

**WEAVING THE RULES FOR OUR COMMON FUTURE:
PRINCIPLES, PRACTICES AND PROSPECTS FOR INTERNATIONAL
SUSTAINABLE DEVELOPMENT LAW**

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ABOUT THE CISDL

The Centre for International Sustainable Development Law (CISDL) is based at the McGill University Faculty of Law in Montreal, Canada, and works in cooperation with the McGill School of the Environment, the Université de Montreal Faculty of Law, and the Université de Québec à Montréal. It is guided in its work by an International Council of leading experts in international environmental, economic and social law, representing developing and developed countries, from intergovernmental and nongovernmental organisations, academic institutions and private practice.

It is the mission of the CISDL to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law (ISDL).

WEAVING THE RULES FOR OUR COMMON FUTURE

This manual is an expression of the CISDL mandate – to advance the understanding, development and implementation of international sustainable development law (ISDL). It is the fruit of research and innovative analysis by a team of jurists drawn from the principal legal traditions of the world, the Lead Counsel and Research Fellows of the CISDL. It has two principal aims. First, it helps to **advance the understanding of ISDL** by providing a survey of international law related to sustainable development: summarising principles, surveying innovative aspects of key treaties in international social, economic and environmental law, identifying the proposed principles of ISDL and offering case studies of ISDL instruments. Secondly, it aims to **strengthen the implementation of ISDL** by providing a capacity-building tool for lawmakers, jurists and educators in developed and developing countries, and belonging to environmental protection, economic progress and social development communities.

The text is presented in five parts. Part I provides a brief introduction; Part II surveys the origins of the concept of sustainable development, identifies its legal aspects and the formation of a body of international law related to sustainable development. Part III examines the principles of international law related to sustainable development, suggesting that legal instruments in this field can be analysed according to a typology of degrees of integration between international social, economic and environmental law – from instruments displaying little or no integration to fully-integrated international sustainable development law. Part IV provides practical case studies of legal instruments at these various degrees of integration, illustrating challenges and innovative methodologies that have been implemented over recent years. Part V establishes cutting-edge research agendas in six priority areas of intersection between international social, economic and environmental law, and identifies several themes which cross-cut these substantive agendas. This part also examines prospects for a new approach to international sustainable development governance in the context of *Agenda 21* and the outcomes of the 2002 World Summit for Sustainable Development (WSSD) in Johannesburg, South Africa.

Weaving the Rules for Our Common Future is designed as a resource and reference source for multiple stakeholders – academics, policy-makers, negotiators, students and practitioners of international sustainable development law – and serves both the legal and wider community. Accordingly, sections of more detailed legal analysis are identified by a smaller font size [as in this example]. Readers from other disciplines may then focus on key principles and analysis without a close reading of legal argument.

The text of this publication was first released for consultation, in draft form, at *Sustainable Justice 2002: Implementing International Sustainable Development Law*, Montreal, Canada, June 13-15 2002, in partnership with the United Nations Environment Programme and the World Bank Legal Vice-Presidency.

KEY CONCEPTS IN INTERNATIONAL LAW

This section provides an overview of the nature of international law for readers from non-legal disciplines. It describes the principal means of formation of international law and provides short explanations of the key legal concepts used throughout this book.

Where does international law come from? The basic rules of international law are drawn from several **sources of law**. The most important of these sources are:

Treaty Treaty law is the most common source of international law and includes rules of international law expressed in writing. Like a contract, a treaty only binds those States that become ‘party’ to the treaty; that is, States that signal their intention to be bound by the rights and duties imposed by a treaty. Treaties may include specific rules or may be ‘framework’ treaties, spelling out general objectives and principles. Some treaties require regular meetings of a ‘conference of parties’ in order to make decisions about treaty implementation. Certain treaties also designate supervisory bodies to monitor compliance with the treaty. The decisions of these supervisory bodies are not usually formally binding on the parties, but are of significant weight and can influence the conduct of States.

Custom Customary law is derived from the behaviour of States according to norms generally accepted as binding. In order to constitute customary law, such state behaviour must be consistent and widespread, and there must also be evidence that States act as they do because they actually believe they are bound by these norms.

Rules of customary law that are consistently obeyed and reinforced across context and time can emerge as a form of ‘super-custom’ and become non-derogable or ‘peremptory’ norms of international law (sometimes referred to as *jus cogens*).

Some obligations under customary law, typically those involving matters of global concern, are owed to the international community as a whole, not just to a particular, identifiable State. All members of the international community have an interest in seeing these obligations respected.

Soft Law: ‘Soft law’ refers to a vast body of legally non-binding or incompletely binding norms, the most important of which are guidelines, resolutions, declarations and recommendations that are made by parties to an international agreement in the course of its implementation. Edith Brown-Weiss argues that international agreements need to be viewed as *living agreements*, into which parties continuously breathe life and to which they give new directions by acting as informal legislatures. In many cases, States follow soft law even though they may not be required to do so. ‘Soft law’ documents also can constitute evidence of emerging customary international law, act as tools to interpret treaties and custom, and as templates for generating the precise text of treaty law.

How does the international system function? It is important to identify **which actors** play a role in the international system and **how the international system is evolving**.

Traditionally, international law was seen as “the body of rules and principles of action which are binding upon civilized States in their relations with one another.”¹ The Peace of Westphalia that ended the Thirty Years’ War over 350 years ago established an international order based on sovereign, independent, territorially-defined States, each having an interest in maintaining political independence and territorial

¹ J.L. Brierly, *Law of Nations*, 6th ed. (Oxford: Clarendon Press, 1963).

integrity. As such, according to the classical definition, international law governs relations between independent States, and the rules of law binding upon States emanate from their free will expressed in treaties, or in customs generally accepted as based on binding principles of law. In this view, international law exists to regulate relations between co-existing independent communities, and to provide mechanisms for the achievement of common aims.² While still relevant, this view of the international system cannot paint the full picture. First, this view assumes that States' primary interests (political independence and territorial integrity) have not evolved over time. In addition, by characterising States as monolithic bodies, this view limits the recognition of other relevant entities within States, not to mention trans-national organisations.³

As Jacobson notes, while the global system still encompasses a plethora of sovereign, decision-making entities, "effective power is increasingly being organized in a non-hierarchical manner."⁴ Thousands of non-governmental as well as inter-governmental organisations have emerged to play a relevant role in the making, implementation and monitoring of international law.⁵ Today, international law provides normative frameworks and procedures for co-ordinating behaviour, controlling conflict, facilitating cooperation and establishing common values.

How is respect for the rule of law ensured in such a system? Unlike domestic legal systems, the international system does not include a centralised system – such as an integrated police force and justice system – to *enforce* international law generally.⁶ Rather, States come to *comply* with international law for a number of reasons; including the incremental effect of a process of continuous interaction, the development of shared values, and the use of incentives between parties to a treaty,⁷ although political and economic considerations also play a role.

This gradual evolution in the nature of the international system has many consequences. The once sharp lines between the public international law, regulating the international conduct of States, and private international law, regulating the activities of individuals, corporations and private entities engaged in trans-border transactions, are fading. The harmonisation of national laws, the human rights movement and globalising trends are gradually meshing international law and domestic law. The formally 'binding' or 'non-binding' nature of international instruments is less likely to result in any practical difference in State behaviour. Indeed, a significant part of international law now consists of so-called 'soft law'.⁸

The changing nature of the international system is also affecting the role of organisations of civil society – non-governmental organisations, labour unions, chambers of commerce, professional associations, and

² This view was stated by the Permanent Court of International Justice in the 1927 *S.S. Lotus Case*. See *S.S. Lotus* (France v. Turkey), (1924) P.C.I.J. (Series A) No. 10.

³ It has been observed that this classical framework of international law centres exclusively on States, relies on binding legal instruments to provide solutions to clearly defined problems, and assumes that States comply with the obligations they have assumed. Moreover, in the classical conception of international law, the line between international law and domestic law is sharply drawn, as is that between public and private international law. Public international law governs intergovernmental relations, while private international law regulates the activities of individuals, corporations and private entities engaged in trans-border transactions. See Philippe Sands, "Environmental Protection in the Twenty-First Century: Sustainable Development and International Law" in N. J. Vig & R. S. Axelrod, eds., *The Global Environment: Institutions, Law, and Policy* (Washington: Congressional Quarterly, 1999) 116.

⁴ H. K. Jacobson, *Networks of Interdependence: International Organizations and the Global Political System*, 2d ed. (New York: Knopf, 1984) 386.

⁵ *Ibid.* See also A. Kiss, "The Implications of Global Change for the International Legal System" in E. Brown Weiss, ed., *Environmental Change and International Law* (Tokyo: United Nations University Press, 1992) 319-325 [hereinafter *Brown Weiss*].

⁶ A key exception is the role of Security Council to respond to threats to international peace and security, under chapter VII of the *Charter of the United Nations*.

⁷ See J. Brunnée & S.J. Toope "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39(1) *Col. J. Trans'l. Law* 19 [hereinafter Brunnée & Toope, *Interactional Theory*].

⁸ For discussion of the meaning of 'soft law,' see P. Dupuy, "Soft Law and the International Law of the Environment" (1991) 12 *Mich. J. Int'l L.* 420; and F. V. Kratochwil, *Rules, Norms and Decisions. on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989) 201.

other social groups. The actions of civil society now seem to influence the development of international law, albeit in a limited way. The international system is not blind to powerful statements coming from a large number of people. When the International Court of Justice considered the legality of nuclear weapons in international law, Judge Weeramantry noted in a dissenting opinion that the two million signatures received by the Court on that issue were “evidence of a groundswell of global public opinion which is not without legal relevance.”⁹ While we should not exaggerate the relevance of civil society statements in relation to a particular case, the views of civil society expressed over time can filter into the general understanding of the law. A good example is the role of civil society in proposing so-called ‘interstitial norms’, norms that modify the effect of other primary norms of international law.¹⁰ The likelihood that these interstitial norms will take root is determined primarily by their effectiveness in reconciling conflicts between other norms of international law and filling gaps in the law, rather than by their formal status as ‘treaty law’, ‘customary law’ or ‘soft law’.¹¹

On a fundamental level, then, the world seems increasingly subject to concurrent forces of integration and disintegration, each serving to oppose and yet reinforce the other. This beautiful paradox is fundamentally re-shaping the structures and processes of the international system.

⁹ *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 [hereinafter *Nuclear Weapons*].

¹⁰ V. Lowe, “The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?” in M. Byers, ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, Oxford University, 2000) at 214-215 [hereinafter *Lowe*].

¹¹ *Ibid.* at 215 & 219-221.

PART I: INTRODUCTION

There is an observable increase in conflicts throughout the world involving human rights, economic development, and the environment. The frequency of these disputes is related to current global patterns of natural resource use, consumption and production, and poverty. These place unprecedented demands on the regenerative capacity of ecosystems and jeopardise the welfare of vulnerable groups.

A fundamental disconnection lies at the core of these conflicts. Environmental conservation initiatives can be indifferent or hostile to economic development, and have at times ignored human rights considerations, such as the interests of local communities directly dependent on natural resources. Economic development still appears to be premised on theoretical models that subordinate environmental and human rights concerns to development outcomes. This approach has not slowed the growing disparities within and among nations. Similarly, international human rights instruments are generally not applied in a manner that addresses environmental issues. International instruments with a primarily human rights focus do not explicitly refer to environmental protection; efforts to link these domains are embryonic. Attempts to deal separately with the issues presented by these phenomena counter the fundamental interconnected nature of international systems, and have proven time and again to have serious consequences.

The problem lies not so much in the goals themselves, but in their governance. In essence, we are crafting a tapestry without weaving together the strands.

There is growing awareness, among policy-makers and academics alike, that respect for human rights, environmental protection and economic development are complementary rather than unrelated or opposing objectives, and that measures to address them require integrated approaches.¹² In particular, recent scholarship, frequently under the term sustainable development, is providing new insights into the systemic inter-relationships among the issues raised.

The language of sustainable development has dominated legal debates in the field of environmental protection since the seminal report of the World Commission on Environment and Development (WCED) in 1987,¹³ *Our Common Future*, popularly known as the *Brundtland Report*. This report defines sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” This definition includes two key elements. First, there is recognition of essential needs and of limitations on the environment’s ability to meet those needs.¹⁴ The bridging of these with ‘sustainable development’ is important because it offers legal and policy solutions to some of the most significant challenges of our era, including meeting essential needs for food, energy, water and sanitation; conserving and enhancing the resource base; reviving growth and changing its quality; re-orienting technology and managing risk.¹⁵ Second, sustainable development has significant procedural elements. It has been described as an open and participatory process of environmental, social, economic, cultural and political change that can be achieved through protecting and enhancing ecosystems, transforming the direction of investments and the orientation of technology, and re-designing institutions to ensure current and future

Sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Brundtland Report, 1987

¹² The need for such integrated approaches is ancient in its origins. See Part II, below.

