardian of it."[40]

This ancient wisdom appears to encompass the notions of public trust and custodianship of the environment, as it informs the king that he is not the owner,

38 *Vellore Citizens Welfare Forum v. Union of India* 1996 5 SCC 647.

39 *Gunerathne v. Homagama Pradeshyia Sabha et al* FR No. 210/97 SC minutes of 3/4/1998.

40 From the ancient chronicles of Ceylon, cited in *Hungary v. Slovakia* 1997 ICJ Reports 7 (*The Danube Dam case*) and *Tikiri Banda Bulankulama et al. v. The Secretary, Ministry of Industrial Development et al. (The Eppawalla case*) 2000 *South Asian Environmental Law Reporter* (SAELR) 7 (2) 1.

but merely the guardian of the land. If the King, the birds and the beasts have an equal right to live, then *a fortiori,* implicitly at least, human beings too have the same right. This implies a certain value system which affords equity and equality to all living beings, including fauna and flora. In such a value system, it is not difficult to accommodate modern concepts such as intergenerational and intragenerational equity, as presumably, there can be no distinctions between the entitlements within a generation or between generations of human beings. Certain concepts found in contemporary international instruments, like the intrinsic value of all living beings,[41] are inherent and integral to religions and philosophies of the East. For instance, the idea of *ahimsa* (which greatly influenced Gandhian thought and action) means non-violence towards all living beings, including trees and plants. Duties towards all are as important as rights.

At the turn of the 3rd millenium Sri Lanka still bears witness to a heritage of a magnificent water-based civilization,[42] built by ancient kings, and based on a philosophy of development with due regard to conservation. Sri Lanka's economy is primarily agricultural, and its system of networks of irrigation canals and tanks (artificial reservoirs), was the hallmark of the local way of life, where each village was built around the Buddhist temple and the tank, a combination of the spiritual and material aspects of life. In the course of history however, the features common to most modern societies were introduced to Ceylon. After nearly five centuries of colonisation, followed by government by local elites during half a century of independence, contemporary Sri Lanka, grapples like most Third World countries, with the problems of development and the environment, urbanization, poverty and pollution so that today, "the small Indian ocean

41 Referred to in the preamble to the *World Charter for Nature*, *op. cit*. n. 5.

42 One ancient ruler, King Parakramabahu the Great (1153-86AD), mandated that not a single drop of water received from rain should be allowed to escape into the sea without being utilized for human benefit. The sanctity attached to water and the way it was carefully used in the ancient island culture and its tanks and technology is explained and illustrated in J. B. Disanayake, Water Heritage of Sri Lanka, University of Colombo, Colombo, Sri Lanka, 2000. According to Disanayake at p. 5: Ecology and culture do not usually go together. Ecology deals with patterns of relations of plants, animals and people to each other and to their surroundings, and culture deals with all the products of human thought. There are, however, certain aspects of both ecology and culture that have very interesting and intimate relationships. This book deals with one such aspect: the water heritage of Sri Lanka.

island…provides textbook examples of many modern dilemmas: *development versus the environment*."[43]

Globalisation has touched the island in both positive and negative ways, from the earliest times. In the past few decades, Sri Lanka has unequivocally followed the path of liberalisation, privatization and open economic policies with respect to trade and investment. Its hybrid legal system is perhaps the most indicative of its links with the rest of the world. Flowing from colonisation by the Portuguese, the Dutch and the British, Sri Lanka today applies the Roman Dutch law in the private law sphere, along with the customary laws of the Kandyan Sinhalese, the Jaffna Tamils and the Muslims for the different ethnic groups, respectively. In the public law sphere, Sri Lanka follows English law principles and many of its statutes are based on English-law.

5. Significant Laws at the National Level

Sri Lanka's Constitution[44] comprises some provisions relating to the environment, contained in the chapter on directive principles of state policy and fundamental duties.[45] Article 27(14) provides that the State shall protect, preserve and improve the environment for the benefit of the community. According to article 28(f), it is the duty of every person to protect nature and conserve its riches. Although article 29 states that the directive principles of state policy and fundamental duties are not justiciable, the Sri Lankan courts have given

43 Words of the futurist Arthur C. Clarke, cited in *Tikiri Banda Bulankulame et. al.* v. *Secretary, Ministry of Industrial Development et al*., *op. cit*. n. 40; A. Wickramasinghe in 'Sustainable Development: The Question of Socio-Economics and Development Priorities', *Sri Lanka Journal of Social Sciences* 1997 20 (1&2), deals with some of the critical policy concerns involved in the procedural path towards sustainability. Another relevant article is written by L.C. De S. Wijesinghe, 'Environment and Sustainable Development-Some Thoughts on a Global Perspective', *Sri Lanka Journal of Social Sciences* 1993 16 (1&2).

44 The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

45 In the Philippines case of *Juan Antonio Oposa and Others v. The Honourable Fulgencio S. Factoran and another* (SAELR) 1 (3), 1994, it is interesting that the Philippino Supreme Court stated that such directive principles are no less important than the rights contained in the chapter on fundamental rights. It also stated that environmental rights predate all governments and constitutions, and need not even be written in the Constitution for they are assumed to exist from the inception of humankind.

recognition to these principles which they have read in the light of principles of international environmental law.[46]

Sri Lanka has an abundance of legislative enactments,[47] in fact numbering over 70 statutes, which are related to various aspects of the environment. However, practically all these statutes were enacted before the era of environmental consciousness and certainly before sustainable development became part of the parlance of law at the international, regional and domestic levels. As regards environmental protection at the sub-national level, under the 13th amendment to the 1978 Constitution protection of the environment is a subject in the concurrent list, meaning that both the central and provincial governments have functions in relation to it. Protection of the environment within the province to the extent permitted by or under the authority of Parliament is included in the Provincial Council list, meaning that such functions are devolved to Provincial Councils.

The most significant piece of domestic legislation in the sphere of environmental protection in the Sri Lankan context is the National Environmental Act of 1980[48] as amended in 1988[49] and 2000,[50] and the implementing regulations. Through this Act and regulations, two important tools for sustainable development were introduced, namely the Environmental Impact Assessment (EIA) and Environmental Protection Licence (EPL). The EIA process has been carried out for many large projects, and has sometimes included a Social Impact Assessment as well. Through this mechanism, the degree of public participation and access to information in relation to large development projects has been greatly enhanced. On the whole however, it is true that there is a much greater amount of regulation than implementation. Problems with regard to implementa-

46 An example is the case of *Tikiri Banda Bulankulama*, *op.cit.* n. 40.

47 A detailed account of Environmental Law in Sri Lanka is contained in the country presentation on Sri Lanka by Justice Mark Fernando, in *Report of the Regional Symposium, op.cit*. n. 21; S. Atapattu traces the history of Environmental Law in Sri Lanka, in a paper entitled 'Wither Environmental Law in Sri Lanka? Tracing Fifty Years of Environmental Law in Sri Lanka', presented at the Conference on *Fifty Years of Law and Justice in Sri Lanka*, organised by the Law and Society Trust, Colombo, November 2000.

48 National Environmental Act, no. 47 of 1980.

49 Amendment Act no. 56 of 1988.

50 Amendment Act no. 53 of 2000.

tion include lack of resources and expertise, as sustainable development often requires greater financial resources as well as technology and skills.

6. Public Interest Litigation, Human Rights and the Environment

The view has been expressed that:

> Adequate protection of the global environment depends on the interplay of international and national measures and the use of national legal systems by individuals or environmental groups creates additional pressure for compliance by governments with their international obligations. More generally, the existence of individual procedural rights helps shape domestic environmental policy and facilitates the resolution of trans-boundary conflicts through equal access to the same private law procedures. It gives non-governmental organisations an opportunity to bring legal proceedings or to challenge proposed developments on a public interest basis. It would be entirely realistic for international law to encourage these trends.[51]

Public interest litigation[52] has since the 1980's become a popular mechanism in the South Asian region[53] including Sri Lanka, in cases concerning issues

51 P.W. Birnie and A.E. Boyle, *International Law and the Environment*, Clarendon Press, Oxford, 1992, p. 194. Similarly, principle 23 of the *World Charter for Nature* (*op.cit*. n. 5) states that all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation. See also D. Robinson, 'Public Interest Law-Commentary and Analysis', in D. Robinson and J. Dunkley, (eds.), *Public Interest Perspectives in Environmental Law*, Chancery Law Publishing Ltd., UK, 1995.

52 Public Interest Litigation is very much in line with procedural tools for participation in environmental matters, like those envisaged in the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,* 38 ILM 517 (1999). See S. Divan, A. Rosencranz, Environmental Law and Policy in India: Cases, Materials and Statutes, Oxford University Press, New Delhi, 2001; H. Dembowski, *Taking the State to Court*, *Public Interest Litigation and the Public Sphere in Metropolitan India*, Oxford University Press, New Delhi, 2001, makes the point that public interest litigation is useful in the face of governmental lawlessness.

53 Justice Bhagwathi of the Indian Supreme Court once stated in relation to public interest litigation: "Law as I conceive it, is a social auditor and this audit function can be put into action when someone with real public interest ignites the jurisdiction…public interest litigation is part of the process of participatory justice and standing in civil litigation of that pattern must have liberal reception at the *judicial doorsteps*."

of development, environment and human rights. Environmental issues and human rights issues are closely linked in the jurisprudence of Sri Lanka.[54] These cases almost always involve executive or administrative action or inaction and frequently also the deeds or misdeeds of private business. When major decisions concern the natural resources of the nation and other important matters of public interest, there is in the usual course of the development process, little room for the community at large to question these decisions and to be informed about their implications. With its genesis following the Bhopal accident in India, public interest litigation has now become a legal tool in several other countries in South Asia particularly in cases concerning human rights and the environment.

