

Part 4: The Principles of International Law Related to Sustainable Development

In recent years discussions of the role of international law in sustainable development have expanded considerably. Increasing numbers of international treaties address global and regional sustainable development goals.¹ In the aftermath of the World Summit on Sustainable Development, there can be legitimate expectations that States and other actors within them will make good faith efforts to live up to their global commitments. And indeed, the decisions of international courts and tribunals are beginning to recognise sustainable development goals and instruments explicitly,² and its concepts are increasingly being invoked before national courts and tribunals around the world.³

Emerging mainly from 'soft-law instruments', such as declarations and international statements, certain principles are starting to assert certain persuasive force. Such principles may help to resolve conflicts related to sustainable development, and support the balanced integration of laws and policies at the intersection of international environmental, social and economic law.

After ten years of study and exchange, the International Law Association Committee on the Legal Aspects of Sustainable Development released the 2002 *New Delhi Declaration on the Principles of International Law Related to Sustainable Development*,⁴ which identifies seven principles in particular, without claiming to be exhaustive. The text of the New Delhi Declaration is reproduced below. At each principle, a brief commentary is provided based on analysis from the *Sustainable Development Law: Principles, Practices and Prospects* (OUP, 2004) to highlight certain aspects of the principle, and underline how it is reflected in the outcomes of the World Summit on Sustainable Development and the global climate change regime.

NEW DELHI DECLARATION OF PRINCIPLES OF INTERNATIONAL LAW RELATING TO SUSTAINABLE DEVELOPMENT

1. The duty of States to ensure sustainable use of natural resources

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.

States are under a duty to manage natural resources, including natural resources solely within their own territory or jurisdiction, in a rational, sustainable and safe way so as to

¹ See *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849, arts. 3 & 4. *United Nations Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 822, arts. 8 & 10, *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*, 17 June 1994, 33 I.L.M. 1328, arts. 4 & 5.

² See *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), I.C.J. Rep. 7), *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep. 226 at 438 and *Certain Phosphate Lands in Nauru (Nauru/Australia)* (1993), I.C.J. Rep. 322. See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 20 September, 1999, WTO Doc. WT/DS58/AB/R (Appellate Body Report) and *LCB v. United Kingdom* (1998) European Court of Human Rights Reports 1998-III.

³ See, for example, the cases of *Bulankulama v. The Secretary, Ministry of Industrial Development* (2000) Vol 7, No. 2 South Asian Environmental Law Reporter 1 (Sri Lankan Supreme Court) and *Shehla Zia and others v. WAPDA*, Case No 15-K of 1992 (Pakistan Supreme Court).

⁴ ILA Resolution 3/2002: *New Delhi Declaration Of Principles Of International Law Relating to Sustainable Development*, in ILA, Report of the Seventieth Conference, New Delhi (London: ILA, 2002). Available online: <http://www.ila-hq.org> and excerpted here.

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.

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.

[\[click here for brief commentary\]](#)

2. The principle of equity and the eradication of poverty

The principle of equity is central to the attainment of sustainable development. It refers to both *inter-generational equity* (the rights of future generations to enjoy a fair level of the common patrimony) and *intra-generational equity* (the rights of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources).

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.

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.

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 recognised by the Charter of the United Nations and the Millennium Declaration of the United Nations, to assist States in achieving this objective.

[\[click here for brief commentary\]](#)

3. The principle of common but differentiated responsibilities

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. Industrial concerns have also responsibilities pursuant to the polluter pays principle.

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.

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.

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.

[\[click here for brief commentary\]](#)

4. The principle of the precautionary approach to human health, natural resources and ecosystems

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 face of scientific uncertainty.

Sustainable development requires that a precautionary approach with regard to human health, environmental protection and sustainable utilization of natural resources should include accountability for harm caused (including, where appropriate, State responsibility), planning based on clear criteria and well-defined goals, consideration of all possible means in an environmental impact assessment to achieve an objective (including, in certain instances, not proceeding with an envisaged activity) and, 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.

Decision-making processes should endorse a precautionary approach to risk management and in particular should proceed to the adoption of appropriate precautionary measures even when the absence of risk seems scientifically assured.

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 body or administrative action should be available.

[\[click here for brief commentary\]](#)

5. The principle of public participation and access to information and justice

Public participation is essential to sustainable development and good governance in that it is a condition of 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 recognised.

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 commerce 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.

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 from which the harm is caused if such harm occurred in that State.

[click here for brief commentary]

6. The principle of good governance

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 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.

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.

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.

[click here for brief commentary]

7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives

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 needs of current and future generations of humankind.

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.

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 ones.

[click here for brief commentary]

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.

Recommended Resources:

2002 New Delhi Declaration

<http://www.ila-hq.org/pdf/Sustainable%20Development/Sus%20Dev%20Resolution%20+%20Declaration%202002%20English.pdf>

1992 Rio Declaration

<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>

CISDL / Foreign Affairs Canada Legal Working Papers on the Meaning and Status of the Principles of International Law Related to Sustainable Development (Drafts for Consultation Only)

The Principle of Integration and Interrelationship, In Particular In Relation To Human Rights and Social, Economic and Environmental Objectives: Recent Developments in International Law Related to Sustainable Development," Carinne Hébert-Sabourin & Sébastien Jodoin, Working Paper for Foreign Affairs Canada (Montreal: CISDL, 2005).

[\[Download Integration Principle PDF\]](#)

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"The Duty of States to Ensure Sustainable Use of Natural Resources: Recent Developments in International Law Related to Sustainable Development" K. Bottriel, reviewed by D. French, Working Paper for Foreign Affairs Canada (Montreal: CISDL, 2005).

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"The Principle of Equity and the Eradication of Poverty: Recent Developments in International Law Related to Sustainable Development," J. Hepburn, reviewed by A. Khalfan, Working Paper for Foreign Affairs Canada (Montreal: CISDL, 2005).

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"The Principle of Common but Differentiated Responsibilities: Recent Developments in International Law Related to Sustainable Development," I. Ahmad, Working Paper for Foreign Affairs Canada (Montreal: CISDL, 2005).

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"The Principle of the Precautionary Approach to Human Health, Natural Resources and Ecosystems: Recent Developments in International Law Related to Sustainable Development," J. Hepburn, reviewed by M.W. Gehring & M.C. Cordonier Segger, Working Paper for Foreign Affairs Canada (Montreal: CISDL, 2005).