¹³ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 8 [hereinafter *Our Common Future*]. See A. Kiss & D. Shelton, *International Environmental Law*, 2nd ed. (New York: Transnational Publishers, 1994) 248-249 [hereinafter *Kiss & Shelton*].

¹⁴ *Our Common Future*, *ibid.*

¹⁵ In *Our Common Future*, these were critical objectives identified for sustainable development.

potential to meet the needs and aspirations of communities.¹⁶ The concept of sustainable development received the approval of over 140 governments in the 1992 United Nations Conference on Environment and Development (UNCED), the ‘Earth Summit’, whose key legal texts, the *Rio Declaration and Programme of Action* and *Agenda 21* addressed mostly environmental, but also social and economic concerns.

Despite general consensus and approval however, there are over seventy other formulations of sustainable development, each reflecting particular values and priorities.¹⁷

For example, in 1991 the International Union for the Conservation of Nature (IUCN) published a sequel to *World Conservation Strategy* entitled *Caring for the Earth*, which put more emphasis on ecological limits. Accordingly, sustainable development was defined as “improving the quality of human life while living within the carrying capacity of supporting ecosystems.”¹⁸ Meanwhile, although the concept of sustainable development includes a focus on social and human rights priorities, the *International Covenant on Civil and Political Rights*,¹⁹ the *International Covenant on Economic, Social and Cultural Rights*²⁰, and the *Universal Declaration of Human Rights*²¹ do not even mention environmental issues.

This lack of clarity has caused difficulties at the national and international level. Laws and policies have often been designed to implement policy objectives in three separate spheres – the economic, environmental and social – without coherence or even co-ordination between them. As international legal regimes become more complex, and systems are put in places to implement commitments, countries are faced with overlapping and sometimes even conflicting legal rules. The situation has become particularly unmanageable for developing countries. Valuable resources and capacity are squandered in an attempt to harmonise programmes, which were never meant to conflict. Furthermore, current international institutions suffer from a lack of respect and credibility as a result of organisational inefficiency and ineffective compliance and enforcement mechanisms.

We believe that the vagueness in the concept of sustainable development was deliberate and appropriate in 1992, for it allowed the idea to be adopted almost universally. This inclusiveness was essential for sustainable development to begin to provide guidance to diverse cultures, on many levels (local, sub-national, national, sub-regional, regional and global). In the *Brundtland Report* formulation, sustainable development is clearly a political and social construct, not a scientific blueprint.²²

The lack of detailed content and specific guidelines for the achievement of sustainable development is certainly central the challenges of implementing appropriate international law. It is important, then, to examine how the concept of sustainable development emerged, to identify the legal regimes that aim to achieve its essential goals, and to ask how these regimes seek to integrate economic, environmental and social priorities.

¹⁶ International Institute for Sustainable Development (IISD), *Impoverishment and Sustainable Development* (Winnipeg: IISD, 1996).

¹⁷ T. C. Trzyna, ed., *A Sustainable World: Defining and Measuring Sustainable Development* (Sacramento: California Institute of Public Affairs, 1995) 23.

¹⁸ D. A. Munro & M. W. Holdgate, eds., *Caring for the Earth: A Strategy for Sustainable Living* (IUCN: 1991).

¹⁹ 19 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976) [hereinafter *ICCPR*].

²⁰ 19 December 1966, 993 U.N.T.S. 3, (entered into force 3 January 1976) [hereinafter *ICESCR*].

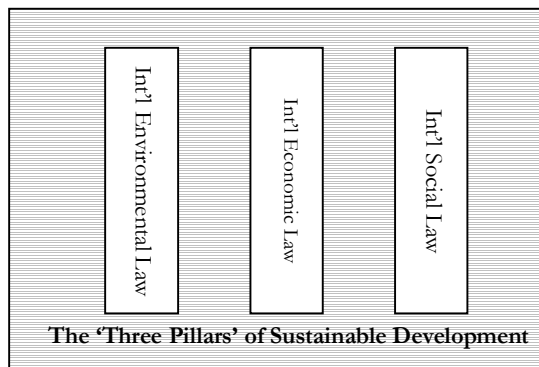
²¹ Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter *UDHR*].

²² S. Baker, M. Kousis, D. Richardson, & S. Young, eds., *The Politics of Sustainable Development* (London: Routledge, 1997).

PART II: THE FOUNDATIONS

Origins of sustainable development

The need for integration of social development, economic progress and environmental protection has been recognised since ancient times and across civilisations.²³ The last twenty-five years has nevertheless witnessed the emergence of sustainable development as an important theme in global discussions of economic, social and environmental policy.²⁴ The term itself first appeared in 1980, with the publication of the *World Conservation Strategy*²⁵ of the International Union for the Conservation of Nature (IUCN). However, many of the central ideas of sustainable development were crystallised earlier in the 1972 United Nations Conference on the Human Environment (UNCHE) and the *Stockholm Declaration on the Human Environment*.²⁶ The event focused primarily on the environment but only in so far as it was needed, used and abused by humanity. The 1992 UNCED (or ‘Earth Summit’) recognised a global need for both environmental protection and economic development and in 1997 the United Nations General Assembly Special Session (the ‘Earth Summit +5’) urged further implementation. In 2002, at the World Summit for Sustainable Development in Johannesburg, South Africa, governments have called for integration of the three pillars of sustainable development – social development, economic progress and environmental protection. This section will briefly examine the evolution of the concept of sustainable development and its prospects beyond the ‘Johannesburg Summit’.



Sustainable Development Prior to Stockholm

Although the Brundtland Report²⁷ popularised the concept of sustainable development in international discourse, its underlying principles are not so recent. It has long been recognised that humanity must live within the carrying capacity of the earth, and manage natural resources so as to meet both current demand and the needs of future generations. In the eighteenth century, Malthus and Ricardo debated the existence of essential links between environment and development, and consequent environmental constraints on economic development.²⁸

Throughout the nineteenth century, it remained unclear to what extent these issues were of international concern, and how international legal rules might govern the balance between environmental protection and economic development.

²³ See *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), I.C.J. Rep. 7 (Separate Opinion of Vice President Weeramantry), where the concept of sustainable development is traced to the practices of ancient tribes in Sri-Lanka, Eastern Africa, America and Europe, and in Islamic legal traditions [hereinafter *Gabčíkovo-Nagymaros*].

²⁴ G. D. Meyers & S. C. Muller, ‘The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy’ (1996) 4 *Buff. Env’tl. L.J.* 1.

²⁵ G.A. Res. 7, U.N. GAOR 36th Sess., Supp. No. 51, U.N. Doc. A/51 (1982) [hereinafter *World Conservation Strategy*].

²⁶ U.N. Doc. A/C. 48/14 (1972), 11 I.L.M. 1461 (1972) [hereinafter *Stockholm Declaration*].

²⁷ *Our Common Future*, *supra* note 13.

²⁸ Thomas Malthus and David Ricardo were 18th-century economic thinkers who were both pessimistic about the prospects for long-term economic growth. Malthus posited that population would increase until the diminishing returns from agricultural production, due to the fixed quantity of land, forced the standard of living to subsistence levels. Once the population reached subsistence levels, the population would cease to grow. Ricardo similarly believed that economic growth would be limited by the scarcity of natural resources. Diminishing returns to land would be offset, but not eliminated, by technological progress. D.W. Pearce & R.K. Turner, *Economics of Natural Resources and the Environment* (Baltimore: John Hopkins University Press, 1990) at 6-7.

In the seminal *Pacific Fur Seal Arbitration* (1893), a dispute arose between the United States and the United Kingdom regarding the right of the United Kingdom to hunt migratory fur seals on the high seas, just outside the three-mile limit of U.S. territorial waters.²⁹ The U.S. argued that it held rights of property and protection in the seals and consequently the right to give effect to conservation measures extraterritorially as trustees ‘for the benefit of mankind.’ The U.S. position was overwhelmingly rejected by the arbitral tribunal in favour of U.K. arguments on freedom of fishing on the high seas.³⁰ However, the tribunal also ‘adopted regulations for the protection and preservation of fur seals’, effectively establishing a safe haven for the seals within a 60-mile radius.³¹ In the 1907 *Trail Smelter Arbitration* between the United States and Canada, sulphur dioxide fumes from a smelter in British Columbia were damaging agricultural and timberland in the State of Washington. The tribunal resolved the dispute by setting a strict limit on the permissible output of sulphur dioxide from the smelter, and more importantly, held that States may be held liable for environmental damage caused by actors from within their territory, if correct laws and standards are not in place.³²

Finally, in the mid-twentieth century, the UN began to support greater recognition for an international sustainable development agenda. As a forum for the development and negotiation of cooperative strategies and binding rules, the UN has had a critical role in promoting sustainable development. For example, in 1962, the UN General Assembly passed a resolution for governments to integrate natural resource protection measures at the earliest stages of economic development, and called for assistance to be provided to developing countries in that respect.³³

The 1972 Stockholm UN Conference on the Human Environment, and the Stockholm Declaration

In 1968, a second resolution by the UN General Assembly pledged to find solutions to problems related to the environment.³⁴ Subsequently, in 1972, the UN hosted the *Conference on the Human Environment* (UNCHE) in Stockholm. The conference provided a forum to discuss inter-State co-operation in the area of environmental protection. As the 26 principles embodied in the *Stockholm Declaration* make clear, the numerous ecological crises threatening the planet at the time demanded worldwide attention and effort.

Principle 4, for instance, recognises a special responsibility to safeguard and wisely manage the imperilled heritage of wildlife and its habitat. The *Stockholm Declaration* also established the United Nations Environment Programme (UNEP), which began operations in 1973, and focused on strengthening and coordinating environmental policy, particularly in developing countries.³⁵ The subsequent adoption by the UN General Assembly of the *World Charter for Nature* in 1982 provided further support for the general principles and attitudes of environmental conservation expressed in the *Stockholm Declaration*. Like the *Stockholm Declaration*, the *World Charter for Nature* was not binding international law. However, it represented a degree of international convergence on the core elements of international environmental law and policy.

Sustainable development as a socio-political concept was finally incorporated into the international environmental debate in the early 1980s.³⁶ As mentioned above, sustainable development first appeared in

²⁹ 1 Moore’s Int’l Arb. Awards 755 [hereinafter *Pacific Fur Sea*].

³⁰ However, as Cassese notes, the tribunal also ‘adopted regulations for the protection and preservation of fur seals’, effectively establishing a safe haven for the seals within a 60-mile radius; see A. Cassese, *International Law* (New York: Oxford UP, 2001) 376 [hereinafter *Cassese*].

³¹ *Ibid.*

³² III U.N.R.I.L.A. (1907), reported at (1941) 35 Am. J. Int’l L. 684 [hereinafter *Trail Smelter*].

³³ G.A. res. 1831, U.N. GAOR, 17th Sess. (1962).

³⁴ See (1968) U.N.Y.B. 84, 430 for the text of a UN pledge to find solutions to environmental problems.

³⁵ C. Tinker, “Environmental Planet Management by the United Nations: An Idea Whose Time Has Not Yet Come?” (1990) 22 N.Y.U. J. Int’l L. & Pol. 793.

³⁶ A. Geisinger, “Sustainable Development and the Domination of Nature: Spreading the Seed of the Western Ideology of Nature” (1999) 27 B.C. Envtl. Aff. L. Rev. 43.

the IUCN's *World Conservation Strategy*,³⁷ followed shortly thereafter by the book, *Building a Sustainable Society*.³⁸ On the whole, this conceptual framework promoted two sets of priorities. First and foremost, the need for environmental protection and conservation was internationally recognised, and public pressure increased to promote the emergence of appropriate policies to its end. At the same time, it was recognised that environmental initiatives alone would not solve many of the most urgent problems. Paramount among these were those which had an impact on the global environment but were intricately related to development strategies. A second set of initiatives was needed to ensure that economic growth, a pressing concern of developing countries, was sustainable. In 1983, the General Assembly established the World

Commission on the Environment and Development (WCED) to investigate these issues, and seek ways forward.³⁹

“Ecology and economy are becoming ever more interwoven – locally, regionally, nationally, and globally - into a seamless net of causes and effects.”

Brundtland Report, 1987

The 1987 'Brundtland Report'

The WCED, chaired by Gro Harlem Brundtland, popularised the term sustainable development in *Our Common Future*, also known as the 1987 *Brundtland Report*.⁴⁰ *Our Common Future* called for a world political transformation based on the concept of sustainable development, that the parallel problems of environmental degradation and development concerns be addressed.⁴¹ As stated earlier, sustainable development was defined as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴² The WCED formally recognised the interrelationships among crises facing citizens throughout the world: “An environmental crisis, a development crisis, an energy crisis. They are all one. Ecology and economy are becoming ever more interwoven – locally, regionally, nationally, and globally - into a seamless net of causes and effects.”⁴³ The WCED further articulated the pursuit of sustainable development as an important goal for the nations of the world, explaining that “the key element of sustainable development is the recognition that economic and environmental goals are inextricably linked.”⁴⁴ As such, the *Brundtland Report* decried the disconnection between existing environmental and development law, and emphasised the increasing interdependence of ecosystems and resource availability with the social and economic components of development. Noting that international law often lagged behind advancements in economy and industry, the Commission called for gap-filling measures, to catch up with the “accelerating pace and expanding scale of impacts on the ecological basis of development.”⁴⁵ It went on to explain how some “forms of development erode the environmental resources upon which they must be based,” and how environmental degradation can undermine economic development and prevent the enjoyment of its benefits.⁴⁶ In calling for a realignment of humanity's relationship with the environment, countries were urged to reorient their development strategies towards to more sustainable paths by taking environmental considerations into account.