Public interest litigation (sometimes called social action litigation) has taken diverse forms, like representative standing where a concerned person or organisation comes forward to espouse the cause of poor or otherwise underprivileged persons, and citizen standing which enables any person, as a concerned member of the citizenry, to bring a suit as a matter of public interest. The test for *locus standi* in these cases, has within limits, been liberalised from the need to be an aggrieved person, to simply being a person with a genuine and sufficient concern. In addition, class actions allow one suit in the case of multiple plaintiffs and/or defendants, and have been useful in this sphere.

7. Evolution of Case Law in Sri Lanka

The first Sri Lankan case in the nature of public interest litigation in the environment/development context, was *Environmental Foundation Ltd.* v. *The*

(*Fertilizer Corporation Kamgar Union v. Union of India*, 1981 *All India Reports*, Supreme Court, 344.) According to Hon. S.J. Sorabjee in 'Judicial Activism in Public Law', paper presented at the *Silver Jubilee Law Conference of the Bar Association of Sri Lanka,* Colombo, 1999: Over the years, experience has shown that governments are not obliging and do not control themselves. Moreover, governmental power has become pervasive and less amenable to effective administrative control. Experience has convincingly established that availability of judicial review is by far the most effective safeguard against administrative excesses and executive high-handedness.

54 Developments in this sphere are discussed in S. Atapattu, 'Environmental Rights and Human Rights', *Sri Lanka: State of Human Rights*, Law and Society Trust, Colombo, 1997 and L. De Silva, "Access to Information and Public Participation', a paper presented to the *SAARC Public Interest Environmental Law Conference*, Colombo, January 1995. In general, see A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996.

Land Commissioner et al.[55] *(The Kandalama case*, 1992) which concerned the granting of a lease of publicly owned land to a private company for the purpose of building a tourist hotel. The hotel was to be built in close proximity to an ancient tank and sacred Buddhist temple, upsetting the local environment, both natural and cultural. Inspite of the public interest litigation questioning the irregularity of the lease, in contravention of the relevant statutory provisions, the project was approved and the hotel was built. But the positive result of the case, was that the authorities were ordered by the court, to follow the correct procedure, and were compelled to do so by providing notice in the Gazette. This case was the first in Sri Lanka, to uphold the standing of an NGO dedicated to the cause of environmental protection. It had important implications with respect to access to justice and the role of the judiciary, which are issues that are naturally raised by the phenomenon of public interest litigation. Other significant issues which came to the forefront as a result of this case, include access to information and public participation in decision-making, compliance with and implementation of the law.

The Environmental Foundation Limited et al. v. *The Attorney General*[56] *(The Nawimana case,* 1992) was a case involving a fundamental rights petition, and was brought by residents of two villages in the South of Sri Lanka, in respect of serious damage to health and property caused by quarry blasting operations. The petitioners alleged the violation of several Constitutional provisions, namely that sovereignty is vested in the people and is inalienable and includes fundamental rights; that no person shall be subjected to torture or to cruel, inhuman or degrading treatment; freedom to engage in any lawful occupation, freedom of movement and of choosing a residence; as well as directive principles of state policy. The case was settled through mediation of the Central Environmental Authority, and the petitioners obtained relief. The court recognised the possibility of invoking fundamental rights provisions in environment – related cases, and the connection between environment, development and human rights. It also accepted by a majority decision, the possibility of public interest litigation, since the first petitioner was an environmental NGO.

In *Environmental Foundation Ltd.* v. *Ratnasiri Wickremanayake, Minister of Public Administration et al.*[57] (1996), there was an unequivocal recognition

55 1994 South Asian Environmental Law Reporter *(SAELR)* 1 (2) 53.
56 1994 *SAELR* 1(1) 17.
57 1996 *SAELR* 3(4) 103.

of the possibility of bringing public interest litigation in suitable cases. Until this judgement, cases in the nature of public interest suits had been heard, but with no pronouncements on their acceptability as a matter of principle. The judgment is, therefore, useful because it disposes of the issue as to whether public interest litigation is admissible in the Sri Lankan legal system.

In *Deshan Harinda (a minor) et al.* v. *Ceylon Electricity Board et al.*[58] *(The Kotte Kids case,* 1998*)* a group of minor children (through their next friends) filed a fundamental rights application alleging that the noise from a thermal power plant generator exceeded national noise standards, and would cause hearing loss and other injuries particularly to infants, including those yet unborn. Standing was granted for the case to proceed on the basis of a violation of the right to life. Although the Sri Lankan constitution contains no right to life, it was argued that all other rights would be meaningless without its existence, at least implicitly. But the case was finally settled as the petitioners agreed to accept an *ex gratia* payment without prejudice to their civil rights, so that there was no adjudicatory decision.

In *Gunarathne v. Homagama Pradeshiya Sabha et al.*[59] (1998), in what was the first express reference to sustainable development by the Supreme Court, it was noted that: "Publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved." The Court stated that the Central Environmental Authority and local authorities must notify the neighbourhood and hear objections, as well as inform the industrialists and hear their views in deciding whether to issue an Environmental Protection Licence. The Court imported this requirement in the licensing process though the law was silent on the matter. The Court also required that agencies must give reasons for their decisions and inform the parties of such reasons.

In *Lalanath de Silva* v. *The Minister of Forestry and Environment*[60] *(The Air Pollution case* 1998), the petitioner averred that the Minister's failure to enact ambient air quality standards resulted in his right to life being violated. The Supreme Court of Sri Lanka ordered the enactment of regulations to control air pollution from vehicle emissions in the city of Colombo. Regulations were enacted pursuant to this decision, which had the effect of ensuring steps for

58 1998 *SAELR* 5 (4) 116.
59 1998 *SAELR* 5 (2&3) 28.
60 Fundamental *Rights 569/98, Supreme Court of Sri Lanka, 1998.*

implementation of the law and compliance with it. Leave to proceed with this case was granted on the basis of a violation of the right to life. However, the case was decided through an order for making regulations, once again without dealing with the issue of the right to life. This case is significant also from the perspective of the role of civil society with regard to laws and their implementation. The petitioner, although a pioneer environmental lawyer and untiring advocate for the public interest, appeared in this case as an affected member of the citizenry.

The case of *Tikiri Banda Bulankulama* v. *Secretary, Ministry of Industrial Development*[61] (2000), is a significant example from recent Sri Lankan jurisprudence, of how consensus reached in Geneva, New York or The Hague, can touch the lives, livelihoods and environments of people in a remote village on a distant island. This case concerned a joint venture agreement between the Sri Lankan government and the local subsidiary of a transnational corporation, for the mining of phosphate in the North-Central province. The terms of the mineral investment agreement were highly beneficial to the company, and showed little concern for broader concerns of human rights, the environment, indigenous culture, history, religion and value systems, and the requisites of sustainable development as a whole. It was the subject of a class action by the local villagers (including paddy and dairy farmers, owners of coconut land and the incumbent of a Buddhist temple) in the Supreme Court.

The proposed project was to lead to the displacement of over 2600 families, consisting of over 12000 persons. The Court found that at previous rates of extraction, there would be enough deposits for perhaps 1000 years, but under the proposed agreement, it would lead to the complete exhaustion of phosphate in around 30 years. According to Justice Amerasinghe of the Supreme Court, fairness to all, including the people of Sri Lanka, was the *lodestar in doing justice*. The Supreme Court held that there was an imminent infringement of the fundamental rights[62] of the petitioners, all local residents. The particular rights were those of equality, freedom to engage in any lawful occupation, trade, business or enterprise, and freedom of movement and of choosing a residence within Sri Lanka.

61 2000 *SAELR* 7 (2) 1.

62 This involved violations of Articles 12 (1), 14 (1) (g), and 14 (1) (h) of the Sri Lankan Constitution.

Justice Amerasinghe, after referring to concepts of sustainable development and intergenerational equity, and analysing the agreement with reference to several principles of international environmental law including principles 14 and 21 of the Stockholm Declaration and principles 1, 2 and 4 of the Rio Declaration stated as follows:

> In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law.' Nevertheless, as a member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.[63]

The Court disallowed the project from proceeding unless and until legal requirements of rational planning including an Environmental Impact Assessment was done. It found that the proposed project would cause harm to health, safety, livelihoods and cultural heritage, as it even interfered with the Jaya Ganga, a wonder of the ancient world, declared as a site to be preserved, under UNESCO'S World Heritage Convention. This cultural heritage the court noted, was non-renewable; so was the historical and archaeological value and the ancient irrigation tanks that were to be destroyed. The toxic waste from the mining would have gone into pits facilitating breeding by mosquitoes. Having considered the question as to whether economic growth is the sole criterion for measuring human welfare, the court stated that ignorance of vital facts of historical and cultural significance on the part of persons in authority can lead to serious blunders in current decision making processes that relate to more than rupees and cents. The judgement draws much inspiration from principles of international environmental law, sustainable development (in particular the separate opinion of Judge Weeramantry in the International Court of Justice case of *Hungary v. Slovakia*)[64] and human rights.

63 *Ibid*, at p. 28.

64 *Case concerning The Gabćikovo-Nagymaros Project*, (1997) ICJ Reports 7. At page 88 in particular, Judge Weeramantry refers to the 'principle' of sustainable development.