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"The Principle of Public Participation and Access to Information and Justice: Recent Developments in International Law Related to Sustainable Development," A. M. Loong, reviewed by M.C. Cordonier Segger, Working Paper for Foreign Affairs Canada (Montreal: CISDL, 2005).

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"The Principle of Good Governance: Recent Developments in International Law Related to Sustainable Development," N. Chowdhury, Working Paper for Foreign Affairs Canada (Montreal: CISDL, 2005).

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TEXT OF BRIEF COMMENTARIES (TO BE LINKED TO EACH PRINCIPLE)

1. The Duty of States to Ensure Sustainable Use of Natural Resources

The 1992 *Rio Declaration*, in Principle 2, affirms the responsibility not to cause damage to the environment of other States or areas beyond the limits of national jurisdiction, and declares that the States have “the sovereign right to exploit their own resources pursuant to their own environmental and development policies.”

Reviews of current scholarly literature and the terms of many international treaties raise several interesting points with regards to this principle. States have sovereign rights over their natural resources. However, these rights are not absolute. Their sovereignty is restricted by a second objective well recognised in international environmental law, namely, that States must not cause irreparable damage to the territories of other states. There are often practical challenges involved in demonstrating the links of ‘causality’ between an action, and irreparable damage to the global environment, or the environment of another state. This negative obligation (‘not to cause damage’), when applied to the management of shared natural resources, has evolved into a positive obligation, namely, ‘to ensure that natural resources are used in a sustainable manner.’

The importance of “protecting and managing the natural resource base of economic and social development” was given very high priority in the 2002 World Summit on Sustainable Development, as the focus of Chapter IV of the Johannesburg Plan of Implementation.⁵ As one example of how this principle is reflected in an international treaty on sustainable development, the Preamble to the 1992 *UN Framework Convention on Climate Change* reaffirms “the principle of sovereignty of States in international co-operation to address climate change,” and applies this concept in Article 3(4), which states “4. The Parties have a right to, and should, promote sustainable development. 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.”

Prof. Nicholas Schrijver has commented that the rights of states in international law under the principle of permanent sovereignty over natural resources, bound as they are by the other conditions, imply the following duties: (i) to ensure that the whole people (including indigenous peoples and future generations), benefit from the exploitation of resources and the resulting national development; (ii) to have due care for the environment, which incorporates the customary obligation to prevent harm to areas beyond national jurisdiction, as well as the nascent responsibility to manage natural resources to ensure sustainable production and consumption.⁶ The responsibility of States not to cause environmental damage in areas outside their jurisdiction is related to the obligation of all States to protect within their territory the rights of other States, in particular their right to integrity and inviolability in peace and war.⁷ Indeed, it is possible that such obligations flow from “the obligation of every state not to allow its territory to be used for acts contrary to the rights of other States.”⁸ Furthermore, in the *Lac Lanoux* arbitration, involving the proposed diversion of an international river by an upstream state, the Arbitral Tribunal reaffirmed that a state has an obligation, when exercising its rights, to consider the interests and respect the rights of another state. This obligation was subsequently relied upon, and elaborated, by the Arbitral Tribunal in the *Trail Smelter* Case, which stated that “[u]nder the principles of international law [...] no state has the right to use or permit the use of territory in such a manner as to cause injury by

⁵ In the JPOI, while the legal duty is not recognised as such, its importance is underlined. Chapter IV focuses on natural resources, and states that “[m]anaging the natural resources base in a sustainable and integrated manner is essential for sustainable development.” See Johannesburg Declaration, and JPOI, *above*.

⁶ N. Schrijver, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge Univ. Press 1997), 390-392.

⁷ *Palmas* Case, 2 H.C.R. (1928) 84 at 93.

⁸ *Corfu Channel Case* (UK v. Albania), (1949) ICJ Rep. 4 at 22.

fumes in or to the territory of another or of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”⁹ This is often considered a rule of customary international law, as was recently noted by Judge Rosalyn Higgins in the Iron Rhine Arbitral Award.

Application of the obligations implied by this principle is not unproblematic. It depends on certain conditions being met, something that will not always be possible. For instance, as a principle of international law, it is likely that the natural resources to which the principle refers must not be purely domestic resources. The harm must have some international, or at least transboundary implications. Another condition with relation to this principle is the need to be able to identify what is ‘sustainable use’, and this will differ in relation to each natural resource, and the ‘use’ that is proposed. Other questions also flow from the specifics of application, the nature of the particular international natural resource and the particular intended use. What are the limits? When is a manner of use clearly unsustainable? When would another state be permitted to object? And finally, of course, should states make a commitment to ensure ‘sustainable use’, how to ensure that this is being done, when science is often unable to make accurate predictions? However, the challenges of application do not negate the value of the principle itself, which helps to identify the obligation, and encourage states to seek appropriate instruments and practices to resolve them. One way that this is attempted is through the adoption of a ‘sustainable management approach’, whereby the States or managers set standards governing the rate of use or exploitation of specific natural resources. For example, long-term natural resource planning and management systems, modelling to estimate or predict ‘sustained yield’ or thresholds for resource collapse, and joint international monitoring systems might all be put in place to help meet the obligation posed by this principle.

2. The Principle of Equity and the Eradication of Poverty

Equity and poverty eradication is a key principle of sustainable development law, consistently reflected in international instruments in the fields of development, human rights, economic and environmental law. Many of the references to equity and poverty eradication in international instruments on environment and development are influenced by the definition of ‘sustainable development’ provided by the World Commission on Environment and Development in the report, *Our Common Future*. The report states that “overriding priority” should be given to the “concept of ‘needs’, in particular the essential needs of the world’s poor” as a key component of sustainable development.¹⁰

This principle was strongly reinforced and highlighted in the 2002 World Summit on Sustainable Development.¹¹ Indeed, Chapter II of the Johannesburg Plan of Implementation focuses on the eradication of poverty for sustainable development. Equity also has an inter-generational dimension, in that States and other actors have an obligation to taken into account the long-term impact of all activities on future generations of humankind.

Reviews of current scholarly literature and the terms of international treaties raise several interesting points with regards to this principle. One of the key components of the principle of equity is the concept of inter-generational equity, which is defined as “that principle of ordering of the community of mankind which will make it possible for

⁹ Trail Smelter Arbitration (United States v. Canada), 3 R. Int'l Arb. Awards 1911 (1938), reprinted in 33 A.J.I.L. 182 (1939), 3 R. Int'l Arb. Awards 1938 (1941), reprinted in 35 A.J.I.L. 684 (1941).