As a result, the adoption of the *Brundtland Report* is widely viewed as the moment at which sustainable development became a broad global policy objective.⁴⁷

³⁷ See generally *World Conservation Strategy*, *supra* note 25

³⁸ L. R. Brown, *Building a Sustainable Society* (New York: W.W. Norton & Company, 1981) [hereinafter *Brown*].

³⁹ *Our Common Future*, *supra* note 13at ix.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.* (“The members of the World Commission on Environment and Development came from 21 very different nations. [...] We are unanimous in our conviction that the security, well-being, and very survival of the planet depend on such changes, now.”). See also D. A. Brown, “Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States” (1996) 5 Dick. J. Env. L. Pol. 175.

⁴³ *Our Common Future*, *ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Our Common Future*, *supra* note 13 at 3.

⁴⁶ *Ibid.*

⁴⁷ P. Behr, “Environmental Issues Emerge as Key to Trade Pact on Hill” *Washington Post* (Mar. 17, 1993) A14 and K. Tumulty, “Free-Trade Talks Raise Questions that Alarm Environmentalists” *Los Angeles Times* (17 November, 1991) at 19.

Some argued that the WCED did not go far enough. It was necessary to question economic development as an objective, critiquing the ‘neo-liberal’ focus on progress, growth and material wealth in order for there to be an effective response. While these voices were heard, others noted the limits of international processes, which are seldom given the ability to directly impose such values. Given that developing countries have different challenges and needs, it is impossible to make a catch-all prescription. In addition, more powerful developed countries invested in environmental programmes, but did not, for the most part, adjust their own unsustainable consumption patterns. Accordingly, it seemed hypocritical for developed countries to insist on conservation by others. The debates, often heated, sought ways of acknowledging the divergent priorities of the ‘haves’ and ‘have-nots’, while recognising the full importance of their common interest. This led the international community on the path to UNCED and the body of rules referred to as “international law in the field of sustainable development.”⁴⁸

The 1992 Rio ‘Earth Summit’, the Rio Declaration and Agenda 21

The *Brundtland Report* led the UN to convene a second global conference, held in 1992 in Rio de Janeiro – the *United Nations Conference on Environment and Development* (UNCED). The very name of the conference reflected a change in approach since the *Conference on the Human Environment* in Stockholm.⁴⁹ While the focus had once been on the human impact on the environment and assessing the relevance of the environment in terms of human need, the UNCED’s approach was in marked contrast. In Rio the emphasis was on the protection of the environment and the advancement of development, giving priority to both, and calling for development processes to take the environment into account. The *Rio Declaration*, a short document of twenty-seven principles, has a stunningly composite character. It reaffirms the *Stockholm Declaration* of 1972 on which it seeks to build, but with a new approach and philosophy. Its central concept is sustainable development, as defined by the *Brundtland Report*, whereby development strategies are urged to recognise environmental priorities that they may be sustainable over the long term. Principle 4 is important in this regard as it affirms that in order to achieve sustainable development, environmental protection must constitute an integral part of the development process. These views are also reflected in Principle 1, which advances the anthropocentric position that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”⁵⁰

Agenda 21, an 800-page blueprint for international action in the 21st century, was another major outcome of the UNCED.⁵¹ *Agenda 21* provides a comprehensive plan complete with strategies and programs to halt and reverse the effects of environmental degradation and to promote sustainable development in all countries.⁵²

The text of *Agenda 21* comprises four sections and a preamble. Its four sections are entitled “Social and Economic Dimensions,”⁵³ “Conservation and Management of Resources for Development,”⁵⁴

⁴⁸ *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1, (1992), 31 I.L.M. 874 (1992), Principle 27 [hereinafter *Rio Declaration*] and *Agenda 21*, Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev.1, (1992) 31 I.L.M. 874, para. 39.1 [hereinafter *Agenda 21*].

⁴⁹ *Kiss & Shelton*, *supra* note 13 at 67.

⁵⁰ *Ibid* at 70-71.

⁵¹ M. McCoy & P. McCully, *The Road From Rio: An NGO Action Guide to Environment and Development* (Amsterdam: Utrecht International Books, 1993) 29 [hereinafter *McCoy & McCully*].

⁵² N. A. Robinson, ed., “*Agenda 21: Earth’s Action Plan*” IUCN Environmental Policy & Law Paper No. 27 (1993) [hereinafter *Robinson*].

⁵³ Containing chapters on international co-operation to accelerate sustainable development in developing countries, poverty, consumption patterns, demographic dynamics, human health, human settlements, and integrating environment and development in decision-making.

⁵⁴ This section deals with the more traditional environmental problems and contains chapters concerning atmosphere, land resources, deforestation, desertification and drought, mountain ecosystems, sustainable agriculture and rural development, biological diversity, biotechnology, oceans and seas, fresh waters, toxic chemicals, hazardous wastes, solid and sewage wastes, and radioactive wastes.

“Strengthening the role of major groups”⁵⁵ and “Means of Implementation.”⁵⁶ Unlike the ‘Rio Treaties’ (the 1992 *United Nations Framework Convention on Climate Change*, the 1992 *United Nations Convention on Biological Diversity*, and the 1994 *United Nations Convention to Combat Desertification*, which will be examined below), *Agenda 21* is not binding; however, it is considered as ‘soft law’.⁵⁷ When they left the Earth Summit, the signatories to *Agenda 21* had agreed on much in principle. Yet, most of the details on environmental goals and standards and commitments of the developed world to the developing world remained to be worked out through more specific treaties, conventions, laws, and institutional changes in the years ahead.⁵⁸

Chapter 38 of *Agenda 21* on institutional matters called for the creation of a new United Nations institution. This body was to ensure the effective follow-up of decisions made at the Earth Summit, enhance international co-operation toward integration on environment and development, and examine progress in the implementation of *Agenda 21*.⁵⁹ The UN responded by creating the United Nations Commission for Sustainable Development (CSD) on November 25, 1992.⁶⁰ The CSD is comprised of 53 UN member States elected for three-year terms.⁶¹ Meeting on a yearly basis, the CSD reviews State implementation at national, regional and international levels of the various chapters of *Agenda 21*. In this manner, the CSD addresses all chapters every three years.⁶²

Since 1992, many countries have embraced the goal of sustainable development.⁶³ Indeed, many governments have developed national *Agenda 21*s, authorised special bodies to implement *Agenda 21*,⁶⁴ or even negotiated regional blueprints for sustainable development. International organisations have also adopted the principles and goals of sustainable development, including the European Union and the United Nations Economic Commissions in each region. Indeed, over the course of the last decade, organisations such as the UNEP, the World Bank, the Organisation for Economic Cooperation and Development, and the IUCN have been actively working to identify specific empirical “indicators” for measuring progress towards sustainable development.⁶⁵

The 1997 New York UN General Assembly Special Session on Sustainable Development

In 1997, a special session of the United Nations General Assembly, widely referred to as ‘Earth Summit+5’, was held in New York. The session saw the attendance of heads of State and Government from across the world. Although a relatively modest event, it reviewed and appraised implementation of *Agenda 21*, and other commitments adopted by the 1992 Earth Summit. It sought to assess global progress made in sustainable development since Rio; to demonstrate the effectiveness of sustainable development by highlighting ‘success stories’ from around the world; to identify reasons why goals set in Rio have not

⁵⁵ Section 3 contains chapters pertaining to the roles in achieving sustainable development to be played by women, children and youth, indigenous people, non-governmental organisations, local authorities, workers and trade unions, business and industry, science and technology, and farmers.

⁵⁶ This section addresses financing mechanisms, technology transfers, science, education, capacity building in developing countries, international institutional arrangements, international legal instruments, and information for decision-making.

⁵⁷ *Agenda 21*, *supra* note 48, chapters 11, 12, 18, 20, 21 & 22. See also *Brown*, *supra* note 38 at 198.

⁵⁸ *Brown*, *ibid.* at 200.

⁵⁹ *Agenda 21*, *supra* note 48 at 38.11.

⁶⁰ *McCoy & McCully*, *supra* note 51 at 45. *Robinson*, *supra* note 52 at 655.

⁶¹ *McCoy & McCully*, *ibid.* at 45.

⁶² *Ibid.*

⁶³ P..L. Stenzel, “Can NAFTA’s Environmental Provisions Promote Sustainable Development?” (1995) 59 *Alb.L. Rev.* 43 [hereinafter *Stenzel*].

⁶⁴ United Nations Commission on Sustainable Development, *National Information Report of the Secretary-General* (1995). This document consists of a table summarising national level co-ordination of actions pursuant to *Agenda 21*, and a matrix summarising national priorities assigned to the various issues and current status. According to CSD, nations having taken these steps towards implementation include Australia, Benin, Belgium, Cameroon, Cuba, Canada, China, Egypt, Germany, Italy, Korea, Malaysia, Mongolia, New Zealand, Netherlands, Norway, Niger, Philippines, Portugal, Peru, Senegal, Switzerland, Sweden, United Kingdom, and Zaire. In addition, over 55 nations are submitting reports to the CSD on *Agenda 21* implementation.

⁶⁵ *Trzyna*, *supra* note 17.

always been met and suggest corrective action; to highlight special issues – such as finance and technology transfer, patterns of production and consumption, use of energy and transportation, scarcity of freshwater – and to identify priorities for future action; and finally, call on governments, international organizations and major groups to renew their commitment to sustainable development. The whole resulted in a Declaration, the *Programme of Further Action to Implement Agenda 21*, which laid out priorities for action to promote sustainable development worldwide.

The 2002 Johannesburg World Summit for Sustainable Development

The World Summit on Sustainable Development in August-September 2002 brings together tens of thousands of participants, including heads of State and Government, national delegates as well as leaders from non-governmental organizations (NGOs), businesses and other major groups. The objective here is to focus the world's attention and direct action toward meeting the challenges of the new millennium, including conserving natural resources in the midst of a multiplying population, with ever-increasing demands for food, water, shelter, sanitation, energy, health services and economic security.

At the Earth Summit, the international community adopted *Agenda 21*, an unprecedented global plan of action for sustainable development. Ultimately, the best strategies are only as effective as their implementation. Ten years later, the Johannesburg Summit presents an exciting opportunity for today's leaders to take concrete steps towards identifiable and quantifiable targets for better implementing *Agenda 21*. In addition to governments, active participation is expected from 'Major Groups' identified as stakeholders in *Agenda 21*, including representatives from business and industry, children and youth, farmers, indigenous people, local authorities, non-governmental organizations, scientific and technological communities, women and workers and trade unions.

Sustainable development, policy and international law

Elements of sustainable development form a substantial part of international environmental, social, and economic policy. However, it is vital to examine the legal status of sustainable development in international law – how is 'sustainable development law' possible at all?

We believe that the complex tensions between economic progress, social development and environmental protection have prompted a fundamental transformation in the dynamic of international discourse. Not only are we witnessing a new model of policy discourse, but a re-designing of the very nature of law-making at the intersection of international economic, environmental and social law.

Emerging international regimes consist of networks, partnerships between States and non-state actors such as inter-governmental organisations, civil society and private sector associations. While the sovereign state remains the principal actor, its freedom to make decisions unilaterally is increasingly restricted. Today, numerous non-state entities perform complex tasks and impact decisions.

Both the 1972 Stockholm UNCHE and the 1992 Rio UNCED conferences contributed significantly toward the development of this new model of international policy discourse.⁶⁶ By allowing a large group of non-governmental actors to attend the conferences as observers, the UN established a new standard of legitimate decision-making at the international level.⁶⁷ Moreover, at Stockholm, NGOs presented their own statement of principles to the conference, and in Rio the NGO Forum developed 'alternative' accords

⁶⁶ M. A. Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford: Clarendon Press, 1995), 97-98.

⁶⁷ An estimated 2000 NGOs were said to be in attendance at the UNCED Conference. L. K. Caldwell, *International Environmental Policy* (Durham: Duke University Press 1996) 106 [hereinafter *Caldwell*]; also *Kiss & Shelton*, *supra* note 13 at 23.

among civil society groups.⁶⁸ There was clearly an interactive process between States *inter se*, between States and non-governmental organisations, and between NGOs themselves.