8. Concluding Remarks: Reflections of a Perspective

When the domestic jurisprudence of Sri Lanka is perceived from this writer's perspective as explained at the outset of this chapter, several reflections emerge:

- Bridging the gap between the principle and practice of sustainable development, and finding the link between norm-setting and implementation, compliance and enforcement, is essentially a multi-disciplinary project. Economics, sociology and science are just some of the other instruments in this process. The law is simply one tool, but an important one, as it can ensure a measure of enforcement, certainty and consistency, and affords a means towards the attainment of the rule of law, justice and equity, which are core concepts in sustainable development.
- Environmental protection forms part of the legislative framework in Sri Lanka, but its linkages with human rights and development have been realised primarily through jurisprudence evolving from courts of law. The fact that a new draft law integrating the idea of sustainable development has not yet become law, is partially a reflection of the tension and/or contradiction between environmental and developmental concerns, which experience shows, limits legislative and executive action more than it does judicial innovation. The EIA process is a tool of sustainable development, already forming part of the legislative framework. It is a very useful mechanism but is not always carried out in practice, for many reasons, including heavy financial costs. In this context, the balancing process that forms part of a public interest litigation is an alternative, albeit a less satisfactory one.
- Regional and domestic jurisprudence has enabled the concept of sustainable development to make a transition from principle to practice to a certain extent. Such jurisprudence gives flesh and blood to international concepts, norms, rules and principles giving them a real existence at all levels, including the sub-national and local levels. This is important, so long as each nation and community also moulds the law according to its own context, priorities and value systems.
- The experience of Sri Lanka, like that of several other countries in the region, has been that the judiciary has been relatively more sensitised and committed to the cause of sustainable development. The most far-reaching developments have taken place in the areas of constitutional law including human rights, administrative law and criminal law. Principles from these spheres have been used as handles or tools towards the causes of environ-

mental protection and sustainable development. Procedural rights and human rights mechanisms have been foremost in efforts to make the connection between principle and practice, perhaps because of the established machinery in this sphere.

- Most of the issues involved in the case law illustrate the dilemmas of development, the environment and human rights. The actors in these cases are diverse, and usually involve the state, particularly the executive arm, and industry, usually on the same side, versus affected citizenry, civil society, non- governmental organizations particularly in the fields of human rights and the environment; lawyers acting for the various parties and the judiciary. In the light of globalisation and the predominance of international business, the possibility of using public interest litigation affords a voice to the public, where development activities would otherwise be the esoteric preserve of the government and international business entities. Most of the time, the attitude in public interest litigation suits has been confrontational although a spirit of reconciliation is more appropriate in resolving such competing interests. Alternative methods of dispute settlement such as mediation have occasionally been invoked, and certainly can offer speedy and effective redress in suitable cases. In relation to civil society and NGOs, sincerity to the cause and credibility should be relevant factors to be considered.
- Public interest litigation has been useful in injecting an informed, participatory and transparent approach to the processes of development, and to governmental and private sector actions involving public resources. It has provided a voice to persons who would otherwise be marginalized. Through public interest litigation, multiple sectors become involved in the development process, as envisaged in the sustainable development notion. Most of all, it has brought forth an element of accountability, and also created some space for the portrayal of a human face in development. The tool of public interest litigation has afforded a fairly viable means towards compliance with sustainable development norms, in a creative and innovative manner. Related to this fact, it has also helped to make the development process more holistic. On the other hand however, it has also meant that courts become directly involved in making policy decisions. This in turn has both positive and negative ramifications, and is by no means uncontroversial. It could create a system of decision making that is in a sense, *ex post facto*, and decentralized, and if not kept within certain limits, could take the development process away from the policy planning objectives of the nation, leading to inconsistency and incoherence. One safeguard here

is that cases usually revolve around the central issue of lawfulness/ unlawfulness of a decision or action.

- The system could be abused, overused and misused, and there must, therefore, be checks, balances and limitations, in order that the development process is not interfered with unnecessarily. There could be a tendency to use these tools to oppose development projects, sometimes related to opposition in the political arena, or other dynamics such as religion or culture, which play a seminal and sometimes unfortunately negative role within the fabric of contemporary society in South Asia. In order to maintain its credibility, the tool of public interest litigation should be steered towards the attainment of sustainable development rather than the opposition to all development. In fact, the concept of sustainable development stands for the spirit of reconciliation rather than conflict, making environmental protection an integral component of development. Otherwise, it would be counterproductive to the whole project of development. What is important is not merely a negative approach of abating the adverse effects of development by stopping various projects, but promoting development that is sustainable. There is a heavy environmental rather than developmental focus in most of the jurisprudence.
- The content of much of the jurisprudence tends to concern the negative aspects of large development projects such as displacement, and of industrialization, such as pollution. This could be related to the influence of norms of environmental protection emerging from international law and the influence of the comparative experience and jurisprudence of the developed world. Environmental legislation in developing countries often emulates that of developed countries. Although no doubt an important issue which should not be neglected, environmental degradation stemming from industrialization, is still only an emerging phenomenon in many developing countries. While issues of survival have also been subject to public interest litigation, it would be heartening to see heightened concern in the areas of more peculiarly third world concerns stemming from underdevelopment, such as poverty, unsanitary living conditions, unclean water accumulation and the mosquito menace causing diseases like malaria and dengue fever, or unsafe drinking water causing cholera and other killer diseases, often claiming the lives of little children. More concerted action in the sphere of public interest litigation, human rights and the environment could have a positive impact in making public authorities better carry out their functions under relevant statutes.

- On some occasions, explicit reference has been made to the international law in context. At other times, there is no reference, and the reasoning process is independent, but the arguments and decisions come remarkably close to that pertaining to international law relating to sustainable development. What is clear is that the domestic jurisprudence is influenced by international law, and even more strongly by how this law has taken shape in the domestic courts of several states in South Asia. Unfortunately, it is hardly ever the case that international law is influenced by domestic jurisprudence such as that in Sri Lanka or the South Asian region. Domestic experience in law and jurisprudence should ideally have an impact on international law and influence its content. This should be even more so in relation to issues of development and sustainable development where the domestic experience of developing countries can be useful as it usually has its genesis in real life situations related to development.
- Many concerns have been raised about the enforcement of decisions flowing from public interest litigation, which often lags behind the decisions. If enforcement does not keep pace with the jurisprudence, the whole process will become futile. Therefore, every effort must be made to ensure expedient enforcement of orders. Orders frequently give reconciliatory remedies such as the installation of safeguards in factories, rather than their closure. This is in line with the dictates of sustainable development.

Finally, it could be said that a glance at Sri Lanka's history and then its modern domestic jurisprudence throws some light on how the basic idea of sustainable development and what it means, is part of the island's past (and to some extent present rural) way of life, as evidenced by its ancient texts, irrigation networks and agricultural systems; and how, in a vastly different context, modern principles of sustainable development as developed by international law and reflected in regional and domestic jurisprudence, are being given meaning in dealing with the dilemmas of environment and development of the contemporary developing country. How best the law can be used as a tool to convert the wisdom of sustainable development in to practical terms within each society,[65] depends on the context, priorities and value systems of that society, viewed within the larger global and regional setting. It mandates a spirit of unity in

65 For further reading on International Law and the Sri Lankan experience in sustainable development, see S. Atapattu, 'Sustainable Development, Myth or Reality?: A Survey of Sustainable Development under International Law and Sri Lankan Law', 14 *Georgetown International Environmental Law Review*, Winter 2001, p. 265.

diversity, faith in the pursuit of an equilibrium and the understanding and attitude that it takes every drop of water to make the mighty ocean.

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SUSTAINABLE DEVELOPMENT IN POLISH LAW

Maria Magdalena Kenig-Witkowska

1. Introductory remarks

In Poland, generally, the concept of sustainable development has been perceived for a long time as an ideological element of environmental protection policy only. And it is not such a long time ago that a wider understanding of that concept, commonly accepted by international community and best expressed in the international legal documents adopted at the Rio Earth Summit in 1992, was adopted into the Polish legal doctrine, State's policy, legal documents and governmental practice.

Like in many other countries, practically the day after the Rio Summit, problems arose connected with the definition of both the term and notion of sustainable development as well as its proper translation into Polish.[1] Even up to the present day, both in the mass media and in statements by academics, not to mention politicians, there is still no uniformity in this respect. In academic papers in particular, one finds a certain kind of semantic chaos where various expressions are used in order to translate the English term sustainable development, such as e.g. durable development, continuous development, eco-

1 It seems that not only Poland experiences such problems. Similar difficulties have been stressed for example by German colleagues, see: Streinz R., Repercussions of the Right to Sustainable Development – Help or Hindrance? Approaches and Perspectives in National, European and Global Economic Law, *Law and State*, vol. 59/60. passim.

Nico Schrijver and Friedl Weiss (Eds.), International Law and Sustainable Development. Principles and Practice, © 2004 *Koninklijke Brill NV. Printed in The Netherlands, pp. 677-698.*

development, etc.[2] And, although there are good arguments for nearly all these commonly used expressions, the Constitution of the Polish Republic of 1997 stipulates the term whose reverse translation into English means the equivalent of "balanced development" which, as perceived by some, does not properly reflect what was originally meant when the term sustainable development was proposed. Once such a term has been incorporated into the Constitution and become a legal term, there is no ground to dispute it in official documents.