¹⁰ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 13 [hereinafter *Our Common Future*].

¹¹ In the Johannesburg Declaration on Sustainable Development, states committed themselves to “building a humane, equitable and caring global society, cognizant of the need for human dignity for all.” In the JPOI, this recognition also appears in numerous instances, for example at para. 1 stating the objectives of the JPOI, recognises that “Poverty eradication [and other aims]... are overarching objectives of, and essential requirements for, sustainable development.” See Johannesburg Declaration, and JPOI, *above*.

every generation, by virtue of its own effort and responsibility, to secure a proportionate share in the common good of the human species."¹² Over the last decade, it has been widely accepted that, for the first time in the history of humankind, human activity has the potential to irreversibly alter the world on a massive scale. This concern has emerged in the context of future generations in particular; as noted in the *Brundtland Report*: "Many present efforts to guard and maintain human progress, to meet human needs, and to realize human ambitions are simply unsustainable – in both the rich and poor nations. They draw too heavily, too quickly, on already overdrawn environmental resource accounts to be affordable far into the future without bankrupting those accounts... We act as we do because we can get away with it: future generations do not vote, they have no political or financial power; they cannot challenge our decisions. But the results of the present profligacy are rapidly closing the options for future generations."¹³

A corollary concept is intra-generational equity. This term can be formulated as the obligation 'to ensure a just allocation of the utilisation of resources among human members of the present generation, both at the domestic and global levels.' Intra-generational equity is directed at the serious socio-economic asymmetry in resource access and use within and between societies and nations that has exacerbated environmental degradation and the inability of a large part of humanity to adequately meet its most basic needs. According to Prof. Schachter, at its bare minimum, intra-generational equity entails that everyone is entitled to the necessities of life: food, shelter, health care, education, and the essential infrastructure for social organization. He suggested that intra-generational equity had become a *de facto* legal norm for developing countries and generally for many industrialised countries: "What is striking is not so much its espousal by the large majority of poor and handicapped countries but that the governments on the other side, to whom the demands for resources are addressed, have also by and large agreed that the need is a legitimate and sufficient ground for preferential distribution [...] It is undeniable that the fulfilment of the needs of the poor and disadvantaged countries has been recognized as a normative principle which is central to the idea of equity and distributive justice."

There is no doubt that some kind of responsibility towards future generations exists. This is increasingly reflected in the number of highly significant international agreements and treaties. As one example of how this principle is reflected in an international treaty on sustainable development, Article 3 of the *United Nations Framework Convention on Climate Change* states that: "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity..."¹⁴

3. The Principle of Common but Differentiated Responsibilities

The *Rio Declaration* provides: "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."¹⁵

Reviews of current scholarly literature and the terms of international treaties raise several interesting points with regards to this principle. According to Prof. Philippe Sands, the principle of common but differentiated responsibility evolved from the notion of the common heritage of mankind and is a particular manifestation of general principles of equity in international law. This principle recognises historical differences in the

¹² Emmanuel Agius, "Obligations of Justice Towards Future Generations: A Revolution on Social and Legal Thought" in E. Agius, ed., *Future Generations and International Law* (London: Earthscan Publications, 1998) at 10.

¹³ *Our Common Future*, above.

¹⁴ *Climate Change Convention*, above, art. 3(1).

¹⁵ *Rio Declaration*, above, Principle 7.

contributions of developed and developing States to global environmental problems, and addresses their respective economic and technical capacity to tackle these problems. Clearly, despite their common responsibilities, important differences exist between the stated responsibilities of developed and developing countries.¹⁶

The principle of common but differentiated responsibility includes two fundamental elements. The first concerns the common responsibility of States for the protection of the environment, or parts of it, at the national, regional and global levels. The second concerns the need to take into account the different circumstances, particularly in relation to each State's contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat.

In practical terms, the application of the principle has at least two consequences. First, it entitles and may require all concerned States to participate in international response measures aimed at addressing environmental problems. Second, it leads to environmental standards that impose differing obligations on States. In the *Rio Declaration*, the international community agreed that "environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply," that "the special situation of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority, and that standards used by some countries "may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."¹⁷

The principle of common but differentiated responsibilities, an important one for developing countries, is referenced more than eight different times in the Johannesburg Plan of Implementation (JPOI).¹⁸ Specifically, it is raised in the Introduction where governments agree to 'undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles, including the principle of common but differentiated responsibilities as set out in Principle 7 of the Rio Declaration on Environment and Development.' This commitment to 'concrete actions and measures' refers to specific priorities, as mentioned in the JPOI in connection with issues such as unsustainable consumption and production, energy, greenhouse gas stabilization, air pollution, and means of implementation. It also refers to international treaties where specific sustainable development obligations and measures are being developed and financed. The principle emerged strengthened, broadened and invigorated by the WSSD in several ways.¹⁹ In the JPOI, most references to the Rio Principles singled out the principle of common but differentiated responsibilities²⁰ and it was also specifically mentioned as a principle to guide efforts relating to: the enhancement of international cooperation;²¹ unsustainable patterns of consumption and production;²² transboundary air pollution,²³ and energy and climate change.²⁴ Perhaps mostly

¹⁶ D. French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities" (2000) 49 *International & Comparative Law Quarterly* 35.

¹⁷ *Rio Declaration*, above, Principles 11 and 6.

¹⁸ See JPOI, above, e.g. at para. 2 where states commit "to undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles, including the principle of common but differentiated responsibilities as set out in principle 7 of the Rio Declaration on Environment and Development."

¹⁹ See M.C. Cordonier Segger, A. Khalfan, M. Gehring, and M. Toering, "Prospects for Principles of International Sustainable Development Law after WSSD: Common but Differentiated responsibilities, Precaution and Participation" (2003) 12:3 *Review of European Community and International Environmental Law (RECIEL)* at 54.

²⁰ See JPOI, above, paragraphs 2, 4, and 81. Each of these references to the Rio Principles, expressly state that these Principles include the principle of common but differentiated responsibilities, thereby highlighting its relevance to sustainable development actions. However, in paragraph 81, in the chapter dealing with financing and trade measures, the reference to the principle of common but differentiated responsibilities is preceded by the term 'in particular....' It is instructive that the principle of common but differentiated responsibilities is given the greatest importance in the chapter on financing.