An important factor has been the emergence of international and regional organisations within which government officials and experts, as well as non-governmental individual and group actors, interact and consider alternative policy options for the emerging problem.⁶⁹ The debate that led to the emergence of sustainable development was partially the result of emerging institutional processes within international organisations that allowed non-governmental actors to direct their claims to the plenary of States as a whole, in addition to States in their individual capacity. Thus, the new institutions served as focal points for a discursive process involving both States *inter se*, and between States and non-state actors.

Consequently, it is increasingly argued that international law-making is no longer depends solely on treaty negotiation and the development of customary rules. From this new perspective, international law is seen as a manifestly dynamic system with numerous hierarchic levels that originate with a statement of values and principles. These evolve into clear and specific directives on how to implement the rules formulated at the intermediate levels of the system.⁷⁰ As argued by Weiss, traditional international law is healthy in the sense that there are more international agreements than ever, and States continue to serve important roles in the international system. It is no longer, however, the sole focus of international legal efforts. Rather, international law is being redefined to include actors other than States among those who make international norms and who implement and comply with them, and to include legal instruments that may not be formally binding.⁷¹

In international law related to sustainable development, so-called ‘soft law’ instruments abound. The *Stockholm Declaration* and the *Rio Declaration* are both non-binding instruments, as are the *Forest Principles* adopted at UNCED. The many guidelines, principles, and recommended practices adopted by the OECD, the UNEP, or the UN Food and Agriculture Organisation (FAO), while non-binding, are sometimes influential legal instruments. For example, the 1989 UNEP *London Guidelines for the Exchange of Information on Chemicals in International Trade* or the 1985 FAO *International Code of Conduct on the Distribution and Use of Pesticides*, and the 1990 FAO *Guidelines on the Operation of Prior Informed Consent*, have been widely respected, although they are non-binding.⁷² There are various reasons that States sometimes prefer non-binding documents. The negotiation of legally non-binding instruments is more likely than the negotiation of formal international conventions in at least certain areas of international law. Agreement appears easier to

⁶⁸ Caldwell, *ibid.* at 66.

⁶⁹ On the role of international organisations as sites of interaction and arenas for coalition building at the international level, See H. Breitmeier, “International Organizations and the Creation of Environmental Regimes” in O. Young, ed., *Global Governance: Drawing Insights From the Environmental Experience* (Cambridge: MIT Press, 1997) at 87-114.

⁷⁰ M. Decleris. *The Law of Sustainable Development: General Principles, A Report for the European Commission* (2000) 40 [hereinafter Decleris].

⁷¹ Edith Brown Weiss, “The Emerging Structure of International Environmental Law” in N. J. Vig & R. S. Axelrod, Eds., *The Global Environment: Institutions, Law, and Policy* (Washington: Congressional Quarterly, 1999) 98, argues that “[i]nternational law now consists of other important legal instruments in addition to binding agreements and rules of customary international law, namely, legally non-binding or incompletely binding norms, or what has been called ‘soft law.’ These instruments exist in all areas of international law, although they appear to be more abundant in human rights, environment, and financial dealings.” She points out that “one of the most important sources of international ‘soft law’ is the myriad of guidelines, resolutions, and recommendations that are made by parties to an international agreement in the course of implementing it” and argues that the “old vision of an international agreement as an unchanging normative document binding upon the parties is obsolete. International agreements need to be viewed as living agreements, into which parties continuously breathe life and to which they give new directions by acting as informal legislatures. The negotiation of legally non-binding instruments is likely to increase more rapidly than the negotiation of formal international conventions, at least in certain areas of international law. This is true because agreement is usually easier to achieve, the transaction costs for governments and even NGOs are lower, the opportunity to set forth detailed strategies is greater, and the ability to respond to rapid changes in scientific understanding or economic or social conditions is better.”

⁷² Philippe Sands, “Environmental Protection in the Twenty-First Century: Sustainable Development and International Law” in N. J. Vig & R. S. Axelrod, eds., *The Global Environment: Institutions, Law, and Policy* (Washington: Congressional Quarterly, 1999) 120.

achieve, the transaction costs are lower, the opportunity to detail strategies is greater, and often, such norms seem to respond better to rapid economic changes in scientific understanding or economic or social conditions.

Sustainable development derives a significant amount of its normative power from its negotiated, incremental acceptance among States, as well as a wide variety of other actors and interest groups. It did not emerge from a hierarchical decision-making structure, and can be characterised as a ‘mutually-generated’ norm. The process of debate around the concept of sustainable development requires participation from the international community as a whole, regulating the conduct of both its legislators and civil society.⁷³ It must represent a global consensus as to future direction of environmental, economic and social decision-making. As such, sustainable development can be seen as a ‘goal’ of the international community as a whole, as well as of its constituent parts.

Sustainable development, therefore, has a peculiarly self-reinforcing character; its normative force rests on the fact that its very concept has itself developed sustainably over time.

Legal aspects of sustainable development

This book argues that in reality, three fields of international law contribute to sustainable development. Since the call for further integration of environment and development law in Chapter 39 of *Agenda 21*, the area of intersection between international economic, social and environmental law has been growing. In order to analyse the body of principles and practices which have developed to mediate and provide coherence in and among these fields, it is important to begin with a survey of recent developments in each of these three areas. In this section, each area is briefly surveyed in turn, by laying out several of the recognised principles, and describing some of the major legal instruments as well as domestic implementation mechanisms that form part of their respective legal regimes.

International Economic Law

A broad interpretation of international economic law encompasses both the conduct of States in international economic relations, and the conduct of private parties involved in cross-border economic and business transactions. As economic interrelationships among countries continue to grow, new challenges appear, and international economic law evolves. It is not derived from a single or even several sources of law; but finds its genesis in a wide variety of sources and continues to be developed through the decisions of international tribunals and relevant international organisations. National, regional, and international law (public and private) and policy are all components of international economic law. International economic law encompasses a wide range of subjects including trade in goods and services, financial law, economic integration, development law, international investment law, business regulation and intellectual property.

International business transactions continue to grow in number and size. Various international organizations play a role in the coordination of this growing area of international law. Chief among them are the World Trade Organisation (WTO), the World Customs Organisation (WCO), the Organisation for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), as well as the International Labour Organisation (ILO) and many regional or bi-lateral trade, investment and economic integration treaties.

International trade law, in turn, focuses on how countries conduct trade in goods and services across national borders, and enshrines the principles of ‘most-favoured nation’ treatment, ‘national treatment’ or

⁷³ See Brunnée and Toope, *Interactional Theory*, *supra* note 7 at 48, referring to lawmaking as a mutually generative activity, and the dual function of States as both makers and observers of international law.

non-discrimination, and 'transparency.' Several organizations address the export and import issues that arise in the international trade of goods and services. Chief among them is the World Trade Organisation (WTO), established through a coordinated body of treaties linked to a quasi-judicial, binding dispute settlement mechanism. The General Agreement on Tariffs and Trade (GATT) came into being in 1948 as a multilateral instrument to promote trade and gradual liberalisation. In 1994, the Uruguay Round of the GATT established the WTO as an international organization. It deals with the rules of trade between States, and supports the multilateral trading system through WTO agreements, including trade of goods, services, and intellectual property. WTO issues also encompass electronic commerce, trade and investment, intellectual property, environment, development, trade policy reviews, government procurement, regionalism, competition policy and dispute settlement. It has over 100,000 official documents produced by or for the WTO's councils, committees, and working groups. The WTO Dispute Settlement mechanism is building a separate body of law through the adoption of dispute settlement panel reports, appellate body reports, and adopted panel reports within its framework. These build on the adopted panel reports from the 1947 GATT framework, which were produced from 1948-1994. A significant difference between the GATT and WTO dispute settlement procedures is that now panel and appellate body reports enjoy near immediate application.

Specifically, these reports become binding at the panel level unless one of the parties decides to appeal or the Dispute Settlement Body (DSB) decides by consensus not to adopt the report.⁷⁴ Similarly, appellate body reports are adopted by the DSB and accepted by the parties unless the DSB decides, again by consensus, within thirty days of the issuance of the report, not to adopt it.⁷⁵ The fact that these new procedures have taken away the power of veto that, under the previous GATT regime, enabled an aggrieved party to block the adoption of panel reports, promises to contribute to the advancement of jurisprudence in this area.

Other institutions also provide assistance and support, through market and country reports and economic analyses, to further promote international trade. The World Customs Organization (WCO) is an independent intergovernmental body with world-wide membership (currently 159 members) that deals specifically with customs issues. The WCO addresses the harmonisation of customs systems, valuation, origins of goods, cross border crime, and information technology. Other relevant international actors include the International Labour Organization (ILO), a specialized UN agency, which develops international labour standards, called conventions and recommendations. These are critical in setting minimum standards of basic labour rights. Select "International Labour Standards" have been developed, through particular labour conventions and international labour guideline processes.

Other informal groupings of interest include the so-called Group of 8 (G8) and the Group of 20 (G20). The G8 meetings deal with macroeconomic issues, including international trade, and relations between developed and developing countries. G8 members include France, the United States, Britain, Germany, Japan, Italy, Canada, European Union, and Russia. Decisions of interest from G8 Summit Meetings, G8 Ministerial Meetings, and scholarly publications form part of the background to this decision-making process. The G20 is a relatively new forum of finance ministers and central bank governors from twenty large developed and developing economies. The G20 aims to bring together systemically significant economies and to promote cooperation between them to achieve stable and sustainable world growth.

In terms of non-governmental actors in this area, the International Chamber of Commerce (ICC) deserves mention. The ICC enjoys a top-level consultative status with the United Nations Economic and Social Council (ECOSOC), representing the views of business in the area of international trade and investment. The ICC promulgates voluntary practices in the conduct of transnational business in such areas as banking, arbitration, commercial crime, e-commerce, energy, financial services, taxation, and trade and investment.

⁷⁴ See paragraph 16.3 of the *Dispute Settlement Understanding*, being Annex 2 to the *Marrakech Agreement Establishing The World Trade Organization*, 15 April 1994 (in force: 1 January 1995), 33 I.L.M. 1125 [hereinafter *DSU*].

⁷⁵ *Ibid.*, para. 17.14.

These practices have found widespread acceptance and are widely adhered to in international transactions. The ICC International Court of Arbitration is a leading international arbitral institution, governed by 1998 *Rules for ICC Arbitration*.

Similarly, the International Standards Organisation (ISO) is a non-governmental organization established in 1947, consisting of a worldwide federation of national standards bodies representing over 140 countries. The ISO develops international agreements of technical specifications to be used consistently as rules or guidelines to ensure that materials and products are suitable for their purposes in a global marketplace. These agreements are published as non-binding international standards to break down barriers to trade and facilitate the international exchange of goods and services.

Regional affiliations range from loosely defined customs unions to highly structured and regulated economic and monetary ones. These regional organizations generally provide online, public access to documents and legislation as well as information from member countries.

- **AFRICA:** African, Caribbean and Pacific Group of States (APC) aims to achieve sustained economic growth for its 78 current members. The APC has produced treaties and agreements, including the 2000 *Cotonou Agreement* between the members of APC and the European Community. In addition, the Common Market for Eastern & Southern Africa (COMESA) is a regional grouping of 21 countries of Eastern and Southern Africa and was established in 1994 to replace the Preferential Trade Area for Eastern and Southern Africa (PTA), which had been in existence since 1981. The Economic Community of West African States (ECOWAS) is a sub-regional grouping of fifteen West African Countries established in 1975 to foster the economic and monetary integration of its Member States. The constitutive treaty of 1975, adopted in Lagos, was revised in 1993. Significantly, this revised treaty provides, as one of the objectives, ‘...to protect, preserve and enhance the natural environment of the region’.⁷⁶ Similarly, the *Constitutive Act* of the African Union adopted in Lome, Togo in 2000, aims to accelerate the political and socio-economic integration of Africa, and to promote sustainable development at the economic, social and cultural levels.⁷⁷
- **ASIA AND THE PACIFIC:** The Asia-Pacific Economic Cooperation (APEC) was established in 1989. APEC currently has 21 member countries that border the Pacific Ocean, working together to promote open trade and economic cooperation in the region. In addition, Indonesia, Malaysia, Philippines, Singapore and Thailand established the Association of Southeast Asian Nations (ASEAN) in 1967 with the signing of the Bangkok Declaration. Brunei Darussalam, Vietnam, Laos, Myanmar, and Cambodia later became members. The ASEAN *Bangkok Declaration* aimed to join Member States in an effort to promote regional economic cooperation and welfare. Objectives from ASEAN summits include the creation of an ASEAN Free Trade Area and a preferential tariff scheme.
- **EUROPE:** The Council of Europe is an international organization whose objectives include the strengthening of democracy, the promotion of social and economic programs, human rights and the rule of law among its 43 Member States. The 1958 *Treaty establishing the European Economic Community (Rome Treaty)*, established a European Common Market, whose objective was to gradually develop integrated economic policies, a common customs tariff scale and the elimination of customs duties among members. The 1993 *Treaty on European Union (Maastricht Treaty)* established the European Union with the aim to achieve an economic and monetary union. Much law has also developed through the European Court of Justice and Court of First Instance, which has jurisdiction to hear disputes between Member States, Community institutions, undertakings and

⁷⁶ See *Revised Treaty of the Economic Community of West African States* (ECOWAS) 1993, art. 29, reprinted at (1996) 8 Afr.J.I.C.L 189. The 1975 Lagos Treaty can be found at 14 ILM 1200 (1975).