However, it needs to be said that many publications do not consider that term as final. Despite the terminological differentiation, the semantic content of the term sustainable development seems to be relatively clear, at least for lawyers. The majority of Polish authors who publish papers on this subject use, in principle, the term sustainable development, according to the 1987 Report of the World Commission for Environment and Development (WCED) and as further developed in the documents of the Rio Earth Summit. It is interesting, that the majority of Polish legal publications on this subject are of an international legal character and only some of them see the subject from the Polish internal law point of view. Those latter publications deal only to a small extent with the substantial content of the term sustainable development and – practically – do not attempt to define it any further. A very characteristic position for the Polish law doctrine in this regard is the opinion of one Polish scholars, whose view is that the sustainable development approach is the crowning of all means of the protection of human environment used thus far.[3]

Linking within one development concept such elements as the economy, social issues and the environment is, for Polish legal reasoning, a relatively new phenomenon and it results in the prevailing of the traditional understanding of that complex process, which is thinking of the environment in terms of protection of the nature. While, as it is proved in theory and practice of the implementation of the said concept, the environment should be perceived from the perspective of the socio-economic processes and, on the other hand, the development should be perceived from the environmental point of view, also because of the requirements stemming from the principle of intra and intergenerational equity. The leading thought of such concept seems to be clear:

2 See on this subject: Ciechanowicz, J., Międzynarodowe prawo ochrony środowiska, (International Law on the Protection of the Environment), Warszawa 1999, p. 59 and next.

3 Równy K., Koncepcja zrównoważonego rozwoju w prawie wspólnotowym i w polskiej rzeczywistości (The Concept of Sustainable Development in European Community Law and Polish Reality), *Przegląd Prawa Europejskiego,* 2 (8) 2000, pp. 58-71.

socio-economic development must not ignore the environment but at the same time must not be unconditionally subordinated to it, *inter alia* in the name of the above-mentioned principle of equity. One of the goals of the concept of sustainable development, namely the protection of nature, to which Polish society has already become accustomed, can be achieved only by the harmonization of two elements: socio-economic development, and the environment.

Taking this opportunity, it is worth mentioning some misunderstandings which result from insufficiently precise law and with respect to doctrine definitions of legal instruments which contain the concept of sustainable development. In Polish legal literature a relative freedom in this field prevails. Such terms may be noticed as: concept, conception, method, principle, etc., which is surprising not only because of the clear semantic difference between those terms but also because they have different meanings as far as law is concerned. It appears that most precise in this field are Polish lawyers dealing with international law who, basically, follow the term "a concept of sustainable development" keeping in mind the continued discussion of this subject in the international-legal literature.[4] Such a "freedom" of those who write on the subject of the environment and the concept of sustainable development has, unfortunately, been followed in many cases by Polish law-makers.

2. The State policy background for legislation

A number of legal documents dealing with the concept of sustainable development have been developed after the political system transformation in Poland took place in 1989.

To begin with, it needs to be underlined that first voices demanding changes in the approach to the environment in Poland have emerged in the early eighties, and they contained many of the propositions pointed out in the Declaration of the United Nations Conference on the Human Environment, Stockholm 1972,[5] as well as in the WCED Report, prepared under the leadership of Gro Brund-

4 Kenig-Witkowska, M.M., Koncepcja sustainable development w prawie międzynarodowym (The Concept of Sustainable Development in International Law), *Państwo i Prawo*, 1998, nr. 8.

5 Report of the United Nations Conference on the Human Environment, Stockholm, 5-6 June 1972, UN Doc. A/CONF. 48/14/Rev.1.

land.[6] Parties promoting sustainable development at that time were ecological organisations, academic communities and the spontaneous social movement for the environment. In order to develop a new point of view on the relationship between the economy and natural resources as well as on land planning, task research teams have been established, many seminars and public discussions were organised, reports published, etc. Various research committees have prepared independent expertise, that helped to make many new investments according to the environment protection recommendations, although the full environmental audit was certainly not in place at that time.

The pro-sustainable-development attitudes of the society, supported by academics and scientists, have eventually created a growing awareness among the ruling circles and policy makers of the necessity to protect the environment. Basic preconditions for the future State policy have been developed in 1989, based on the new approach to the issue of the environment during the historic Round Table where experts, prominent scholars and environmental activists were present both at the governmental as well as the Solidarity (opposition) sides. It resulted in the approval of twenty eight postulates related to the protection of the environment, and reflected in the Protocol of the Sub-group of the Round Table for Ecology.[7] In that protocol, major tasks and necessary activities were listed which needed to be implemented in order to introduce the principles of sustainable development in Poland. The most important of them were: 1) recognition of the principle of sustainable development and eco-politics as the leading factors for further social and economic development of the country; 2) making the Ministry of Environment Protection, Natural Resources and Forestry responsible for land planning and forestry with the change of functions and tasks of the Ministry at the same time; 3) adopting laws pertaining to the management of water; 4) changes in the agriculture and urban policies; 5) verification of the energy and motorisation policies; 6) updating of ecological laws; 7) increase of the role of State Inspection for the Protection of Environment; 8) establishment of the system of the protection of the environment at the community level, and 9) development of the environment education programmes.

6 Our Common Future. World Commission on Environment and Development, Oxford 1987.

7 Więckowski, C., Polityka ekologiczna państwa. Priorytety, instrumenty prawne, planowane działania. (The State Policy on Ecology. Priorities, Legal Instruments, Planned Activities), *Problemy ekologii*, 1998, nr.4.

As a result, the National Environmental Policy of Poland, a first of its kind document based on the ideas and outcome of the Round Table was adopted by the Parliament (Seym) of the Republic of Poland by virtue of its resolution of 10 May 1991. It was the document by which the concept of sustainable development reached a stable policy ground in Poland.[8] It was also the first strategic action programme for Poland and apparently one of the first in the Central and Eastern Europe. Probably, it was also a first strategic plan of action in the World perceiving environmental problems in an integrated manner together with the socio-economic development, while adhering closely to the concept of sustainable development, referred to at that time in Poland as eco-development. It is worth noticing that Poland's National Environmental Policy preceded such international documents as the Rio Declaration (1992), The Fifth European Community Programme (1993) and the Environmental Action Programme for Central and Eastern Europe (1993).

The National Environmental Policy defined sustainable development from the environmental perspective placing this concept among the main foundations of the national environmental policy. This document lists the following basic principles of national policy on sustainable development, 1) pollution prevention; 2) recycling of materials and resources; 3) neutralization of pollution; 4) law-abiding principle, (this means the necessity of reconstruction of the legal system and the system of enforcement in such a way that environmental regulations will be strictly abided; 5) principle of common good; 6) economisation principle (this means that the greatest possible advantage will be taken of market mechanisms with necessary maintenance through state intervention); 7) polluter pays principle; 8) regionalisation principle (meaning regionalisation of countrywide mechanisms and policy of environmental protection).

The National Environmental Policy also set the following primary goals and priorities for the above-mentioned eco-development: 1) modernization of environmental law including the legally binding international agreements; 2) introduction of new economic instruments and bringing the existing ones to realistic terms (environmental fees and non compliance fines, tax and customs exemptions and preferences, subsidies and soft loans); 3) establishment of new institutions for monitoring and enforcement of environmental law; 4) establishment of relevant financing bodies, such as National, Regional and Municipal Funds for Environmental Protection and Water Management, Ecofund, and Bank for Environmental Protection.

8 See: *Monitor Polski,* 1991, nr. 18, item 118. For the English version see the website of the Ministry of Environment, http://www.mos.gov.pl

The Ministry of Environment Protection, Natural Resources and Forestry (since 1999 – Ministry of Environment) has elaborated (in two years time) its subsequent larger version. That document, however, has not been fully useful because it was not followed by any concrete programme of action, similarly to the Executive Programme for the National Environmental Policy up to the Year 2000,[9] approved by the Government and accepted by the Parliament in 1995. None of them could play its role, because the important technical elements related to codification of law on the protection of the environment were missing, in spite of the fact that such codification has been already envisaged in many official documents as the target model for related legal solutions.[10] Despite its many weaknesses, the National Environmental Policy has remained over many years as major document accentuating the State's attitude towards the issues of the protection of the environment and the development, as well as the basic document to define the rules and directives on how the legislative processes in that matter should proceed.

Almost at the beginning of the transformation of the political system in Poland, the Polish Parliament (the legislative body composed of two Chambers – the Seym and the Senate) has been attaching considerable importance to the environment issues, which were debated in plenary sessions by both Chambers. For example, the Senate, in its resolution of 4th November 1994, has criticised the overall situation of the environment in Poland. It brought to public attention the fact that despite actions undertaken in 1989 to improve the environment, it deteriorates and many problems listed in the National Environmental Policy remain unsolved. In connection with that, the Senate stressed the necessity to follow the "road map" to sustainable development as the only one which could guarantee the fulfillment of needs and aspirations of both, the society and the State, and at the same time bringing Poland closer to the European integration and achievement at the level of a really developed country. All that should be taking place in the name of well-being of future generations and with full participation of the whole society and of all sectors of the economy. Expressing its serious concern about the appropriate implementation of the officially approved policy of sustainable development, the Polish Parliament called upon the Government to develop a strategy for sustainable development. The Parlia-

9 *Monitor Polski*, 1995, nr. 4, item 47.

10 For the critics see: Paczuski, R., Czy nadążamy? Zrównoważony rozwój zadaniem współczesnego państwa – rola polityki i prawa w jego realizacji (Do We Cope with? Sustainable Development as a Task for a Modern State – the Role of Politics and Law in its Implementation), *Ekoprofit*, 1998, nr. 10.

ment expressed also its will, that the work of Government be preceded by consultations with all the concerned parties.[11]

The above-mentioned concern of the legislative bodies has been reflected in the relatively large number of laws adjusting the outdated legal regulations to the requirements of the new situation resulting from the transformation of the political and economic system as well as to the needs related to Poland's aspirations as a member of the European Union.