²¹ *Ibid.*, at paragraph 2.

²² *Ibid.*, at paragraph 14.

²³ *Ibid.*, at paragraph 39.

importantly, the JPOI indicates that the principle of common but differentiated responsibility should be taken into account in implementing Agenda 21 and the internationally agreed development goals.²⁵ This statement suggests that the principle does not apply only to environmental protection, but also to social development goals such as poverty eradication.

As one example of how this principle is reflected in an international treaty on sustainable development, the UN Framework Convention on Climate Change states, at Article 3 (1) and that "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." And at 3 (2), it affirms that "The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration." And indeed, under the *Kyoto Protocol to the UN Framework Convention on Climate Change*, the principle of common but differentiated responsibilities permits, at Article 4, for example, specific commitments only for developed country parties, and allows for differentiation in reporting requirements.²⁶ It is also enshrined in Article 10, which states "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments under Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention, shall... (d) Cooperate in scientific and technical research and promote the maintenance and the development of systematic observation systems and development of data archives to reduce uncertainties related to the climate system, the adverse impacts of climate change and the economic and social consequences of various response strategies, and promote the development and strengthening of endogenous capacities and capabilities to participate in international and intergovernmental efforts, programmes and networks on research and systematic observation, taking into account Article 5 of the Convention;"

To implement the principle of differentiated responsibility, one important mechanism is establishment of international financing for international treaty implementation, such as the Global Environmental Facility,²⁷ which supports activities of developing countries to comply with the *UN Framework Convention on Climate Change*, the *UN Convention on Biological Diversity* and the *UN Convention to Combat Desertification*. These mechanisms provide financial grants for implementing sustainable development projects and developing environmentally sound technology.

As a further example of how this principle is reflected in an international treaty on sustainable development, the Kyoto Protocol also contains provisions in this respect. For instance, at Article 10 (2), it states that "In the context of the implementation of Article 4, paragraph 1, of the Convention, in accordance with the provisions of Article 4, paragraph 3, and Article 11 of the Convention, and through the entity or entities entrusted with the operation of the financial mechanism of the Convention, the developed country Parties and other developed Parties included in Annex II to the Convention shall: (a) Provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of

²⁴ Ibid., respectively at paragraphs 20 and 38.

²⁵ Ibid., at paragraph 81.

²⁶ *Kyoto Protocol*, above, arts. 4.1, 4.2.

²⁷ The GEF provides resources in the areas of climate change, biodiversity, pollution of international water-courses and depletion of the ozone layer. In 2002, desertification was added as a focus for GEF funding.

existing commitments under Article 4, paragraph 1(a), of the Convention that are covered in Article 10, subparagraph (a)..." And at Article 12, it establishes a clean development mechanism, the purpose which 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."

4. Precaution regarding human health, natural resources and ecosystems

Article 15 of the 1992 *Rio Declaration* on Environment and Development states: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."²⁸

Reviews of current scholarly literature and the terms of international treaties raise several interesting points with regards to this principle. The origins of precaution²⁹ appear to lie in national law, notably the German law, or *Vorsorgeprinzip*, which is also considered the most important principle of German environmental policy.³⁰ Precaution responds to an important problem in decision-making, namely, the absence of complete scientific information concerning the environmental consequences of a particular activity. If decisions are made based only on available information, it is highly likely that they will damage the environment, perhaps severely or irreparably. Because the impetus for economic development tends to be strong, the environment has been protected only to the extent that scientific information exists. Consequently, precaution has received widespread support by the international community as a valuable tool to integrate development, both economic and social, with environmental protection.³¹

As one example of how this principle is reflected in an international treaty on sustainable development, the 1992 UN Framework Convention on Climate Change states, at Article 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. Efforts to address climate change may be carried out cooperatively by interested Parties."

Simply put, precaution means the proponent of activities which might lead to either significant, serious or irreversible harm is obliged to take measures (or permit measures to be taken) to prevent this damage (including halting the proposed activities), even if there is a lack of full scientific certainty as to the existence and severity of the risk. In essence, precaution switches the burden of proof necessary for triggering policy

²⁸ *Rio Declaration, above.*

²⁹ There is significant debate on the connotations of normativity of the term 'precautionary principle' as compared with 'precautionary approach'— the 'principle' being seen as suggesting a binding law which the 'approach' implies a non-binding guideline. We adopt the neutral term 'precaution' in this publication.

³⁰ P.L. Gündling, "The status in International Law of the Principle of Precautionary Action" in D. Freestone & T. Ijstra, eds., *The North Sea: Perspectives on Regional Environmental Co-operation*, (London:Graham & Trotman, 1990) at 23-30; K. von Moltke, "The *Vorsorgeprinzip* in West German Policy," Appendix 3, Royal Commission on the Environment, Twelfth Report (1988); A. Nollkaemper, "The Precautionary Principle in International Environmental Law: What's New Under the Sun?" (1991) 22 *Marine Pollution Bulletin* 3 [hereinafter *Nollkaemper*]; J. Cameron & J. Abouchar, "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment" (1991) 14 *B.C. Int'l & Comp. L. Rev.* 1.

³¹ For a detailed review of the origins and history of precaution see Trouwborst, A. *Evolution and Status of the Precautionary Principle in International Law* (Kluwer Law International, The Hague, 2002).

responses (see Table: Precautionary Thresholds). It is not a panacea, nor is it intended for use in all situations. It is, however, a useful tool for a more systematic response to the problem of scientific uncertainty in environment and health decision-making. Essential elements include the magnitude, distribution and probability of damage needed to trigger the principle, as well as an aspect of proportionality between the magnitude of potential harm, and its likelihood of occurring. The distribution of risk is also important, as harms rarely fall equally on those affected. Perhaps most important, precaution also can lead to a reversal of the burden of proof where science, and risk, are not certain.³²

Table: Precautionary Thresholds³³

<i>status</i>	Soft law:	Treaty law:
<i>standard & year</i>	<p>"possibly damaging effects of most dangerous substances" <i>Final Declaration of the Second International North Sea Conference, 1987</i></p> <p>"potentially damaging impacts" <i>Final Declaration of the Third International North Sea Conference, 1990</i></p> <p>"serious or irreversible damage" <i>Rio Declaration Principle 15, 1992</i></p> <p>"significant adverse effects" <i>WSSD Johannesburg Declaration, 2002</i></p>	<p>"may cause harm to humans or the environment" <i>Bamako Convention, 1991</i></p> <p>"threat of significant reduction or loss of biological diversity" <i>Biodiversity Convention, 1992</i></p> <p>"reasonable grounds for concern [that...] may bring about hazards to human health, harm living resources and marine ecosystems" <i>OSPAR Convention, 1992</i></p> <p>"potential adverse effects" <i>Cartagena Protocol to Biodiversity Convention, 2000</i></p>