⁷⁷ See *Constitutive Act of the African Union*, adopted in Lome, 12 June, 2000, arts. 3(d) and 3(j).

individuals. Decisions from the Court of Justice and Court of First Instance have led to a particular quasi-constitutional order specific to the region. The European Free Trade Association (EFTA) also deserves brief mention. Originally founded in 1960 by six European nations, EFTA now includes Iceland, Liechtenstein, Norway and Switzerland. The legal instrument of the Association is the *Stockholm Convention*. EFTA's objective is to remove trade barriers among members. Finally, the European Economic Area (EEA) came into being on January 1, 1994 extending the internal market of the EU to three EFTA countries, Iceland, Liechtenstein, and Norway. The Secretariat administers the *Stockholm Convention*, the EEA Agreement, and other conventions and agreements.

- WESTERN HEMISPHERE: The Free Trade Area of the Americas (FTAA) aims to integrate the economies of 34 nations in the Western Hemisphere into a single free trade area with a launch date in 2005. This process was initiated in 1994 at the Summit of the Americas, and is built upon five sub-regional blocks. The Andean Community, a customs union, is comprised of Bolivia, Colombia, Ecuador, Peru, and Venezuela. Andean integration focuses on economic and social cooperation to promote the growth of member economies. Its aim is to create a Latin American common market through complete trade liberalisation, a common external tariff, the progressive harmonization of socio-economic policies and the coordination of national legislation. The Caribbean Community (CARICOM) is an organization focusing on Caribbean regional integration. The MERCOSUR - Southern Common Market Agreement, also known as the *Treaty of Asunción*, established a common market among Argentina, Brazil, Paraguay and Uruguay. MERCOSUR aims for a program of trade liberalisation, reductions of customs tariffs, the elimination of non-tariff barriers and other restrictions to trade. Finally, the North American Free Trade Agreement (NAFTA), entered into force on January 1, 1994, aims to eliminate tariffs on qualifying goods between Canada, Mexico and the United States. Other objectives include fair competition, greater investment opportunities, and the protection and enforcement of intellectual property rights.

International Social Law

International law in the social domain comprises two broad categories. The first included specialized bodies of law – international human rights law, international humanitarian law (law of armed conflict) and international labour law,⁷⁸ each of which include a body of treaties and declarations, elements of which also have expression in customary international law. These bodies of law are each linked to multilateral international monitoring bodies.

The second category is a growing corpus of international development law, composed mainly of multilateral ‘soft law’ declarations decided in specialised conferences such as the *Beijing Declaration and Platform for Action* (United Nations Fourth World Conference on Women),⁷⁹ *the Report of the International Conference on Population and Development*, the 1996 *Rome Declaration on World Food Security and World Food Summit Plan of Action*,⁸⁰ *Programme of Action of the World Summit for Social Development*.⁸¹ General Assembly resolutions include the *Declaration on Social Progress and Development*,⁸² and the *Millennium Declaration*,⁸³ This category is conspicuous by the absence of formally binding treaties or governance institutions. However, multilateral declarations such as the can form part of the progressive development of international law, can have interpretative force in the interpretation of treaty law, and may be considered politically binding, independent of their legal force.

⁷⁸ See for example, treaties of central relevance to sustainable development such as the *Indigenous and Tribal Peoples Convention, 1989, I.L.O. Convention No. 169* and the *Maintenance of Social Security Rights Convention, 1982, I.L.O. Convention No. 157*.

⁷⁹ U.N. Doc. A/CONF.177/20 (1995)

⁸⁰ See also the follow-up document, *Declaration of the World Food Summit: Five Years Later*, 2002, WFS Doc. FYL 2002/3.

⁸¹ UN World Summit for Social Development, U.N. Doc. A/CONF.166/9 (1995).

⁸² G.A. Res. 2542, UN GAOR 1969.

⁸³ *Millennium Declaration*, G.A. Res. 55/9, UN GAOR, 2000, ch. III.

International human rights law is probably the most relevant body of social treaty law in the context of sustainable development.

Key treaties include, *inter alia*, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁸⁴ *International Covenant on Civil and Political Rights* (ICCPR).⁸⁵ The pre-eminent human rights declaration is the *Universal Declaration of Human Rights*.⁸⁶ International human rights treaties each include a treaty body composed of independent experts that assess reports by State Parties. Certain treaties, such as the ICCPR, include an Optional Protocol permitting individual complaints. However, unlike environmental treaties, they generally do not have conferences of parties that monitor progress on treaties. Inter-governmental discussion on human rights occurs in the United Nations Commission on Human Rights.

Human rights law provides legal content and institutional mechanisms that include key rights such as the right to political participation, the right to free expression, the right to an adequate standard of living and the right to equality of social welfare and poverty and equality rights for women and minorities, the right to self-determination and the right to development. The interaction between human rights law and sustainable development is elaborated upon in Part IV, Case Study IV.

*International Environmental Law*⁸⁷

The framework of international environmental law is based on several key principles, implemented through multilateral environmental agreements (MEAs) and national instruments, and coordinated by a system of international environmental governance (IEG). This section surveys a few key principles, identifies some of the significant legal instruments in the field and examines prospects for further development within a strengthened IEG regime.

The principles of international environmental law have gained increasing recognition over the past decades; while some are considered influential ‘soft law’, others are increasingly emerging as norms of customary international environmental law or have been codified in key MEAs, binding upon their Parties.

One of these founding principles is a general obligation on States to cooperate in investigating, identifying, and avoiding environmental harms. This general obligation of cooperation involves specific duties relating, for example, to the exchange of information, the need to notify and consult with potentially affected States, and the requirement to coordinate international scientific research.

A second widely accepted principle of international environmental law that States are required to ensure that activities within their jurisdiction or control do not damage the environment of other States or the commons.⁸⁸ The duty to prevent harm is often written to require States to take all “practicable” steps to avoid harm. The reliance on a standard of “practicable” steps suggests that the duty to prevent harm may not be absolute, but requires at least that States diligently and in good faith make all reasonable efforts to avoid environmental damage.

A third principle is that of pollution prevention, a specific articulation of the general duty to avoid environmental damage. The current focus on pollution prevention, both by industry and among

⁸⁴ *ICESCR*, *supra* note 20.

⁸⁵ *ICCPR*, *supra* note 19.

⁸⁶ *UDHR*, *supra* note 21.

⁸⁷ This section is based on the United Nations Environment Programme, D. Hunter, J. Sommer, S. Vaughan’s ‘Concepts and Principles Of International Law’ (Nairobi: UNEP, 1998).

⁸⁸ As provided in Principle 21 of the *Stockholm Declaration*, *supra* note 26 (and, more recently, Principle 2 of the *Rio Declaration*, *supra* note 48), “States have, in accordance with the Charter of the United Nations and the principles of international law, ... 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.”

policymakers, reflects a growing knowledge that avoiding or reducing pollution is almost always less expensive than attempting to restore a contaminated area. Pollution prevention has been adopted, in general terms, by numerous conventions and resolutions restricting the introduction of pollutants into the environment.⁸⁹ MEAs can also prescribe concrete quantitative standards for pollution abatement, including in some cases specific timetables for reducing or eliminating certain emissions. In some contexts, pollution prevention refers exclusively to minimizing waste through design changes, input substitutions and other clean production methods. Industry now recognizes that designing a product or process to minimize waste production is often more cost effective than relying on "end-of-pipe" technologies or disposal options. Beginning with the initial design of a product and of its production process and continuing all the way through the life-cycle of a product to disposal, the most modern companies now seek clean production methodologies and processes to reduce material inputs and waste discharges.

A fourth principle, precaution, can apply both in general environmental law, and in the law relating to specific sustainable development law issues such as health, biodiversity and natural resources. This is a key principle of international environmental law, central to the prevention of environmental damage and the protection of the rights of present and future generations.⁹⁰ This precautionary principle underlies a number of international legal instruments. It also applies in a variety of contexts from protecting endangered species to preventing pollution. The precautionary principle evolved from the growing recognition that scientific certainty often comes too late to design effective legal and policy responses to potential environmental threats. In essence, it switches the burden of proof necessary for triggering policy responses. The far-reaching implications of the precautionary principle are considered more fully in Part III, section 5, below.

The polluter pays principle is also widely recognised. This principle implies that the polluter should bear the expenses of carrying out pollution prevention measures or paying for damage caused by pollution.⁹¹ Instituting the polluter pays principle ensures that the prices of goods reflect the costs of producing that good, including costs associated with pollution, resource degradation, and environmental harm. Environmental costs are reflected (or 'internalised') in the price of every good. The result is that goods that pollute less will cost less, and consumers may switch to less polluting substitutes. This will result in a more efficient use of resources and less pollution. The broader question of State responsibility and liability for environmental harm remains contested. A distinction continues to emerge in international environmental law between international 'responsibility' and international 'liability': the former arises from unlawful acts, the latter can arise from the consequences of otherwise lawful acts (although it is still used at times with reference to unlawful acts). Imposing liability for acts not prohibited by international law irrespective of fault or the lawfulness of the activity emphasises the harm, rather than the conduct. Traditional principles of State responsibility can merge with the concept of State liability, particularly in instances such as ultra-hazardous activities where States must meet such a strict standard of care that for all practical purposes

⁸⁹ Principle 6 of the *Stockholm Declaration*, *ibid* sets out the principle in sweeping terms: "The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems."

⁹⁰ As set forth in the *Rio Declaration*, *supra* note 48 at Principle 15, the precautionary principle states that: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Many have argued that the Principle has developed since then, to a broader formulation which includes health. See M. Gehring, M.C. Cordonier Segger, *Precaution in International Sustainable Development Law: A Legal Brief*, (Montreal: CISDL, 2001) online: <http://www.cisd.org>.

⁹¹ Originally recommended by the OECD Council in May 1972, the polluter pays principle has been increasingly accepted as an international environmental principle. It has been explicitly adopted in several bilateral and multilateral resolutions and declarations, including Principle 16 of the *Rio Declaration*, *supra* note 48, which provides: "National authorities should endeavour to promote the internalisation 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."

they will be ‘responsible’ for any activity leading to harm.⁹² Aside from the regime governing State responsibility, liability for pollution-related injuries is also addressed, albeit generally, in many treaties.

International environmental law now includes a considerable body of MEAs, many of which contain integrated provisions related to sustainable development as well. Virtually every MEA includes provisions requiring co-operation in generating and exchanging relevant information. In addition to increasing understanding of environmental issues, the exchange of information through specific, periodic reporting requirements is one of the most important tools for monitoring the domestic implementation of international environmental obligations. MEAs have institutionalised the collection and distribution of information by creating international bodies (such as clearinghouses or secretariats) with explicit information generating and distribution functions. The exchange of information will continue to be a critical aspect of environmental protection in the future.

A comprehensive examination is beyond the scope of this manual, but a few well-known MEAs are mentioned below. While there are over 300 important MEAs and thousands of regional or sub-regional environmental co-operation instruments, these are not organised in any hierarchy or generalised system. Rather, each environmental accord was negotiated, many in the last three decades, in order to address a specific environmental problem. Often, the first step was simply to collate, in a co-operative way, enough scientific information to clearly define the problem and identify the steps needed to address it. This being the case, the MEAs are often grouped by the environmental problems they were established to resolve.

While some MEAs have been more successful than others, for many it is simply too early to tell whether enough can be done, in time, to achieve the goals of the parties to the treaties.