The National Environmental Policy was mainly directed at the most urgent actions to be taken by the year 2000. Therefore, the Government developed and submitted to the Parliament in 2000 a new national environmental policy document – the Second National Environmental Policy, which took into consideration such new factors as: the Rio Declaration, the new Constitution of Poland, the European Agreement, duties connected with Poland's membership in OECD and NATO, the new administrative division of Poland and the division of powers between the State and local administration, introducing administrative reforms in the public health, social welfare and education systems.[12] The Second National Environmental Policy in its Chapter 1 refers to the Polish Constitution stating that the Republic of Poland ensures the protection of the environment, while pursuing the principle of sustainable development. Referring to particular principles for the concept of sustainable development, as a guidance for national environmental policy, the document stresses that the essence of the concept of sustainable development is based on an equal and balanced approach to social, economic and ecological issues, which means that the environmental protection issues are taken into consideration in all policies of the State.

The following principles have been listed as a guidance for implementation of the Second National Environmental Policy: 1) precautionary principle; 2) the principle of a high level of environmental protection; 3) the principle of equal access to the natural environment (considering the inter-generation equity; inter-regional and inter-group equity); 2) the principle of regionalisation of the State ecological policy; 3) the principle of socialization of the State ecological policy; 4) the polluter pays principle; 5) the principle of prevention; 7) the principle of applying the best available technique; 8) the principle of subsidiarity

11 *Monitor Polski* 1994, nr. 8, item 6.

12 The Second National Environmental Policy of 2000 has been known also as the New National Environmental Policy. Also the National Environmental Policy of 1991 is known as the First National Environmental Policy.

and auxiliarity; 9) the principle of security clauses; 10) the principle of environmental effectiveness and economic efficiency.[13]

Such a catalogue of principles clearly evidences on its eco-development scope. It is somehow justified because the title of the document contains the term "environmental". Although this document is much less of a sectoral (environmental) character in comparison to the document of 1991, it still maintains their essential features. To be fair, it needs to be said that this document states that the primary objective of the new, Second Environmental Policy is to ensure ecological safety for Polish people, hence the principles listed are adequate, although they only partly refer to the standards of the principle of sustainable development as it is reflected in the Polish Constitution.

To achieve the goals originating from the concept of sustainable, the Polish Government in the Second National Environmental Policy set out: 1) strategies, 2) tactics and 3) sectoral actions.

Strategies are shaping the macro-economic policies that will provide conditions to assist sustainable development in Poland. They provide, *inter alia,* grounds for the encouragement of environmentally-friendly consumption patterns and discouraging consumptional life-styles as well as for improving the quality of all components of the environment throughout the country. Those strategies call for providing the public with access to environmental information, participation in the decision-making processes, access to justice in matters concerning the environment, and for promotion of the concept of sustainable development in international relations.

Tactics were set for the development and improvement of appropriate laws, structures and administrative management systems at the industrial and institutional levels. They were also set up for promoting the principles and application of environmental management systems at the national level. In this part, the Second National Environmental Policy also provided grounds for effective negotiations with the European Union concerning the necessary transition periods for Poland's implementation of the EU requirements and administering environmental audits in the privatization process of investments and the EIA procedures for new developments.

13 For the text of the document see the website of the Ministry of Environment: http://www.mos.gov.pl

Sectoral actions were directed to energy and other industries, transport, agriculture, forestry, construction and municipal management, land planning, tourism, health care, commerce, defense and the military sector for the compliance of their activities with those arising from the concept of sustainable development. For instance, for various industries, the sectoral actions call, *inter alia,* for the use of alternative raw materials and renewable energy sources, cleaner production technologies, improvement of energy and raw materials efficiency; promotion of environmental management systems, etc. In commerce, sectoral actions were focused on the introduction of eco-labeling; improvement of information about the products' impact on the environment; introduction of product charges and deposits. Similar actions were to be taken in other sectors of the national economy.

Following the guidelines from the Second National Environmental Policy, the Ministry of Environment has drafted a document subsequently submitted to the Parliament, entitled The Strategy for Sustainable Development in Poland till the year 2025 (further referred to as Strategy), which presents itself as guidelines for other ministries, and is an example of perceiving sustainable development mainly from the civilisation perspective.[14] The authors of that document recognized that Poland, owing to its achievements, stepped into the club of countries which are to participate in the global process of sustainable development. That is why in the Strategy only some principles of the Rio Declaration, i.e. 1, 2, 3, 4, 5, 7, 8, 10, 11, 13, 16, 17 and 27 were directly adopted.[15]

14 ibidem.

15 The following principles from the Rio Declaration have been adopted for the Strategy: 1/ Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature; 2/ States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction; 3/ The right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations; 4/ In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it; 5/ All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world; 7/ States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknow-

The Strategy explains that other principles were by-passed because many of them concern developing countries, and although Poland is sufficiently economically and socially developed to take into consideration such principles like e.g. those concerning demographic policy, it is at the same time too poor to take the responsibility (mainly financial) for the development of least developed countries. It does not mean that in the future, concurrently with the economic and social progress in Poland, there should not be developed structures and means of development assistance for developing countries. Besides, Poland participates in such assistance in the framework of such organisations as OECD, NATO, UN and the EU.

Inclusion of the above-mentioned principles in the Strategy does not seem to be clearly justified. Why, for example, have principles 9, 12, 14, and 15 not

ledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command; 8/ To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies; 10/ Environmental issues are best handled with participation of all concerned citizens, at all relevant levels. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided; 11/ States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries; 13/ States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction; 16/ National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment; 17/ Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority; 27/ States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principle embodied in ...[Rio Declaration] and in the further development of international law in the field of sustainable development.

been included? Or the principles concerning particular groups of society as well as those concerning the concept of global solidarity in the face of an endangered environment. It could, therefore, be said that some of those principles are of legal-international character, as contained in international treaties to which Poland is a contracting party, and therefore their repetition appears to be unnecessary. Nevertheless, some of them have found their place among those listed in *the* Strategy. It looks even less justified in the light of the fact that this document is considered to be the basis for the development of sectoral strategies, including the education of society, which is essential for the implementation of the concept of sustainable development.

The Strategy is no doubt the document which looks at sustainable development in Poland more from the perspective of civilization than the preceding Second National Environmental Policy. The document clearly states that sustainable development does not mean environment protection only. Sustainable development means development conditioned by the ecological space which, through the assumed synergy of the socio-economic and environmental aspects, becomes the safe and beneficial development for mankind, the economy and the environment. Thus, it is not an obstacle for the progress but its stimulator. Sustainable development does not mean a measurable goal by itself. It is a process which is a task over a period of time to be taken care of by generations.

Furthermore, the Strategy stipulates that the sustainable development strategy should serve first of all as a basis for the development of conditions for such stimulation of the development processes that they would extend the danger to the environment to a minimum. The implementation of these postulates must not, at the same time, reduce the pace of economic growth or widen the poverty margin which, in turn, would create social and economic tensions. The Strategy concerns the safety of the national territory, its ecology, maintenance of the sovereignty of state, health and social protection for each citizen, compliance of rights and duties as stipulated in the Constitution as well as compliance with legal orders. The Strategy also mentions the necessity of the fulfillment by Poland of its duties resulting from the obligations stemming from ratified international agreements as well as declarations made by the Government. All those efforts constitute a modicum of guarantee that the Polish doctrine and practice in the implementation of the concept of sustainable development will not stay on the margin of global efforts in this regard.

3. Selected Polish legislation viewed from the perspective of the concept of sustainable development

The international legal concept of sustainable development has been laid down in the Polish Constitution as a principle. The Constitution of the Republic of Poland in Article 5 of Chapter I stipulates that the Republic of Poland safeguards the independence and sovereignty of its territory, ensures freedom and human and citizens' rights as well as security of citizens, safeguards the national heritage and ensures the protection of the environment, following the principle of sustainable development.[16]

Inserting such terms into the major chapter of the Constitution indicates that the Republic of Poland considers the issue of the environment as one of the most important. According to that, the Constitution orders public authorities to carry on the policy of ensuring ecological safety for present and future generations, and also stipulates that the protection of the environment is one of the duties of public authorities which have to support the activities of citizens for the protection and improvement of the environment, following the international-legal concept of sustainable development (Article 74). Moreover, Article 86 of the Constitution stipulates that everybody is obliged to take care of the environment and is responsible for its deterioration.

There are also other parts in the Constitution emphasizing the particular importance of environmental issues, which contain standards and rules concerning the right to the environment and information, right to protection of health, right to safe and hygienic conditions of work (articles 66, 68, 74), which are all elements of the third generation of human rights. It is worth mentioning that by Article 74 (1), the principle of ecological security for the present and future generations equity has been adopted in Polish legislation.

It should be stressed that, by virtue of Article 31 of the Constitution, in the democratic state the limitations in the sphere of using constitutional freedom and rights can be made solely by means of an appropriate law and only when they are absolutely necessary, for example in order to protect the environment. This, once again, shows that Polish law-makers put emphasis on the environmental aspect of the concept of sustainable development.

16 For the text of the Polish Constitution of 2 April 1997 (Konstytucja Rzeczpospolitej Polskiej z 2 kwietnia 1997 r.), *Dziennik Ustaw Rzeczpospolitej Polskiej* 1997, nr. 78, item 483. For English version see: Polish Constitutional Law – the Constitution and Selected Statutory materials, Warsaw, Chancellary of the Seym 2000, pp. 27–90.