The degree of harm needed to trigger the principle depends on the provisions of the relevant law or treaty. Further, the magnitude of damage is usually inversely proportionate to the likelihood of risk, for precaution to be triggered. Precaution can be recommended when there is a *high* risk of "possible harm", or when there is a *lower* risk of "serious and irreversible harm." They are balanced by proportionality. On one hand, whether the likelihood of a risk is high or low, and on the other, whether the magnitude or severity of consequences, should the harm occur, is high or low. If the weight of the legal 'good' in danger is very high (such as human lives), the correlating potential for it to occur may be minimal but could still pass over the threshold, triggering the need for precaution.³⁴

The table: *Precaution and Proportionality*, demonstrates the rough balancing relationship between both considerations.

³² In more detail, these include proportionality; non-discrimination; consistency; examination of the benefits and costs of action or lack of action; and examination of scientific developments. Proportionality means that measures are proportional to the desired level of protection. Non-discrimination means that comparable situations should not be treated differently and different situations should not be treated in the same way, unless there are objective grounds for doing so. Consistency means being consistent with measures already adopted in similar circumstances or using similar approaches. Examination of the benefits and costs of action and lack of action means making a comparison between the most likely positive or negative consequences of the envisaged action and those of inaction in terms of the overall cost to proponents, both in the long- and short-term. Examination of scientific developments means maintaining measures adopted for as long as the scientific data are inadequate, imprecise or inconclusive, and as long as the risk is considered too high to be imposed on society. The measures may have to be modified or abolished by a particular deadline, in the light of new scientific findings, but this usually linked development of scientific knowledge not a timing factor. Scientific research is carried out with a view to obtaining a more advanced or more complete scientific assessment. In this context, measures are subjected to regular scientific monitoring, so that they can be re-evaluated in the light of new scientific information.

³³ Communication from the European Commission on the Precautionary Principle, EC COM 1 (2000) WTO document WT/CTE/W/147G/TBT/W/ 137 27 June 2000, and F. Perrez, *Precaution: From Rio to Johannesburg* (Geneva: Geneva Environment Network / Swiss Agency for Environment, Forests and the Landscape, 2002).

³⁴ See F. Perrez, *Precaution from Rio to Johannesburg* (Geneva: GEN & SAEFL, 2002).

Table: Precaution and Proportionality

<i>Degrees of Certainty (Probability) about Threat</i>	<i>Relevant Degrees (Magnitude) of Potential Harm</i>
<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <p>Threat almost unknown</p> <p>Highly uncertain of threat</p> <p>Fairly uncertain of threat (possibly)</p> <p>Uncertain of threat (potentially)</p> <p>Highly certain of threat</p> </div> <div style="width: 10%; text-align: center;"> <p>↔</p> <p>↔</p> </div> <div style="width: 45%;"> <p>Serious <i>and</i> irreversible harm</p> <p>Serious or irreversible damage</p> <p>Potentially damaging impacts/effects</p> <p>Significant harm</p> <p>Potential adverse effects</p> </div> </div>	

This rough equilibrium seems to play out in international law related to environment and health. Risks of a serious hazardous waste spill might be very, very harmful but fairly unlikely. Precautionary action would be justified, since the harms would be so high, should the event occur.³⁵

This principle may best be described in international law as *lex ferenda*, a principle in the process of becoming international customary law, with persistent objectors properly on record.³⁶ However, at the Summit, the question of the legal validity of the precautionary principle *per se* became less relevant internationally and discussions focused more specifically on the scope and nature of precaution. The contribution of the WSSD was to re-focus thinking away from debates on the precise status of precaution in international law (is it customary law, or simply an approach), and toward recognition of its relevance as a complement to science-based decision-making, and with regard to social and development agendas (such as human health and the need for assistance to strengthen developing country capacities). These discussions may well foster and enhance implementation because instead of focusing on an abstract legal concept, debates focused on how the principle actually works and can be applied in a transparent and fair way. In the future, the manner of application and implementation will be crucial to both its acceptance and utilization.

5. The Principle of Public Participation and Access to Information and Justice

According to Agenda 21, States must ensure broad public participation in initiatives for sustainable development, through access to information and access to justice.³⁷ The Johannesburg Declaration states that countries 'recognize that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels.'³⁸ They commit, as social partners, to 'continue to work for stable partnerships with all major groups, respecting the independent, important roles of each of them.' There are three aspects to this principle. First, people should be accorded the opportunity to participate in official socio-economic development decision-making processes and activities that directly affect and impact their lives and well-being. Second, in order to participate fully, the public must be provided with, or at least have access to, adequate information concerning the

³⁵ M.C. Cordonier Segger & M. Gehring, "Precaution, Health and the World Trade Organization: Moving Toward Sustainable Development" (2003) *Queen's Law Journal* 29:1 at 133 - 140. See also M.C. Cordonier Segger, "Precaution, Trade Law & Justice: Global Review of the 'Safe' Level of Risk" in J. Wargo (ed.) *Regulating Ecologically* (New Haven: Yale University Press, 2004 forthcoming).

³⁶ For further information about the process, see J. Cameron, 'International Law and the Precautionary Principle' in T. O' Riordan, J. Cameron, and A. Jordan, *Reinterpreting the Precautionary Principle* (Cameron May, 2001), 123.

³⁷ See *Agenda 21*, above, at para 8.3(d), 8.4(e), and 23.2, providing that sustainable development requires "broad public participation in decision-making."

³⁸ Johannesburg Declaration, above at para. 26.

decisions and activities of government. Third, those whose rights are affected by State decisions should have access to justice.

Reviews of current scholarly literature and the terms of international treaties raise several interesting points with regards to this principle.