For example, many environmental concerns have been raised as rates of species extinction continue to grow, often a result of the destruction of habitat or lack of common parameters for the protection and sustainable use of the earth’s biological diversity. A growing body of MEAs exists covering biodiversity protection and use. Many of these are administered by UNEP. These MEAs include: the *Agreement on the Conservation of African-Eurasian Migratory Waterbirds* (AEWA); the *Agreement on the Conservation of Small Cetaceans of the Baltic & North Seas* (ASCOBANS); the *Agreement on the Conservation of the Black Seas, Mediterranean and Contiguous Atlantic Area* (ACCOBAMS); the *Convention on International Trade in Endangered Species of Flora and Fauna* (1973); and the *Bonn Convention on Migratory Species* (1979).⁹³ These treaties can encourage joint management regimes for certain species. For example, the *Convention on International Trade in Endangered Species of Flora and Fauna* (CITES) lists endangered species through a system of Annexes. If a particular species is listed as particularly vulnerable or endangered in one of the Annexes, Parties to the MEA will limit its exploitation, and establish trade restrictions for countries not in compliance with the protection regimes. One of the most significant in the group relating to biological diversity is the *United Nations Convention on Biological Diversity* (1992), which seeks both a clearly environmental priority, the protection of biodiversity, and also more sustainable use of biodiversity for development. The CBD’s

⁹² Under the rubric of State responsibility, the recent *Articles on State Responsibility*, adopted by the International Law Commission, establish that the obligation to make reparations is premised on ‘injury’ or ‘damage’, but there is no requirement that an international dispute be premised on the fact of harm. This is particularly evident in the analysis of damage in J. Crawford, *The International Law Commission’s Articles on State Responsibility – Introduction, Texts & Commentaries* (Cambridge: Cambridge UP, 2002) 29-31 [hereinafter *Crawford*]. The new Articles are highly relevant to cases of environmental harm attributable to a State, in particular where the obligations breached are peremptory norms of international law (such as the prohibition on ‘massive pollution’ of the atmosphere and seas) or obligations owed to the international community as a whole (such as an obligation aimed at protection of the marine environment, the obligation to refrain from massive pollution of the sea and atmosphere, or even a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States (and of areas beyond national control), recognised by the ICJ in the *Nuclear Weapons* case and reiterated in the *Gabčíkovo/Nagymaros* case. See I. Brownlie, *Principles of Public International Law* (New York: Oxford UP, 1998) 288 [hereinafter *Brownlie*]; see *Nuclear Weapons*, *supra* note 9 at 241-42; *Gabčíkovo/Nagymaros* *supra* note 23, para. 53.

⁹³ International environmental law benefits from a strong co-ordinating and promotional role played by the United Nations Environment Programme. Excellent resources on international environmental law, as well as links to the MEAs listed here, are available online at www.unep.org.

recently negotiated *Cartagena Protocol on Biosafety* (2000) is also a strong example of sustainable development law, using economic measures to promote safer use of biological technologies.

Another example of an MEA problem area is the international trade or use of chemicals. Chemicals and their products can cause significant harm to the environment, particularly if they are used irresponsibly or if the countries receiving shipments of dangerous chemicals are not fully informed of their properties. Chemicals-related conventions include: the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987) and the *Multilateral Fund for the Implementation of the Montreal Protocol*; the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989); the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (1998) (joint interim secretariat with FAO); and the *Stockholm Convention on Persistent Organic Pollutants* (2001). These conventions set regimes in place to regulate, and in some cases even ban or control, international trade and use of chemicals. They can help to ensure safe use of hazardous substances, or prevent them from entering a country where such safe use cannot be assured.

There are also several atmosphere-related conventions, including the *Vienna Convention for the Protection of the Ozone Layer* (1985); and several other regional treaties.

Not all MEAs are administered by UNEP. Many international conventions administered by other bodies, which have both environment and sustainable development components. These include the *United Nations Convention to Combat Desertification* (UNCCD); the *United Nations Framework Convention on Climate Change* (UNFCCC); the *United Nations Convention on the Law of the Sea* (UNCLOS); and the UNESCO *Man and the Biosphere Programme* (MAB) and *World Heritage Convention* (WHC).⁹⁴ These are not as clearly limited to environmental priorities, and are highlighted elsewhere in this publication as particular sustainable development law accords.

To truly understand the nature of the international environmental legal regime, it is also necessary to examine the nature of national environmental management. This is conducted through a variety of means, including species and habitat conservation measures, environmental taxes and charges, negotiated voluntary agreements, deposit and refund (or take-back) schemes, and also restrictions on certain goods and practices. Environmental standards play a strong role. One recent study by UNEP and the IISD, which seeks to explain environmental law to trade lawyers, outlines five. First, environmental quality standards, which seek to set a certain state of the environment. These are done with the designation of permissible concentrations of substances (pollution) in the air, water or soil, or population standards which require the protection of certain species that have become threatened or endangered. The second are emission standards, which identify the amount of certain substances a facility may emit. The third are product standards, which specify certain characteristics that are deemed necessary to avoid environmental harm from the use or disposal of products. This includes bans on certain chemicals in products, and these standards are often used to protect human health. The fourth are process and production standards, which specify how products are to be produced and what kinds of impact they may have on the environment. Finally, the study mentions performance standards, which require certain actions (such as environmental impact assessment, mentioned below), which can improve environmental management. The overall effect of all these standards is to require producers, traders and consumers to consider the environmental impact of the economic decisions they take, internalising external environmental costs. Market mechanisms such as taxes, charges, tradable permits or subsidies can achieve the same goal, and are often also part of national environmental management systems.⁹⁵

⁹⁴ These conventions are often considered broader than simply MEAs, and are administered under their own regimes. See generally A. Boyle and D. Freestone, eds *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University, 1999) [hereinafter *Boyle & Freestone*].

⁹⁵ United Nations Environment Programme (UNEP) & International Institute for Sustainable Development (IISD) *Environment and Trade: A Handbook* (Winnipeg: IISD, 2000).

International environmental governance has recently been detailed, clarified and strengthened, through a comprehensive intergovernmental process that culminates in the 2002 World Summit for Sustainable Development. This process defined five essential building blocks for a significantly strengthened international environmental governance (IEG) regime, which will also be mentioned below in the concluding section on sustainable development governance.

International environmental governance will be mainly done through the implementation of the outcomes of UNEP's Governing Council Seventh Special Session, Decision I: International Environment Governance (IEG). This decision was the result of a ministerial-level intergovernmental process, established by the UNEP governing council, addressing issues and options for strengthening international environmental governance.⁹⁶ There is also a special role for the Global Environment Facility (GEF) in terms of financing environmental projects. Third, co-ordination will be enhanced through the further development of an Environmental Management Group (EMG) composed of relevant international organisations and treaty secretariats. Fourth, there will be clustering of Multilateral Environmental Agreements (MEAs) along functional and programmatic lines. Fifth, and this call was reinforced by the WSSD, the General Assembly is invited, for its 57th Session, to consider establishing universal membership for the Governing Council/Global Ministerial Environment Forum.

⁹⁶ More information on international environmental governance negotiations can be found at the UNEP website, online: <http://www.unep.org/IEG>. See also M.C. Cordonier Segger, A. Khalfan, M. Gehring, "International Environmental Governance for Sustainable Development, A Legal Brief", Centre for International Sustainable Development Law (CISDL), online: <http://www.cisd.org>.

PART III: THE PRINCIPLES

As seen above, in recent years discussions of international sustainable development have expanded considerably.⁹⁷ Increasing numbers of international treaties, particularly in the fields of international trade and environmental law, are attempting to address sustainable development goals.⁹⁸ International legal decisions and opinions are beginning to recognise sustainable development goals and instruments explicitly,⁹⁹ and are increasingly being invoked before national courts and tribunals around the world.¹⁰⁰

A substantive body of legal norms has developed, supported by distinctive procedural elements, that can resolve perceived conflict and guide further integration at the intersection of environmental, social and economic law.

The question remains as to whether, in this changing context, the principles that comprise the notion of sustainable development are sufficiently substantive at this time to be capable of establishing the basis of an international cause for action.¹⁰¹ Can these principles give rise to an international customary legal obligation, the violation of which would give rise to a legal remedy? To answer this question, it is important to identify substantive principles of international law related to sustainable development, and analyse the practice and *opinio juris* of States.

We believe that a body of substantive legal norms has developed, supported by distinctive procedural elements, that can resolve perceived conflicts and guide further integration at the intersection of international environmental, social and economic law.¹⁰²

The international processes described earlier are culminating in a general, though not universal, acceptance of the normative power of sustainable development, and expectations of good conduct on the part of States and other actors in order to attain sustainable development are emerging. As explained above, the changing structure of international law has allowed a multiplicity of actors, both State and non-State, to generate knowledge and participate in the developing discourse through domestic and international legal

⁹⁷ These include, *inter alia*, a report by the *World Commission on Environment and Development Experts Group on Environmental Law* (1987), the *Rio Declaration*, final documents of various large UN Conferences, including the 18th *UNGA Special Session on International Economic Co-operation* (1990), the *Vienna World Conference on Human Rights* (1993), the *Cairo UN Conference on Population and Development* (1994), the *Beijing UN Womens Conference* (1995) and the *Copenhagen Social Summit* (1995), the *Agenda for Development* by the UN Secretary General (1995); the *IUCN Draft Covenant on Environment and Development*, revised in 2000; the *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development*, UN Secretariat, September 1995, International Law Association committee research seminar publications, including ‘*The Right to Development in International Law*’ (1992), ‘*Sustainable Development and Good Governance*’ (1995), and ‘*International Economic Law with a Human Face*’ (1997); the *UNEP Position Papers on International Environmental Law Aimed at Sustainable Development*, UNEP (1997) and 2000 (Montevideo Programmes II and III), and the *Earth Charter* (2000).

⁹⁸ See Campiglio, et al., *The Environment After Rio: International Law and Economics*, (Boston: Graham & Trotman, 1994) and P. Sands, *Principles of International Environmental Law: Frameworks, Standards and Implementation*, vol. 1 (Manchester: Manchester University Press 1996) [hereinafter Sands, *International Environmental Law*]. See *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849 [hereinafter *Climate Change Convention*], *United Nations Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 822, arts. 8 & 10 [hereinafter *Biodiversity Convention*], *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 [hereinafter *Desertification Convention*]. See also *Washington Declaration – the Global Programme of Action for the Protection of the Main Environment from Land-based Activities* UNEP/OCA/LBA/IG.2/14, reprinted at (1995) 6 Yb.I.E.L. 883 [hereinafter *Washington Declaration*] and *United Nations Convention on the Non-Navigational Uses of International Watercourses*, UN Doc. A/51/869 (1997) [hereinafter *Watercourses Convention*].

⁹⁹ See *Gabčíkovo-Nagymaros*, *supra* note 23, *Nuclear Weapons*, *supra* note 9 and *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 20 September, 1999, WTO Doc. WT/DS58/AB/R (Appellate Body Report) [hereinafter *Shrimp Turtle*].

¹⁰⁰ *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).

¹⁰¹ See W. Lang, ed., *Sustainable Development and International Law* (London: Dordrecht, 1995) [hereinafter *Lang*], P. Sands, “International Law in the Field of Sustainable Development” (1994) 65 Byb. I. L. 303, and H. McGoldrick, “Sustainable Development: The Challenge to International Law” (1994) *Review of European Community and International Environmental Law* 3.

¹⁰² For recent judicial treatment of the challenges of integrating environment and development, see *Gabčíkovo-Nagymaros*, *supra* note 23, para. 90.

systems. Consequently, the adoption of general principles holds the potential to further develop and strengthen international sustainable development law.¹⁰³ While their expression is often found in soft-law instruments, such substantive and procedural principles reflect a body of applicable norms. Compliance with these norms contributes to the unfolding process of sustainable development.¹⁰⁴ The *Principles of International Law Related to Sustainable Development* recently identified by the Committee on the Legal Aspects of Sustainable Development of the International Law Association are a useful starting point. These will be examined in this section.

Efforts have been made by the International Law Association (ILA), and elsewhere, to identify general substantive and procedural principles of international law for sustainable development. In the 2002 *New Delhi Declaration on the Principles of International Law Related to Sustainable Development*,¹⁰⁵ the ILA Committee on the Legal Aspects of Sustainable Development identified seven principles in particular. The text of the declaration is excerpted below.

NEW DELHI DECLARATION OF PRINCIPLES OF INTERNATIONAL LAW RELATING TO SUSTAINABLE DEVELOPMENT¹⁰⁶

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 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 common concerns 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

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).

¹⁰³ *Declaris*, *supra* note 70 at 14.

¹⁰⁴ This is not to say that all these principles must be present in conjunction in order to have a sustainable regime. Depending on the particular context and circumstances, it may not be necessary to invoke some of them. For example, the principle of common but differentiated responsibility may not be applicable where members of the environmental regime are all developing countries.

¹⁰⁵ International Law Association, Committee on the Legal Aspects of Sustainable Development, *Fifth Report on the Principles of International Law relating to Sustainable Development* (London: ILA, 2002). See also ILA Resolution 3/2002: *New Delhi Declaration Of Principles Of International Law Relating To Sustainable Development*, online: <http://www.ila-hq.org> and excerpted here.

¹⁰⁶ CISDL is acting as special representative of the Committee on the Legal Aspects of Sustainable Development to the World Summit on Sustainable Development, with a mandate to put forward these Principles.

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 Cooperation 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.

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, of countries with economies in transition, and in particular of least developed countries and countries 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.

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.

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.

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.

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.

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.