The fact that environmental issues occupy the highest rank, that of the Constitution, did not practically mean that all the existing laws had to be replaced, because many of them have been already prepared at the time when the Constitution was developed. Those laws in force before the present Constitution was adopted have been used as the directives which were later reflected in the Constitution itself. Hence, for example, the Law on Land Planning (Ustawa o zagospodarowaniu przestrzennym) adopted on 7 July 1994 has, for the first time in Poland, taken as a directive the concept of sustainable development.[17] Article 1(1) clearly states that its regulations are taking sustainable development as a basis. That article is of considerable importance, because before the law has been adopted, the concept of sustainable development was not more than a political postulate.

Obviously, this law is not sufficient for the establishment of a whole national economic strategy based on the principle of sustainable development. Nevertheless, it changes dramatically the approach to land planning by making it subordinate to ecological criteria through the introduction of environmental audit of new investments. In the same year, the Parliament adopted the Law on Construction (Prawo budowlane), subsequently modified in 1997 in order to adapt it to the requirements of the Constitution and of the principle of sustainable development contained in it.[18]

On 19 January 1995, the Parliament of the Polish Republic adopted a resolution on policy of sustainable development which reflects the continuity of steps taken by the Government towards the implementation of the principle of sustainable development in Polish law.[19] It has been underlined by the Parliament that sustainable development represents an obligation of the contemporary civilisation, and its implementation is one of primary goals of the Republic of Poland. In order to put it in practice, the Parliament recommends the Government to accelerate the interdisciplinary and multilateral activities in the economic and international policy, but it does not limit that duty to the Ministry of Environment. All central bodies of the State administration are to share the burden equally. An important role was assigned to the Commission for Eco-

17 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskiej* 1994, nr. 89, item 415; Changes: *Dziennik Ustaw Rzeczpospolitej Polskiej* 1996, nr. 106, item 496; *Dziennik Ustaw Rzeczpospolitej Polskiej* 1997, nr. 111, item 726; nr. 133, item 885; nr. 141, item 943; nr. 106, item 668.

18 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskiej 1994,* nr. 89, item 414; Changes: *Dziennik Ustaw Rzeczpospolitej Polskiej* 1997, nr. 111, item 726.

19 *Monitor Polski* 1955, nr. 4 item. 48.

development which is to support any initiatives by citizens, and to the Government and Parliament in the field of the promotion and introduction of the principles of sustainable development in Poland. The Parliament has also considered education of the society, which would create awareness of the necessity to follow those principles, as one of the most important tasks.

Still in the period of drafting of the Constitution, the Law on Maintenance of Cleanliness and Orderliness in the Communities (Ustawa o utrzymaniu czystości i porządku w gminach) was adopted on 13 September 1996. On 27 June and 21 August 1997, namely in the year when the Constitution was adopted, a new updated Law on the Protection and Shaping up of the Environment (Ustawa o ochronie i kształtowaniu środowiska), and a Law on Waste (Ustawa o odpadach), have been adopted.[20] Those laws were drafted in the spirit of the principle of sustainable development included in the new Constitution of the Republic of Poland. Although the Law on Waste as well as the Law on Maintenance of Cleanliness and Orderliness in the Communities do not use *expressis verbis* the term sustainable development, their provisions indicate the use of standards and rules valid for the implementation of the concept of sustainable development.

The Law on the Protection and Shaping up of the Environment contains a legal definition of sustainable development in the way it is conceived by the Polish legislator. Article 3, section 3a of the Law, says that sustainable development means such a socio-economic development in which – in order to balance the chances of access to the environment of the particular societies or their citizens of both present and future generations – the integration of political, social and economic actions takes place, while maintaining the environmental balance as well as sustainability of the basic natural processes. Such notion contains a lot of key elements of the concept of sustainable development as it has been developed in the international law, however with an emphasis on the environmental perspective of this concept.[21]

On 10 April 1997, the Law on Energy (Prawo energetyczne) was adopted which refers repeatedly to the concept of sustainable development and introduces

20 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskiej* 1994, nr. 49, item 196; Changes: *Dziennik Ustaw Rzeczpospolitej Polskiej* 1995, nr. 90, item 446; *Dziennik Ustaw Rzeczpospolitej Polskiej* 1996, nr. 106, item 496, nr. 132, item 622; *Dziennik Ustaw Rzeczpospolitej Polskie*j 1997, nr. 46, item 296; nr. 96, item 592; nr. 121, item 770; nr. 133, item 885; *Dziennik Ustaw Rzeczpospolitej Polskiej* 1998, nr. 106, item 668; nr. 113, item 715.

21 Ibidem.

principles that prove their practical use and not only, as it happens sometimes, the use of just one more particular term as a facade.[22] This Law introduces rules on economic and rational utilization of fuels and energy, keeping in mind the requirements of the environment. It also refers to renewable energy resources (Article 3) and defines the principles of national energy policy according to, again, the principle of sustainable development (Article 15). Five of the fifteen regulations listed in that Article give justification for taking actions for the implementation of the principle of sustainable development in the energy sector in Poland.

One of the last acts adopted by the Polish Parliament which directly refers to the concept of sustainable development is the Law on the Protection of the Environment (Prawo ochrony środowiska), adopted on 27 April 2001, replacing the above-mentioned laws of 1997.[23] As stipulated in its Article 1, this Law defines the rules for the protection of the environment as well as the conditions of using natural resources, implementing the requirements of sustainable development. These rules concern: 1) the setting up of the conditions of the protection of the environment; 2) conditions for the introduction of substances or energy into the environment; 3) costs of the use of environment; 4) public access to information on the environment; 5) public participation in matters concerning the environment; 6) duties and responsibilities of the administrative authorities, and sanctions.

It is interesting to note that Article 3 of this Law basically repeats the above-mentioned definition of the previous Law on the Protection and Shaping up of the Environment as far as the concept of sustainable development is concerned. The only difference concerns emphasis. The Law on the Protection of the Environment put more stress on the necessity of the integration of political, economy and social activities taking into account the environmental balance. It may, therefore, be said that this definition constitutes a kind of legal interpretation in Polish law of the said international legal concept.

Yet, further evidence of the principle of sustainable development are Art. 4 and 55 of the Law on the Protection of Natural Environment (Ustawa o ochronie przyrody),[24] and Art. 11 of the Law on Voivodenship Autonomy of 5 June 1998 (Ustawa o samorzadzie województwa),[25] as well as Art. 1 of the Law on Packaging and Packaging Waste of 11 May 2001 (Ustawa o opako-

22 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskiej* 1977, nr. 54, item 348.
23 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskiej* 2001, nr. 62, item 627.
24 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskiej* 1991, nr. 114 item 492.
25 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskie*j 1998, nr. 91, item 576.

waniach i odpadach opakowaniowych).[26] The Law on Management of Water Resources of 18 July 2001 (Prawo wodne) also contains direct reference to the constitutional principle of sustainable development (Art. 63 and 125).[27]

The above-mentioned examples of legislation certainly do not exhaust the whole range of achievements of Polish legislative authorities as far as the introduction of the concept of sustainable development into legal use is concerned. However, they can be considered as one of the most essential and reflecting the approach of Polish law-makers to the international legal concept of sustainable development. Polish legislation in this field also contains other legislative acts of various character: those of the general level and sectoral levels, those at the level of lowest territorial administrative units, executive and technical regulations, etc. and there are many of them. Therefore, considering the heavy workload of the Polish legislative authorities in the period of transformation of the political system, all those accomplishments should be valued, even if they reflect mainly environmental component of sustainable development.

4. Poland's obligations resulting from the Treaty of Accession to the European Union in the field of sustainable development

Poland has confirmed its commitment to follow the international-legal concept of sustainable development by signing the final documents of the United Nations Conference on Environment and Development (1992), and the World Summit on Sustainable Development (2002). A related Polish law has been also enriched by the ratification by Poland of the international agreements in this field which, according to Article 87 of the Polish Constitution, have the same power as the Constitution and national law because, according to the Constitution, ratified international agreements after their publication in *Dziennik Ustaw Rzeczpospolitej Polskiej* (Journal of Laws of the Republic of Poland) become part of the national legal order and are to be directly implemented (Article 91 of the Constitution).

In the past period Poland has ratified many international environmental agreements and actively participated in the related international law-making process. At present, Poland is contracting party to tens of international agreements related to the environment. In this respect it needs to be said that massive

26 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskiej* 2001, nr. 63, item 638.
27 For the text see: *Dziennik Ustaw Rzeczpospolitej Polskiej* 2001, nr. 115, item 1229.

development of human resources, to be adequately prepared for their implementation, is required. The above-mentioned concerns of the legislative bodies have found their reflection in the relatively large number of laws adjusting the out-of-date legal regulations to the requirements of the new situation resulted from the transformation of the political system and development of a market economy as well as to new needs related to Poland's membership of the European Union.[28]

Particular attention was given to the European Agreement which establishes an association between the Republic of Poland on the one side, and the European Communities on the other, made in Brussels on 16 December 1991 and later referred to as European Agreement.[29] The Agreement stipulates that Poland is committed to introduce principles, standards and legal mechanisms related to the environment in the same way as they are in force in the European Communities. It appears that the Agreement ensured that the obligations emerging from it has become a major factor affecting the way the Polish environmental policy has been formulated.

The European Agreement defined basic goals for the cooperation between its parties in the field of the environment as well as the means for the achievement of those goals. One of them is to integrate environmental issues into all policy areas which, since the Amsterdam Treaty, have become the Union's fundamental objective of sustainable development. Poland has been committed to the connection of its economic development with the protection of the environment and to the fulfillment of the European Union's requirements regarding the environment, through adjustment of its present and future legislative system to the legislative system of the EU.