First, there is clearly a debate about whether States have simply committed to ensure public participation in sustainable development decision-making, or whether such participation is actually a 'right'. Many have suggested that implementation of a commitment to ensure public participation depends on respect for the human rights to assembly, freedom of speech and expression. Early manifestations of such a right to participate is recognized in several major international human rights instruments, foremost among them being Article 25 of the International Covenant on Civil and Political Rights and Article 21 of the Universal Declaration of Human Rights. Second, the State must also ensure that all persons have effective access to relevant information held by public and private actors regarding sustainable development issues. Third, effective participation necessarily requires the State to have attention to disparities within society and remove the obstacles to participation by vulnerable groups such as minorities, or the poor. A corollary to this requirement is the need for access to justice for individuals and groups, comprising effective judicial or administrative procedures to redress allegations of violations of entitlements or rights. Legal writers such as Prof. Alexander Kiss and Dinah Shelton have discussed participation by affected groups in areas of environment and development decision-making as a right: "Public participation is based on the right of those who may be affected to have a say in the determination of their environmental future."³⁹

International instruments concerning indigenous peoples have been explicit in referring to participation as a right. In these texts, participation is expressed as instrumental to the realisation of other rights and values. For example, the International Labour Organization's (ILO) 1989 *Convention on Indigenous and Tribal Peoples* recognises "[t]he rights of the peoples concerned to the natural resources pertaining to their lands...[T]hese rights include the right of these peoples to participate in the use, management and conservation of these resources." The 1994 *Draft UN Declaration on Indigenous Peoples* likewise recognises a right of indigenous peoples to participate "in the political, economic, social and cultural life of the State [Article 4] [...] if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies [Article 19] [...] if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them [Article 20]."

The UN Committee on Economic, Social and Cultural Rights has indicated that this principle is essential to the realisation of economic, social and cultural rights, such as, *inter alia*, the rights to health and water. It states that right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under the right to health. Furthermore, promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health.⁴⁰ It indicates that one component of these rights is 'information accessibility' including the right to seek, receive and impart information concerning such issues.⁴¹

The 1998 *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*⁴² (*Aarhus Convention*) has

³⁹ See A. Kiss & D. Shelton, *International Environmental Law*, 2nd ed. (New York: Transnational Publishers, 1994) at 67.

⁴⁰ Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health*, UN ESCOR, 2000, UN Doc. E/C.12/2000/4, at para. 54.

⁴¹ General Comment No. 15 at para. 12 (c) (iv), General Comment No. 14, *ibid.*, para. 12 (b) (iv).

⁴² This regional convention is open to participation by members or consultative members of the UNECE (including North America and the former Soviet States of Central Asia). An annex lists the activities and

developed the principle of public participation significantly. Concluded under the auspices of the United Nations Economic Commission for Europe (UNECE) at its fourth "Environment for Europe" Convention in Aarhus, Denmark in June 1998.⁴³ The convention is one of the first binding international instruments to recognize "the right of every person of present and future generations to live in an environment adequate to his or health and well-being." The preamble to the Convention links this right of access to justice in environmental matters, stressing that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced." This right is guaranteed by three types of procedural rights that each Party undertakes to provide: (1) access to information; (2) public participation in decision-making; and (3) access to justice in environmental matters. Article 9 of the 1998 *Aarhus Convention* provides for access to justice in environmental matters.⁴⁴

Whether it is a right as such or not, the role of public participation as a necessary means for achieving sustainable development is clearly identified in the *Brundtland Report*, which found that "in the specific context of the development and environment crisis of the 1980s, which current national and international political and economic institutions have not and perhaps cannot overcome, the pursuit of sustainable development requires: [...] a political system that secures effective citizen participation in decision making." The Brundtland Commission identified 'effective participation' as a necessary component of sustainable development. The Commission refers particularly to the significance of participation in promoting sustainable development by specific groups of the public, namely indigenous people and NGOs.

Agenda 21 and related texts follow this trend. Rather than referring to 'participation' as a right, they indicate that participation is vital in the process of sustainable development. *Agenda 21* provides that "one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making." It emphasises the desirability of direct participation in governance by identifying important roles for women, youth, indigenous people and their communities, non-governmental organisations, local authorities, workers and their trade unions, business and industry, the scientific and technological community, and farmers.⁴⁵ Public participation in the development and implementation of environmental and other laws is also encouraged.⁴⁶

installations in respect of which public participation provisions apply, including refineries, power stations, nuclear reactors and installations, smelters, chemical plants, mines and waste management installations. It applies not just to transboundary activities, but also to national activities

⁴³ Relevant background material includes important case-law of the European Court; see esp. *Plaumann v. Commission*, C-25/62, [1963] E.C.R. 95 at 107. See also *Spijker v. Commission*, C-231/82, [1983] E.C.R. 2559; *Deutsche Lebensmittelwerke v. Commission*, C-97/85, [1987] E.C.R. 2265; *Cook v. Commission*, C-198/91, [1993] E.C.R. I-2487; *Matra v. Commission*, C-225/92, [1993] E.C.R. I-3203; *Air France v. Commission*, T-2/93, [1994] E.C.R. II-323; *Consortio Gruppo di Azione Locale "Murgia Messapica" v. Commission*, T-465/93, [1994] E.C.R. II-361.

⁴⁴ The article requires Parties to ensure access to justice in three circumstances: (1) Parties must ensure access to a review procedure before a court or another independent and impartial body established by law for any person who considers that his or her information request has been ignored, wrongfully refused, inadequately answered, or otherwise not dealt with in accordance with the Convention's access to information provision under article 4; (2) Parties must ensure access to a review procedure before a court or another independent and impartial body established by law for "members of the public concerned" to challenge "the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6" (dealing with public participation in decision-making), and "where [review is] so provided for under national law . . . of other relevant provisions of this Convention"; and (3) Parties must ensure access to administrative or judicial procedures for "members of the public . . . to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

⁴⁵ *Ibid.*, ch. 23-32, and para. 8.3(c), recommending that governmental processes "facilitate the involvement of concerned individuals, groups and organizations in decision-making at all levels."

⁴⁶ *Rio Declaration*, above note 1, Principle 10; see also *Agenda 21*, *ibid.* at para. 23.2, stating "One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making." In addition, citizens should have "effective access to judicial and administrative proceedings, including redress and remedy." *Rio Declaration*, *ibid.*, Principle. 10; see also *Agenda 21* at para. 27.13, recommending that nongovernmental organisations have the right to protect the public interest by law.