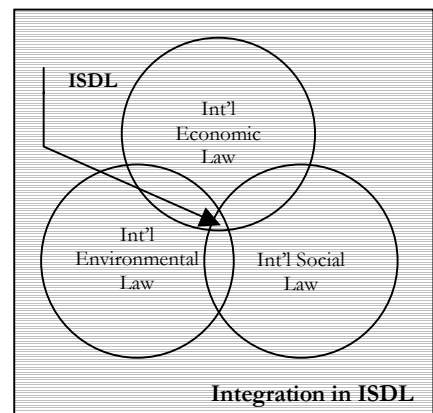
In the context of the World Summit for Sustainable Development, greater attention is being paid to these international principles as tools to integrate economic, social and environmental objectives. This section will examine these principles in greater detail, in an attempt to demonstrate that there is a clear and sufficient body of law underlying the concept of sustainable development, with sources in environmental, human rights, and economic law.

The principle of integration and interrelationship will be considered first, as it provides a conceptual framework for ‘integrated thinking’ in international law relating to sustainable development. Integration is not simply a matter of joining three areas of law into one. Rather, there is a particular pattern to this weaving of social, environmental and economic bodies of law, depending on the requirements and policy choices prevalent at the time. The concept of degrees of integration of environmental, economic and social law in international regimes involves an incremental, nuanced process. In order to bring this integration into high relief, we adopt a qualitative, example-rich methodology rather than relying on chronological or criterion-based analysis.

1. The principle of integration and the interrelationship of social, economic and environmental objectives

The concept of sustainable development integrates economic, environmental and social (including human rights) priorities. As a point of departure therefore, it is proposed that an international sustainable development law (ISDL) would be the area of intersection

between three fields of international economic, environmental and social laws. This refers to a specific, narrower set of legal instruments and provisions where environment, social and economic considerations are integrated to a varying degree.



Not all aspects of international environmental law are international sustainable development law. For example, according to Boyle and Freestone, animal rights, the conservation of ‘charismatic mega-fauna’, and trans-boundary environmental disputes do not necessarily deal with the sustainable development issue.¹⁰⁷ The same may be true for various aspects of international trade, tax or investment law in the economic field, or certain specific laws for the international protection of human rights, social development or protection of cultural property in the social field.

Emergence of the principle

The need for the integration of development and environment policy permeates soft law, including the 1972 *Stockholm Declaration* and 1992 *Rio Declaration*, and the 1992 *Agenda 21*.

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."¹⁰⁸ As a consensus document negotiated and signed by over 160 countries, this strongly suggests that States agree to a concept of development that integrates environmental protection.¹⁰⁹ If social and economic aspects of development are recognised, and international law can be considered part of the development process, then the Principle 4 argument that environmental protection cannot be considered in isolation advocates integration of these fields. This view is supported by Chapter 39 of *Agenda 21*, where States commit to objectives such as; (a) to focus on the “further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns”; and recognises, at (b), the “need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of the developing countries.”¹¹⁰

Integration, as a necessary step toward sustainable development, is also referred to directly in several recent global agreements among States. It is a keystone provision in two of the 1992 *Rio Conventions* (the *UN Framework Convention on Climate Change* and the *UN Convention on Biological Diversity*).¹¹¹

Integration is recognised as necessary in a generation of subsequent treaties such as; the 1994 *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*; the 1995 *Washington Declaration on Protection of the Marine Environment from Land-based Activities*, and; the 1997 *United Nations Convention on the Non-Navigational Uses of International Watercourses*.¹¹²

Recent international scholarship in various fields also recognises the need for an integrated approach. According to Weiss, “[e]vidence of global integration abounds: regional trading units; regional political and economic organizations such as the European Union (‘EU’)... international regimes covering issues ranging from banking and trade to human rights, environmental protection, and arms control; and the spread of financial markets. The information revolution, the rapid technological advances, global environmental problems, liberalized trade, and other economic and other interdependencies compel greater interdependency and greater integration.”¹¹³ However, as noted by others “if there is no longer much doubt

¹⁰⁷ A. Boyle & D. Freestone, “Past Achievements and Future Challenges” in W. Lang, *supra* note 101 at 6.

¹⁰⁸ *Rio Declaration*, *supra* note 48, Principle 4. See also the *Stockholm Declaration*, *supra* note 26, Principle 13.

¹⁰⁹ European Commission, *The Law of Sustainable Development* (Brussels: EC, 2001).

¹¹⁰ *Agenda 21*, *supra* note 48, ch. 39.1, Objectives (a) and (b).

¹¹¹ See the *Climate Change Convention*, *supra* note 98, art. 3(4), with *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, 37 I.L.M. 22 (1998), art. 4(1)(f) [hereinafter *Kyoto Protocol*]; and the *Biodiversity Convention*, *supra* note 98, art 6.

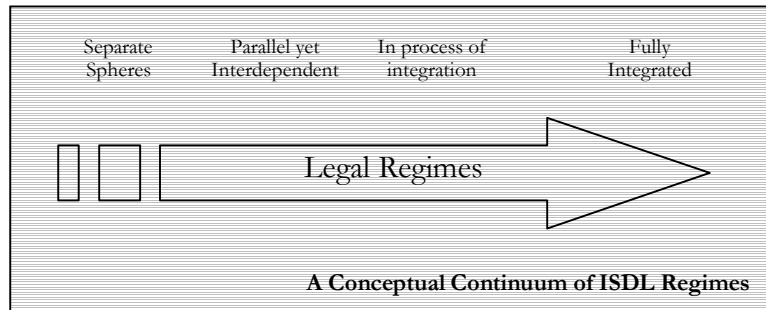
¹¹² See the *Desertification Convention*, art. 4(2), the *Watercourses Convention*, and see also the *Washington Declaration*, *supra* note 98.

¹¹³ Brown Weiss, *supra* note 5 at 345.

about whether integrative approaches to research are needed in support of a sustainability transition, how to achieve such integration in rigorous and useful programs remains problematic.”¹¹⁴

Application of the principle

We believe that a conceptual ‘continuum’ can be designed, based on the degree to which international regimes integrate economic, social and environmental law. Four degrees of integration must be identified. These range from regimes that envisage international economic, social and environmental law as separate, independent fields to regimes that fully integrate these three areas of law and form the corpus of international sustainable development law (ISDL).



The degree of integration along this continuum can be described as follows:

a) Separate spheres

Many international economic, social and environmental regimes engage one field of law in particular, with little integration presently sought or expected. In this instance, the regime was not held to have particular significance for the other sustainable development priorities, and as such, there was little pressure to integrate the three spheres of economic, environmental and social law. For example, recent human rights accords, such as the *Rome Statute of the International Criminal Court*,¹¹⁵ do not include many significantly environmental or economic provisions.

b) Parallel yet interdependent

At this degree of integration, a core agreement in one field of law exists in parallel with other, complementary accords in other areas of law. This parallel yet interdependent relationship exists in order to allow the whole package to proceed on a political level, but inter-linkages between the elements are weak or almost non-existent. For example, environment and labour agreements can run parallel to trade liberalisation agreements. Such recent cases include the *North America Free Trade Agreement* (NAFTA) and the *North American Commission for Environmental Cooperation*,¹¹⁶ as well as the *Environmental Side Agreements to the Canada-Chile and the Canada-Costa Rica Free Trade Accords*.¹¹⁷

c) Regimes in the process of integration

Certain international legal rules are progressing toward greater integration, whereby instruments emerging primarily in one field of law are slowly taking into account and integrating social, economic or environmental priorities. At this degree, pressure from civil society or industry, reflected in changing views of developing or developed countries, is forcing a gradual integration of the missing elements of sustainable development into the picture. Thus, international legal regimes once thought to be isolated or concerned only with a particular domain are becoming cognisant of their linkages with other areas. An example of this process is the integration of environmental considerations into trade laws, such as those of

¹¹⁴ W. C. Clark “A Transition towards Sustainability” (2001 Symposium: Environment 2000 – New Issues for a New Century, Sustainable Science for a Sustainable Environment)(2001) 27 Ecology L.Q. 1021.

¹¹⁵ *Rome Statute of the International Criminal Court*, 17 July 1998, U.N. Doc. A/CONF.183/9 (1980).

¹¹⁶ *North America Agreement on Environmental Cooperation* (Washington, Ottawa, Mexico City), 8, 9, 14 September 1993, in force 1 January 1994; 32 I.L.M. (1993) 1480 [hereinafter *NAAEC*].

¹¹⁷ M. Cordonier Segger *et. al.*, *Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD/UNEP, 2001).

the *World Trade Organisation* (WTO), through recent decisions of the WTO Appellate Body.¹¹⁸ Other examples include the successful use of trade measures for environmental protection purposes in the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*¹¹⁹, the 1985 *Vienna Convention for the Protection of the Ozone Layer*,¹²⁰ and the 1998 *UN/ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, which links environmental rights and human rights, acknowledging an obligation to future generations, and seeks to establish that sustainable development can be achieved through the involvement of all stakeholders.

d) Highly integrated new regimes

Finally, certain highly integrated treaty provisions and customary principles are now emerging. These rules include consideration of social, economic and environmental aspects of a problem in the negotiation process and in the provisions of the final accord or in the customary rule. Few complete examples exist, but perhaps one of the treaties worth further review is the 1994 *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, which attempts to slow the advance of encroaching deserts often created by environmental and economic pressures, primarily for social development goals, especially health and community well-being.¹²¹ Another example is the 1992 *Convention on Biological Diversity* and the recent *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, which was adopted by the Conference of the Parties to the Convention on 29 January 2000, and which contains provisions regulating trade in genetically modified products for social and environmental objectives.¹²² The *lex ferenda* of the precautionary principle is a potential example of an international customary rule within the corpus of international sustainable development law.¹²³

This conceptual continuum raises a number of questions, particularly in the most highly contested ‘degree’, that of international laws or legal instruments in the process of integration. A more in-depth examination of practical legal instruments or treaties is provided in Part IV, where case studies of the process of integration are provided.

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

States have a sovereign right over their natural resources. However, this right is not absolute. This sovereign right is restricted by a second objective, namely, that States must not cause damage to the global environment. Subsequently, this negative obligation (‘not to cause damage’) has evolved into a positive obligation, namely, to use natural resources in a sustainable manner.

Emergence of the principle

An early form of these divergent ideas was expressed in Principle 21 of the *Stockholm Declaration*, whereby “[s]tates have, in accordance with the Charter of the United Nations and the principles of international law,

¹¹⁸ See e.g. *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (18 September 2000), WTO Doc. WT/DS135/R (Panel Report) [hereinafter *Asbestos*]; *Shrimp Turtle*, *supra* note 99 and *EC – Measures Concerning Meat and Meat Products (Hormones) (Complaint by USA and Canada)* (13 February 1998), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Appellate Body Report) [hereinafter *Hormones*], online: World Trade Organization <http://docsonline.wto.org>.

¹¹⁹ *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 154 [(entered into force 1 January 1989), as amended by the *London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, June 29, 1990, UNEP/OZ.L.Pro.2.3 (Annex II [hereinafter *Montreal Protocol*]). See also the Protocol’s *Noncompliance Procedure*, 29 June 1990, 30 I.L.M. 537.

¹²⁰ *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, UNEP Doc. 1G.53/5/Rev.1, 26 I.L.M. 1529 (entered into force 22 September 1988) [hereinafter *Vienna Convention*].

¹²¹ *Desertification Convention*, *supra* note 98.

¹²² *Cartagena Protocol on Biosafety*, 15 May 2000, 39 I.L.M. 1027, online: <http://www.biodiv.org> [hereinafter *Cartagena Protocol*].

¹²³ See the *Southern Bluefin Tuna provisional measures*, (*New Zealand and Australia v. Japan*), Cases 3 and 4, Order of 27 August 1999, online: <http://www.un.org/Depts/los/ITLOS/Tuna_cases.htm>.

the sovereign right to exploit their own resources pursuant to their own environmental 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.” Subsequently, the *Rio Declaration* reaffirmed Principle 21 of the *Stockholm Declaration* with one addition. Principle 2 declares, while reaffirming the responsibility not to cause damage to the environment of other States or areas beyond the limits of national jurisdiction, that the States have “the sovereign right to exploit their own environmental and development policies” (emphasis added). Principle 21 of the *Stockholm Declaration* and Principle 2 of the *Rio Declaration* each comprise two fundamental elements. The first element reaffirms the sovereign right of States to exploit their own natural resources. The second element, however, somewhat limits the first by introducing the responsibility, or an obligation, not to cause damage to the environment of other States. Taken together, they establish a basic obligation.¹²⁴

The principle of state sovereignty implies that States, within limits established by international law, can act as they choose within their territory which includes activities that may result in negative effects on their own environment.