Among the general provisions of the Agreement there are some which are in direct relationship with the sustainable development concept, e.g. item 7 of the preamble stipulating that there should be a linkage between full implementation by Poland of political, economic, and legal reforms and the protection of the environment. Article 71 obligates Poland to follow the principle of sustainable development in its social and economic development, particularly when policies for investment in various sectors of the economy such as mining, energy, agriculture, transport, development of the regions, and tourism are concerned.

28 See the website of the Ministry of Environment: http://www.mos.gov.pl for information on the international agreements ratified by Poland in this field.

29 For the text of the European Agreement see *Dziennik Ustaw Rzeczpospolitej Polskiej* 1994, nr. 11, item 38.

The specific environmental provisions of the European Agreement directly fall under the Title VI on Economic Co-operation. In this connection Title V of the Agreement also has to be mentioned, designed to strengthen the free trade areas established under the Agreement by using provisions in which it has been expressed that Poland as party to the Agreement "undertakes" and "shall endeavor" certain activities and steps, thus stressing Poland's commitment to these provisions . Its provisions on approximation of laws provide the legal basis for the adoption and implementation of the entire *acquis communautaire.* The first article in this Chapter on approximation of laws contains a broad range of requirements that Poland ensures in the national legislation. The environment is also listed as one of the areas for legislative approximation. Hence, according to Article 68, Poland has committed itself to adjust its present and future legislation to that of the Communities' and to take steps in order to ensure the compatibility of future laws with those of the European Union. It, first of all, should concern the harmonization of laws in the field of the protection of health of people and animals, flora, and natural environment (Article 69).

In Article 80 of the Agreement, which deals with the Natural Environment, efforts to improve the deteriorating environment have been made a priority. It should be reflected *inter alia* in more efficient control of the air and water pollution of the regional and trans-boundary character, in the impact of agriculture on the environment, in the construction sector and land planning, and it should be combined with the exchange of information and experts. Therefore, it is generally considered that Poland's legislative activities, stimulated by the standards of the European Agreement, had direct impact on the way the future legislation in the field of the environment as formulated, following the concept of sustainable development. Since the beginning of the 1990s, extensive actions have been taken for the harmonization of the socio-economic system, the structure of legislation, institutional management and the social and economic infrastructure with those existing in the European Union.[30] As a result of many years of action, the European Union accepted, on 25th November 2002, the

30 See the website of the Ministry of Environment, supra note 13. According to law in force for 27 March 2003, Poland transposed the following regulations, directives and decisions of the EU legal system in the field of the environment: Dir. Dir. 97/11/EC; 2001/42/EC; 90/313/EC; 98/70/EC; 99/32/EC; 94/63/EC; 99/32/EC; 96/62/EC; 99/30/EC; 92/72/ EEC; 2002/3 EC; 97/68/EC; 1999/94/EC; 2000/69/EC; 75/442/EEC; 91/689/EEC; 75/439/EEC; 94/62/ EC; 99/31/EC; 91/157/EC; 96/59/EC; 89/429/EEC; 94/67/EC; 2000/76/EC; 86/278/EEC; 2000/53/EC; 91/271/EEC; 91/676/EEC; 76/464/EEC; 75/440/EEC; 98/83/EC; 76/160/EEC; 78/659/EEC; 79/923/EEC; 2000/60/EC; 92/43/EEC; 79/409/EEC; 99/22/EC; 96/61/EC; 96/82/EC; 2001/80/EC; 2002/18/EC; 2000/14/EC; 2002/49/EC;

Common Position by which it confirmed the earlier negotiated conditions as well as agreed to an additional transitional period as regards Directive 2001/80. The European Union accepted altogether ten proposals of Poland for the transitional periods. While agreeing to concessions to Poland, the European Union stressed that those concessions were made because of the economic and demographic potential of Poland, and also because of the magnitude of investments Poland needs to make in the field of the protection of the environment. Those transitional periods concern such crucial areas as: quality of air and waters, industrial pollution, waste management, and nuclear safety.[31]

By signing the Accession Treaty, on 16 April 2003 in Athens, Poland has committed itself to abide by its obligations, including these of the acquis communautaire. Thus, Poland is obliged to follow, in its policy and implementation actions, the requirements stemming from the concept of sustainable development based on the balance of socio-economic and environmental elements which, as mentioned earlier, has already been written down as a principle in the Polish Constitution.[32]

5. Conclusions

Certainly, the value of legal activities can only be measured in practice by the achievements in the enforcement of law. Even best regulations without proper enforcement often result in the so called facade-like laws. Such remarks refer also, but not only, to the implementation of the concept of sustainable development. This is due to many causes, starting from the truism that the law does not keep pace with the reality and is frequently not adjusted to local conditions, and ending with lack of human and financial resources which make the implementation of, for example, technical standards for the protection of the environment impossible. One should not forget the issue of the education of society and of the fostering of new attitudes conditioning the approach to the environment and development, which would require abandonment of habits of living (lifestyles) as well as of traditional ways of running economic activities.

96/29/EUROATOM; 90/641/EUROATOM; 97/43/EUROATOM. Resolutions: 93/1493/EUROATOM; 2037/2000/EC; 338/97/EC. Dec. 1999/276/EC.

31 For more detailed information on Polish negotiations and the Common Position on environmental issues as well as for the transitional periods see the website of the Office of the Committee of European Integration (UKIE – Urząd Komitetu Integracji Europejskiej), Annex II to the Accession Treaty: http://www.ukie.gov.pl

32 For the text of the Treaty see: http://www.ukie.gov.pl

All those circumstances have taken place in Poland. As for now, there is no way yet to assess the level of their importance as well as of their impact on the implementation of the constitutional principle of sustainable development. What is noticeable, is the fact that Polish society has so far insufficiently developed the behaviours and habits of a citizen's society. It is still thinking in the categories: "we" (people) and "them" (the rulers), also when it comes to thinking about future generations. Certain expectations for the change in social habits could be associated with the National Strategy for Ecological Education.[33]

Something, which is less visible for the non-professional or outside observer, also needs to be noticed, namely that the implementation of law is a costly process and, because of that, it takes a long time. It requires an appropriately developed infrastructure at nearly all levels of the State administration, with stress on its least-prepared level i.e. the level of local community. These remarks also concern, possibly *a fortiori*, the legal-international standards whose knowledge at the lower administrative levels responsible for their implementation is quite inadequate. And, to be fair, that knowledge is so far practically only available to a narrow group of civil servants, politicians and academics.
Implementation of the concept of sustainable development requires also the competence and real will of political elites. Therefore, there are views that the concept of sustainable development in Poland has not entered the everyday practice much further then beyond the legislature stage.[34] Even if that view is considered exaggerated, the review of Polish legislative accomplishments reveals that the use of the term sustainable development is still more facade-like. This view seems to be supported by the lack of executive regulations of general preconditions contained in the laws, which often are considered abstract. Perhaps one relevant factor here is the fact that the term sustainable development is perceived in so many and imprecise ways, both by politicians and lawyers as well as, paradoxically, by those who practically deal everyday with the issues of sustainable development.

Even though the concept of sustainable development has been defined in the aforementioned Article 3 of the Law on the Protection of the Environment, in theory and practice there are at least two perceptions of sustainable development, namely ecological and civilisational.[35] In the ecological perspective (eco-

33 Text is available on the website of the Ministry of Environment http://www.mos.gov.pl

34 Równy, K., op.cit., supra note 3.

35 Górka, K., Poskropko, Radecki, W., Ochrona Środowiska (Protection of the Environment), Warszawa 2001, p. 84.

development), sustainable development is perceived as the process of limitation of the impact on the environment and its improvement by means of the "ecologisation" or "greening" of economic processes and implementation of integrated systems for the protection of the environment. In the civilisational aspect, sustainable development is understood as the process of searching for, and of implementing the new forms of economic development, new technologies, new sources of energy, new means of social communication, and also new forms of non-economic activities for the society. And, although in general both perspectives of the perception of sustainable development are expected to result in the achievement of the same goal, the roads which lead to that goal are perceived in a different way. It appears that, after all, both approaches inadequately integrate the environmental, developmental and, in particular, social concerns.

This brief review of Polish legislation in the field of sustainable development demonstrates the adoption and incorporation into Polish law of the international legal concept of sustainable development with an emphasis on its pro-environmental dimension. Polish legislative experience shows that the socio-economic development aspect of the sustainable development concept has been generally subordinated to the classic principle of the preservation of nature.

Among academics, as well as in professional circles, a view is often expressed that Poland's weaknesses in the implementation of the concept of sustainable development have little to do with relevant legislation (where there is still a room for improvement) but concern mostly the sphere of implementation and compliance. However, it must not be forgotten that one of the conditions of compliance with law is its clarity and precision, which at times are missing in Polish legislation. From the same review it appears that the term sustainable development and its content is not uniformly perceived by the Polish legislator, although this term is very often used as a key phrase in order to comply with the Constitution.

Polish problems are to a certain extent similar to common weaknesses encountered by other countries in the process of the implementation of law, due both to insufficient financial resources and to resistance of certain interest groups, which no doubt slow down the enforcement of law. Well developed countries cope better, but in countries where the implementation mechanisms do not follow the legislation requirements, the law can be satisfied with its facade-like character, particularly when the will of the ruling political class is also facade-like.