The Johannesburg Summit strongly reconfirmed this principle, at almost all levels. As well as reflecting its importance for international environmental decision-making, provisions on the importance of public participation can be found in almost all sections of the Johannesburg Plan of Implementation.⁴⁷ In the Plan of Implementation, governments agreed to '[e]nsure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development, taking into full account principles 5, 7 and 11 of the Declaration.'⁴⁸ Provisions on public participation, access to information and access to justice are also found throughout the JPOI referring to public participation in areas such as poverty eradication, which focuses on the participation of traditionally marginalized groups, such as women and indigenous peoples, in the development and implementation of poverty reduction strategies.⁴⁹ In the area of ensuring more sustainable production and consumption patterns, public participation and consultation of stakeholders is specifically mentioned in sections committing to further efforts in the areas of sustainable energy and waste management. In addition, in the section focused on protecting and managing the natural resource base of economic and social development, references are made to ensuring public participation in different ways in terms of water, agriculture, mountains, biodiversity, forestry and mining. The Plan even provides for increased participation (in markets) of small and medium-sized enterprises. In addition, there are special provisions regarding the need to ensure public participation in the development of national strategies for sustainable development as a means of implementation. Finally, in the Plan of Implementation, at Chapter XI on the Institutional Framework for Sustainable Development, there are provisions for the need to ensure the participation of civil society, major groups, and the public at different levels of sustainable development governance.⁵⁰

6. The Principle of Good Governance

The Johannesburg Plan of Implementation states that "[g]ood governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basis for sustainable development."⁵¹ The importance of this principle was also strongly recognised in the Johannesburg Declaration, through a commitment to "undertake to strengthen and improve governance at all levels for the effective implementation of Agenda 21, the Millennium development goals and the Plan of Implementation of the Summit."⁵²

Governance can be seen as of economic, political and administrative authority to manage a country's affairs at all levels and on all issues. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.⁵³ Good

⁴⁷ Johannesburg Declaration, *above* at 26 which states "[w]e recognize that sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels. As social partners, we will continue to work for stable partnerships with all major groups, respecting the independent, important roles of each of them."

⁴⁸ See JPOI, *above*, at para 128.

⁴⁹ See JPOI, *above*, at para 7.

⁵⁰ See JPOI, *above*, at para 164, which states: "[a]ll countries should also promote public participation, including through measures that provide access to information regarding legislation, regulations, activities, policies and programmes. They should also foster full public participation in sustainable development policy formulation and implementation. Women should be able to participate fully and equally in policy formulation and decision-making.

⁵¹ JPOI, *above*, at para 4. There are also specific references to the need to improve governance and the rule of law with regard to forests (para 45 (f)), and sustainable development in Africa with reference to human rights and urban management (para 62 and 71).

⁵² Johannesburg Declaration, *above*, at 30.

⁵³ P. Uvin & I. Biagiotti, "Global Governance and the 'New' Political Conditionality" (1996) 2 *Global Governance: A Review of Multilateralism and International Organizations* 377.

governance as a principle obliges States and international organisation to: democratic and transparent decision-making, anti-corruption, respect for the rule of law and human rights. It is closely related to the principle of participation, access to information and justice. Aside from the above-mentioned components, there is significant debate as to its scope (e.g. to inter-state decision-making) and to the range of actors to which it applies (e.g. to private actors).

Reviews of current scholarly literature and the terms of international treaties raise several interesting points with regards to this principle. First, it is hard to define precisely. The World Bank defines governance as "the exercise of political power to manage a nation's affairs."⁵⁴ Another articulation, more descriptive than definitional, sees governance as "the conscious management of regime structures with a view to enhancing the legitimacy of the public realm."⁵⁵ The UNDP has identified a set of characteristics for good governance.⁵⁶ They include: participation,⁵⁷ rule of law,⁵⁸ transparency,⁵⁹ responsiveness,⁶⁰ consensus orientation,⁶¹ equity,⁶² effectiveness and efficiency,⁶³ accountability,⁶⁴ and strategic vision.⁶⁵ These core characteristics are interrelated and mutually reinforcing- they cannot stand alone. For example, accessible information means more transparency, broader participation and more effective decision-making. Broad participation contributes both to the exchange of information needed for legitimate decision-making. Legitimacy, in turn, means effective implementation and thus further participation. Responsive institutions must therefore be transparent, and function according to the rule of law if they are to be equitable.

Two approaches to 'good governance' have emerged. The first emphasises the domestic dynamics of good governance. This view argues for stringent reforms in developing countries that are seen to lack sufficient progress towards good governance.⁶⁶ It was used mainly by international financial and development institutions to depict the need to review improper or unsatisfactory functioning of governmental machinery or the need for more efficient administration.⁶⁷ Aspects of the good governance are dealt with in international institutions such as the New Partnership for Africa's Development 'Peer Review Mechanism' and in the United National Convention to Combat Corruption.

⁵⁴ See World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (1989) [hereinafter World Bank, *Africa*].

⁵⁵ G. Hyden & M. Bratton, eds., *Governance and Politics in Africa* (Boulder: Lynne Rienner Publishers, 1993) at 7.

⁵⁶ UNDP, *Governance, above*, 313. An exception to this trend towards assessment of characteristics is A. Seidman *et al.*, "Building Sound National Frameworks For Development and Social Change" (1999, 4 CEPML & P. J. 1.

⁵⁷ All men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their interests. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.

⁵⁸ Legal frameworks should be fair and enforced impartially, particularly the laws on human rights.

⁵⁹ Transparency is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.

⁶⁰ Institutions and processes try to serve all stakeholders.

⁶¹ Good governance mediates differing interests to reach a broad consensus on what is in the best interests of the group and, where possible, on policies and procedures.

⁶² All men and women have opportunities to improve or maintain their well-being.

⁶³ Processes and institutions produce results that meet needs while making the best use of resources.

⁶⁴ Decision-makers in government, the private sector and civil society organisations are accountable to the public, as well as to institutional stakeholders. This accountability differs depending on the organisation and whether the decision is internal or external to an organisation.

⁶⁵ Leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.

⁶⁶ P. McAuslan, "Good Governance and Aid in Africa" (1996) 40 J. Afr. L. 168 at 168-82.