The importance of education of the society as well as of the attempt to promote new civilisational habits are also not to be underestimated. And even

if the environmental education of Polish society should progress faster than e.g. its economic education, the environmental background of the society – at least until now – is relatively narrow. These remarks concerning education of the society also apply to the education of Polish lawyers, who have significant influence in transforming constitutional obligations into appropriate legal instruments and in applying the law in practice.

APPENDIX

ILA NEW DELHI DECLARATION OF PRINCIPLES OF INTERNATIONAL LAW RELATING TO SUSTAINABLE DEVELOPMENT*

The 70th Conference of the International Law Association, held in New Delhi, India, 2-6 April 2002,

NOTING that sustainable development is now widely accepted as a global objective and that the concept has been amply recognized in various international and national legal instruments, including treaty law and jurisprudence at international and national levels,

EMPHASIZING that sustainable development is a matter of common concern both to developing and industrialized countries and that, as such, it should be integrated into all relevant fields of policy in order to realize the goals of environmental protection, development and respect for human rights, emphasizing the critical relevance of the gender dimension in all these areas and recognizing the need to ensure practical and effective implementation,

TAKING THE VIEW that there is a need for a comprehensive international law perspective on integration of social, economic, financial and environmental objectives and activities and that enhanced attention should be paid to the interests and needs of developing countries, particularly least developed countries, and those adversely affected by environmental, social and developmental considerations,

RECALLING that in its Report on *Our Common Future* (1987), the World Commission on Environment and Development identified the objective of sustainable development

* ILA Resolution 3/2002 (see also www.ila-hq.org and UN Doc. A/57/329)

as being '…to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs',

CONCERNED about growing economic and social inequalities between and within States as well as about the ability of many developing countries, particularly least developed countries, to participate in the global economy,

RECOGNIZING the need to further develop international law in the field of sustainable development, with a view to according due weight to both the developmental and environmental concerns, in order to achieve a balanced and comprehensive international law on sustainable development, as called for in Principle 27 of the Rio Declaration and Chapter 39 of Agenda 21 of the UN Conference on Environment and Development as well as in the various resolutions on legal aspects of sustainable development of the International Law Association,

AFFIRMING that consideration should be given to the interaction of States, intergovernmental organizations, peoples and individuals, industrial concerns and other non-governmental organizations as participants in multilateral development co-operation,

AWARE of the concern expressed by the UN General Assembly during its 19th Special Session in 1997 to review progress achieved since the 1992 UN Conference on Environment and Development that 'the overall trends for sustainable development are worse today than they were in 1992'; and of the General Assembly's call 'to continue the progressive development and, as and where appropriate, codification of international law related to sustainable development',

RECOGNIZING that the forthcoming World Summit on Sustainable Development, convened by the United Nations General Assembly in Johannesburg, South Africa, 26 August-4 September 2002, provides an important opportunity for addressing the role of international law in the pursuance of sustainable development,

REAFFIRMING the ILA's Seoul Declaration on Progressive Development of Principles of Public International Law Relating to a New International Economic Order, as adopted by the 62nd Conference of the International Law Association held in Seoul in 1986,

TAKING INTO ACCOUNT the United Nations General Assembly Declaration on the Right to Development of 1986,

TAKING FURTHER INTO ACCOUNT the Rio Declaration on Environment and Development and related documents ensuing from the 1992 UN Conference on Environment and Development, as well as the final documents resulting from the series of world conferences on social progress for development (Copenhagen, 1993), human rights (Vienna, 1993), population and development (Cairo, 1994), small islands states and

sustainable development (Barbados, 1994), women and development (Beijing, 1995), least-developed countries (Brussels, 2001) and financing for development (Monterrey, 2002), respectively,

EXPRESSES the view that the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations,

IS OF THE OPINION that the realization of the international bill of human rights, comprising economic, social and cultural rights, civil and political rights and peoples' rights, is central to the pursuance of sustainable development,

CONSIDERS that the application and, where relevant, consolidation and further development of the following principles of international law relevant to the activities of all actors involved would be instrumental in pursuing the objective of sustainable development in an effective way:

1. The duty of States to ensure sustainable use of natural resources

1.1 It is a well-established principle that, in accordance with international law, all States have the sovereign right to manage their own natural resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction.

1.2 States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems. States must take into account the needs of future generations in determining the rate of use of natural resources. All relevant actors (including States, industrial concerns and other components of civil society) are under a duty to avoid wasteful use of natural resources and promote waste minimization policies.

1.3 The protection, preservation and enhancement of the natural environment, particularly the proper management of climate system, biological diversity and fauna and flora of the Earth, are the common concern of humankind. The resources of outer space and

celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are the common heritage of humankind.

2. The principle of equity and the eradication of poverty

2.1 The principle of equity is central to the attainment of sustainable development. It refers to both *inter-generational equity* (the right of future generations to enjoy a fair level of the common patrimony) and *intra-generational equity* (the right of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources).

2.2 The present generation has a right to use and enjoy the resources of the Earth but is under an obligation to take into account the long-term impact of its activities and to sustain the resource base and the global environment for the benefit of future generations of humankind. 'Benefit' in this context is to be understood in its broadest meaning as including, *inter alia*, economic, environmental, social and intrinsic benefit.

2.3 The right to development must be implemented so as to meet developmental and environmental needs of present and future generations in a sustainable and equitable manner. This includes the duty to co-operate for the eradication of poverty in accordance with Chapter IX on International Economic and Social Co-operation of the Charter of the United Nations and the Rio Declaration on Environment and Development as well as the duty to co-operate for global sustainable development and the attainment of equity in the development opportunities of developed and developing countries.

2.4 Whilst it is the primary responsibility of the State to aim for conditions of equity within its own population and to ensure, as a minimum, the eradication of poverty, all States which are in a position to do so have a further responsibility, as recognized by the Charter of the United Nations and the Millennium Declaration of the United Nations, to assist States in achieving this objective.

3. The principle of common but differentiated responsibilities

3.1 States and other relevant actors have common but differentiated responsibilities. All States are under a duty to co-operate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should co-operate in and contribute to this global partnership. Corporations have also responsibilities pursuant to the polluter-pays principle.

3.2 Differentiation of responsibilities, whilst principally based on the contribution that a State has made to the emergence of environmental problems, must also take into

account the economic and developmental situation of the State, in accordance with paragraph 3.3.

3.3 The special needs and interests of developing countries and of countries with economies in transition, with particular regard to least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognized.

3.4 Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries, *inter alia* by providing financial assistance and access to environmentally sound technology. In particular, developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development.

4. The principle of the precautionary approach to human health, natural resources and ecosystems

4.1 A precautionary approach is central to sustainable development in that it commits States, international organizations and the civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, including in the light of scientific uncertainty.

4.2 Sustainable development requires that a precautionary approach with regard to human health, environmental protection and sustainable utilization of natural resources should include:
(a) accountability for harm caused (including, where appropriate, State responsibility);
(b) planning based on clear criteria and well-defined goals;
(c) consideration in an environmental impact assessment of all possible means to achieve an objective (including, in certain instances, not proceeding with an envisaged activity); and
(d) in respect of activities which may cause serious long-term or irreversible harm, establishing an appropriate burden of proof on the person or persons carrying out (or intending to carry out) the activity.

4.3 Decision-making processes should always endorse a precautionary approach to risk management and in particular should include the adoption of appropriate precautionary measures.

4.4 Precautionary measures should be based on up-to-date and independent scientific judgment and be transparent. They should not result in economic protectionism. Transparent structures should be established which involve all interested parties, including

non-state actors, in the consultation process. Appropriate review by a judicial or administrative body should be available.

5. The principle of public participation and access to information and justice

5.1 Public participation is essential to sustainable development and good governance in that it is a condition for responsive, transparent and accountable governments as well a condition for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions. The vital role of women in sustainable development should be recognized.

5.2 Public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas. It also requires a right of access to appropriate, comprehensible and timely information held by governments and industrial concerns on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, without imposing undue financial burdens upon the applicants and with due consideration for privacy and adequate protection of business confidentiality.

5.3 The empowerment of peoples in the context of sustainable development requires access to effective judicial or administrative procedures in the State where the measure has been taken to challenge such measure and to claim compensation. States should ensure that where transboundary harm has been, or is likely to be, caused, individuals and peoples affected have non-discriminatory access to the same judicial and administrative procedures as would individuals and peoples of the State in which the harm is caused.

6. The principle of good governance

6.1 The principle of good governance is essential to the progressive development and codification of international law relating to sustainable development. It commits States and international organizations:
(a) to adopt democratic and transparent decision-making procedures and financial accountability;
(b) to take effective measures to combat official or other corruption;
(c) to respect the principle of due process in their procedures and to observe the rule of law and human rights; and
(d) to implement a public procurement approach according to the WTO Code on Public Procurement.

6.2 Civil society and non-governmental organizations have a right to good governance by States and international organizations. Non-state actors should be subject to internal democratic governance and to effective accountability.

6.3 Good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development as well as the full participation of women in all levels of decision-making. Good governance also calls for corporate social responsibility and socially responsible investments as conditions for the existence of a global market aimed at a fair distribution of wealth among and within communities.

7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives

7.1 The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind.

7.2 All levels of governance – global, regional, national, sub-national and local – and all sectors of society should implement the integration principle, which is essential to the achievement of sustainable development.

7.3 States should strive to resolve apparent conflicts between competing economic, financial, social and environmental considerations, whether through existing institutions or through the establishment of appropriate new institutions.

7.4 In their interpretation and application, the above principles are interrelated and each of them should be construed in the context of the other principles of this Declaration. Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter of the United Nations and the rights of peoples under that Charter.

New Delhi, 6 April 2002.

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