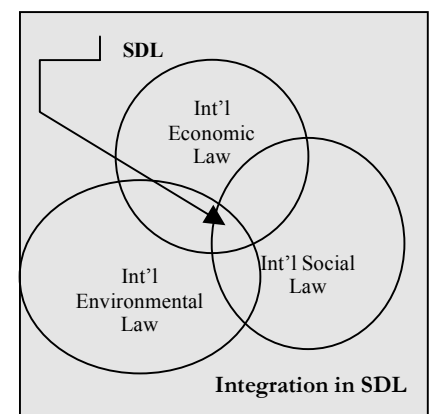
⁶⁷ For example, in explaining Africa's development problems, the World Bank stated that "Underlying the litany of Africa's development problems is a crisis of governance." See World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (1989) at 60.

The international approach points to an emerging pressure for democratic governance.⁶⁸ In Chapter XI on Institutional Framework for Sustainable Development of the Johannesburg Plan of Implementation, the importance of good international governance, in particular global economic governance and a rules-based multilateral trading system, is recognized. In addition, Chapter XI goes on to offer specific guidance to countries on a national level, stating (at para 162) that countries must “[c]ontinue to promote coherent and coordinated approaches to institutional frameworks for sustainable development at all national levels, including through, as appropriate, the establishment or strengthening of existing authorities and mechanisms necessary for policy-making, coordination and implementation and enforcement of laws”... and (at para 163) that “[a]ll countries should promote sustainable development at the national level by, inter alia, enacting and enforcing clear and effective laws that support sustainable development. All countries should strengthen governmental institutions, including by providing necessary infrastructure and by promoting transparency, accountability and fair administrative and judicial institutions.”⁶⁹

7. The Principle of Integration and Interrelationship in Relation to Social, Economic and Environmental Objectives.

Principle 4 of the 1992 *Rio Declaration* States 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.”⁷⁰

The concept of sustainable development integrates economic, environmental and social (including human rights) priorities. As a point of departure, sustainable development law (SDL) addresses the area of intersection between three fields of international economic, environmental and social law. As such, not all aspects of international environmental law are also sustainable development law. For example, as noted by Prof. Alan Boyle and Prof. David Freestone, animal rights, the conservation of ‘charismatic mega-fauna’, and trans-boundary environmental disputes do not necessarily deal with issues of sustainable development.⁷¹ As not all international law in these three areas is (or even needs to be) integrated, the term ‘sustainable development law’ refers to a specific, narrower set of legal instruments and provisions where environment, social and economic considerations are integrated to varying degrees in different circumstances. And by extension, the principle of integration is fundamental to sustainable development.



The need for integration was strongly reinforced and highlighted in the 2002 World Summit on Sustainable Development (WSSD). Indeed, in the 2002 Johannesburg Declaration on Sustainable Development, states assumed “a collective responsibility to

⁶⁸ Franck, *above*, 315 at 83. In 1994, the UN and the Organization of American States refused to recognise the military junta that overthrew the democratically elected government of Haiti and called for the forcible removal of the junta. See P. Uvin & I. Biagiotti, “Global Governance and the ‘New’ Political Conditionality” (1996) 2 *Global Governance: A Review of Multilateralism and International Organizations* 377 at 384-88. The international wing of the governance discourse can be seen beyond the political or individual countries’ or regional responses to events in any one country. The UN, the ICJ, the WTO, the World Bank, IMF and regional organisations such as the EU, MERCOSUR, OAU, OAS, the Commonwealth, and ECOWAS, may all be seen as institutions of global governance seeking to facilitate the harmonisation of national policies in various fields. See M. J. Trebilcock, “What Makes Poor Countries Poor?: The Role of Institutional Capital in Economic Development” in E. Buscaglia, W. Ratliff & R. Cooter, eds., *The Law and Economics of Development* (London: JAI Press Inc., 1997) at 15.; see also *Charter of Paris for a New Europe*, Nov. 21, 1990, 30 I.L.M. 190 at 193.

⁶⁹ See JPOI, *above*, at paras 162 - 163.

⁷⁰ *Rio Declaration, above*, Principle 4. See also the *Stockholm Declaration on the Human Environment*, U.N. Doc. A/C. 48/14 (1972), 11 I.L.M. 1461 (1972) [hereinafter *Stockholm Declaration*], Principle 13.

⁷¹ A. Boyle & D. Freestone, “Past Achievements and Future Challenges” in W. Lang, *above*, at 6.

advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection...". In the Johannesburg Plan of Implementation (JPOI), this recognition also appears in numerous instances, for example at paragraph 2, stating the objectives of the JPOI, governments accord that it "will promote the integration of the three components of sustainable development - economic development, social development and environmental protection - as interdependent and mutually reinforcing pillars."⁷² States should ensure that social and economic development decisions do not disregard environmental considerations, and not undertake environmental protection without taking into account relevant social and economic implications. While the exact formulation and application of this norm vary according to the circumstances of its use, its general purpose is to ensure the necessary integration between social, economic and environmental policies and laws, responding to the 'collective responsibility' assumed by States in the Johannesburg Declaration.

From this obligation flows several increasingly accepted procedures, practices and instruments of sustainable development law. For example, the use of sustainability or 'integrated' impact assessments, can ensure that economic development decisions (including decisions about policies, plans, programmes or projects) consider, and do not ignore, their potential social and environmental impacts. From this principle, too, stems the reverse sustainable development obligations for environmental protection not to be carried out without consideration of relevant social and economic aspects. For example, decision-making bodies for conservation projects, such as large parks, should ensure that their plans provide for, or even have the prior informed consent of, local peoples and other socially vulnerable groups who could be affected by the new park boundaries and restrictions.

Integration of laws and policies in these areas was directly referred in many global treaties, using different textual formulations depending on the context and purpose of the instruments. It is a keystone provision of the 1992 *Rio Conventions*. As one example of how this principle is reflected in an international treaty on sustainable development, the *UN Framework Convention on Climate Change* 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."⁷³ This is made operational in the 1997 Kyoto Protocol, which states at Article 14, for example, that "Each Party included in Annex I shall strive to implement the commitments mentioned in paragraph 1 above in such a way as to minimize adverse social, environmental and economic impacts on developing country Parties..."

⁷² See Johannesburg Declaration on Sustainable Development and Johannesburg Plan of Implementation [hereinafter JPOI], in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, August 26 to Sept 4, 2002, A/CONF.199/L.1 (New York, United Nations, 2002). The JPOI can be found online: http://www.johannesburgsummit.org/html/documents/summit_docs.html.

⁷³ See the *United Nations Framework Convention on Climate Change*, above, art. 3(4), with *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, 37 I.L.M. 22 (1998).