This is rooted in the principle of permanent sovereignty over natural resources as formulated in various resolutions of the UN General Assembly regularly adopted after 1952.¹²⁵ A landmark resolution was adopted by the UN General Assembly in 1962, when it resolved that the “rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development of the well-being of the people of the state concerned.”¹²⁶ The resolution reflects the right to permanent sovereignty over national resources as an international legal right, and has been accepted by some tribunals as reflecting customary international law.¹²⁷ Moreover, in 1972, before the Stockholm Conference, the UN General Assembly declared that “each country has the right to formulate, in accordance with its own particular situation and in full enjoyment of its national sovereignty, its own national policies on the human environment.”¹²⁸ Finally, the UN Resolution on Permanent Sovereignty over Natural Resources stated: “[We] strongly reaffirm[...] the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries [and] affirm [...] that the application of the principle of nationalization carried out by States, as an expression of their sovereignty [...] implies that each State is entitled to determine the amount of possible compensation and the mode of payment.” (i.e. in relation to expropriation and nationalisation of property).¹²⁹

Schrijver has commented that the rights and duties of states in international law under the principle of permanent sovereignty over natural resources imply the following duties: (i) to ensure that the whole population (including indigenous peoples and future generations), benefit from the exploitation of resources and the resulting national development; and, (ii) The duty 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 within the domestic sphere to ensure sustainable production and consumption. The second limb of this duty is, according to Schrijver, discernible from both UN resolutions and treaty law relating, *inter alia*, to protection of wildlife habitat, migratory birds, endangered species, biodiversity protection, deforestation, and pollution i.e. matters of common concern

¹²⁴ Referred to below as the rule in Principle 21/Principle 2.

¹²⁵ See, for example, G.A. Res. 523, U.N. GAOR, 6th Sess., U.N. Doc. A/RES/523 (VI) (1952); G.A. Res. 626, U.N. GAOR, 7th Sess., UN Doc. A/PV.411 (VII) (1952); G.A. Res. 837, U.N. GAOR, 9th Sess., 512th plen. mtg., Supp. No. 21, at 21, U.N. Doc. A/2890 (1954); G.A. Res. 1314, U.N. GAOR, 13th Sess. Doc. A/RES/1314 (XIII) (1958); and G.A. Res. 1515, U.N. GAOR, 15th Sess., 948th plen. mtg., Supp. No. 16, at 9, U.N. Doc. A/4648 (1960).

¹²⁶ G.A. Res. 1803, UN GAOR, 17th Sess., Supp. No. 17.

¹²⁷ *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libya*, 53 I.L.R. 389 (1977) at para. 87; *Kuwait v. American Independent Oil Co.*, 21 I.L.M. 976 (1982).

¹²⁸ G.A. Res. 2849, U.N. GAOR, 26th Sess., U.N. Doc. A/RES/2849 (1972).

¹²⁹ G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9400 (1973).

to both present and future generations. Although Schrijver has not made it so explicit, one could today add climate change to this list of common concerns.¹³⁰

The importance placed by States on the first principle – permanent sovereignty over natural resources – is also reflected by its frequent invocation, in various forms, in international agreements. The 1971 *Ramsar Convention* emphasised that the inclusion of national wetlands sites in its List of Wetlands did “not prejudice the exclusive sovereign rights of [...] the party in whose territory the wetland is situated.”¹³¹ The 1983 *International Tropical Timber Agreement* recalled “the sovereignty of producing members over their natural resources.”¹³² Recent treaties also refer to the sovereign rights of States over natural resources in their territory. The preamble to the 1989 *Basel Convention* recognised that “all States have the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in their territory.”¹³³ The preamble to the 1992 *Climate Change Convention* reaffirmed “the principle of sovereignty of States in international co-operation to address climate change.” Finally, the 1992 *Biodiversity Convention* more specifically reaffirmed that States have “sovereign rights [...] over their natural resources” and that “the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.”¹³⁴

Nevertheless, as early as the 1970s, limits to the application of the principle of State sovereignty over natural resources emerged as the international community recognised the need for co-operation to protect the environment. Consequently, the second element of the principle of permanent sovereignty over natural resources reflects the view that States are subject to environmental limits in the exercise of their rights. In the form presented in Principle 21/Principle 2, the responsibility not to cause damage to the environment of other States or of areas beyond national jurisdiction has been accepted as an obligation by all States.¹³⁵

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.¹³⁶ 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 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.”¹³⁷ Most writers have accepted this formulation as a rule of customary international law, and it was cited by H.E. Justice de Castro in his dissent in the *Nuclear Tests Case*.¹³⁸

However, consistent state practice and *opinio juris* are not easy to discern since there are relatively few claims brought by States relying upon the rule reflected in Principle 21/Principle 2 – which, it must be recalled, is not binding as treaty law. It is nonetheless possible to develop an argument based on the principle of good neighbourliness in international law. The general principle relied upon in the *Trail Smelter*

¹³⁰ N. Schrijver, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge Univ. Press 1997), 390-392 [hereinafter *Schrijver*].

¹³¹ *Convention on Wetlands of International Importance, Especially as Waterfowl Habitat*, Feb. 2, 1971, TIAS No. 11,084, 996 U.N.T.S. 245, article 2(3) [hereinafter *Ramsar Convention*].

¹³² *International Tropical Timber Agreement*, 18 November 1983, U.N. Doc. TD/TIMBER/11, art. 1.

¹³³ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Mar. 22, 1989, UN Doc. EP/IG.80/3, 28 I.L.M. 649 (1989) [hereinafter *Basel Convention*].

¹³⁴ *Biodiversity Convention*, *supra* note 98, art. 15(1). See also the *Food and Agriculture Organization Undertaking on Plant Genetic Resources* (1983) and the 1989 Agreed Interpretation, recognising that plant genetic resources are a ‘common heritage of mankind’ at Chapter 10, 410.

¹³⁵ *Sands*, *supra* note 98 at 201.

¹³⁶ *Palmas Case*, 2 H.C.R. (1928) 84 at 93.

¹³⁷ *Trail Smelter*, *supra* note 32.

¹³⁸ *Case Concerning Nuclear Tests* (New Zealand and Australia v. France) (1974) I.C.J. Rep. 457 [hereinafter *Nuclear Tests*]. Judge Castro stated: “If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes, the consequences must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claims that France should put an end to the deposit of radio-active fall-out on its territory.”

case, discussed above, derives from an extension of the principle of good-neighbourliness. Although the *UN Charter* does not expressly address environmental issues, Article 74 reflects the agreement of the UN's members that ;“their policy in their metropolitan areas must be based on the general principles of good neighbourliness” ;and, take account of “the interests and well-being of the rest of the world, in social, economic and commercial matters.” The principle of good-neighbourliness underlies the dicta of the ICJ that the principle of sovereignty embodies “the obligation of every state not to allow its territory to be used for acts contrary to the rights of other States.”¹³⁹ 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. The tribunal stated that “France is entitled to exercise her rights; she cannot ignore the Spanish interests. Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.”¹⁴⁰ The principle was further developed in 1961, when the UN General Assembly declared, specifically in relation to radioactive fallout, that “[t]he fundamental principles of international law impose a responsibility on all States concerning actions which might have harmful biological consequences for the existing and future generations of peoples of other States, by increasing the levels of radioactive fallout.”¹⁴¹ In 1972, shortly before the Stockholm Conference, the General Assembly directed that the Conference must “respect fully the exercise of permanent sovereignty over natural resources, as well as the right of each country to exploit its own resources in accordance with its own priorities and needs and in such a manner as to *avoid producing harmful effects for other countries.*”¹⁴²

The development of the second element of Principle 21/Principle 2 – the obligation not to damage the environment of other States – can also be traced to earlier treaties. The 1951 *International Plant Protection Convention* expressed the need to prevent the spread of plant pests and diseases across national boundaries.¹⁴³ The 1963 *Nuclear Test Ban Treaty* prohibits nuclear tests if the explosion would cause radioactive debris “to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted.”¹⁴⁴ The 1968 *African Conservation Convention* requires consultation and co-operation between parties where development plans are “likely to affect the natural resources of any other state.”¹⁴⁵ Under the 1972 *World Heritage Convention* the parties agreed that they would not take deliberate measures that could damage heritage that is “situated on the territory” of other parties.¹⁴⁶

Principle 21/Principle 2 has also been affirmed in many General Assembly resolutions and acts of other international organisations. Shortly after the Stockholm Conference, Principle 21 was expressly stated by the UN General Assembly resolution 2996 to lay down the “basic rules” governing the international responsibility of States in regard to the environment. It was also the basis of Article 30 of the *Charter of Economic Rights and Duties of States*, which provides that: “[a]ll States have 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.”¹⁴⁷ Principle 21 is further endorsed by the 1975 Final Act of the Helsinki Conference on Security and Co-operation in Europe.¹⁴⁸ It is also present in Principle 3 of the 1978 UNEP *Draft Principles*, which requires States to ensure that “activities within their jurisdiction or control do not cause damage to the natural systems located within other States or in areas beyond the

¹³⁹ *Corfu Channel Case* (UK v. Albania), (1949) ICJ Rep. 4 at 22 [hereinafter *Corfu Channel*].

¹⁴⁰ *Lac Lanoux Arbitration* (Spain v. France), 12 R.I.A.A. 281, 23 I.L.R. 101, 123 (1957).

¹⁴¹ G.A. Res. 1629, U.N. GAOR, 15th Sess., Supp. No. 16A, at 241-242, U.N. Doc. A/4684/Add.1 (1961).

¹⁴² G.A. Res. 2849, U.N. GAOR, 26th Sess., U.N. Doc. A/RES/2849 (1972) [emphasis added].

¹⁴³ *International Plant Protection Convention*, Dec. 6, 1951, 150 U.N.T.S. 67, Preamble, art. VII.

¹⁴⁴ *Nuclear Test Ban Treaty*, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43 (entered into force Oct. 10, 1963), art. I(1)(b).

¹⁴⁵ *African Convention on the Conservation of Nature and Natural Resources*, Sept. 15, 1968, 1001 U.N.T.S. 3, art. XVI(1)(b) [hereinafter *African Convention*].

¹⁴⁶ *Convention Concerning Protection of World Cultural Property and Natural Heritage*, Nov. 23, 1972 U.S.T. 40 (hereafter *World Heritage Convention*), article 6(3).

¹⁴⁷ G.A. Res. 3821, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974).

¹⁴⁸ 14 I.L.M. (1975), 1292; 1 August 1975 [hereinafter *Helsinki Final Act*].

limits of national jurisdiction.”¹⁴⁹ Finally, the 1982 *World Charter for Nature* called for the need to “safeguard and conserve nature in areas beyond national jurisdiction.”¹⁵⁰

More recently, the second component of Principle 21/Principle 2 has been referred to, or wholly incorporated,¹⁵¹ in the preamble to several treaties. It was fully reproduced in the operational part of a treaty for the first time in Article 3 of the 1992 *Biodiversity Convention*, and in the Preamble of the 1992 *Climate Change Convention*.

Language similar to the second element of Principle 21 also appears in treaties. The 1978 *Amazonian Treaty* modifies the issue of the legal status of Principle 21, declaring that the exclusive use and utilisation of natural resources within their respective territories is a right inherent in the sovereignty of each state and that “the exercise of this right shall not be subject to any restrictions other than those arising from international Law.”¹⁵² The 1981 *Lima Convention* goes further by requiring activities to be conducted so that “they do not cause damage by pollution to others or to their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not, as far as possible, spread beyond the areas where [they] exercise sovereignty and jurisdiction.”¹⁵³ The 1982 *UNCLOS* transforms the responsibility into a duty. Under Article 193 of *UNCLOS*, States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment. *UNCLOS* shifts the emphasis from a negative obligation to prevent harm to a positive commitment to preserve and protect the environment. To that end, however, Article 194(2) provides that States “[s]hall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with [the] Convention.”¹⁵⁴ The 1985 *ASEAN Convention* goes further, by recognising the second element of Principle 21 as a “generally accepted principle of international law.”¹⁵⁵

On this basis, certain scholars have stated that the support given to Principle 21 and Principle 2 by States and other members of the international community over the past twenty years establishes a “compelling basis for the view that it now reflects a general rule of customary international law.”¹⁵⁶ This places international legal limits on the right of States in respect of activities carried out within their territory or under their jurisdiction.¹⁵⁷

Application of the principle

One particularly innovative manner of meeting the obligations found within these principles is through the adoption of a ‘sustainable’ approach, one that has as its focus standards governing the rate of use or exploitation of specific natural resources. Particularly for marine living resources, exploitation is required to

¹⁴⁹ UNEP *Draft Principles of Conduct in the Field of the Environment for Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States*, U.N. Doc. UNEP/1G12/12 (1978), 17 I.L.M. 1097, 1099 (1978).

¹⁵⁰ *World Charter for Nature*, GA Res. 37/7, UN GOAR, 37th Sess., Supp. No. 51, UN Doc. A/37/51 (1983); 23 I.L.M. 455. para. 21(e) [hereinafter *World Charter for Nature*].

¹⁵¹ *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, Nov. 13, 1046 U.N.T.S. 120, 11 I.L.M. 1294 (1972) [hereinafter *London Convention*]; *Convention on Long-Range Transboundary Air Pollution*, Nov. 13, 1979, T.I.A.S. No. 10,541 [hereinafter *LRTAP Convention*]; and the *Vienna Convention*, *supra* note 120.

¹⁵² *Amazonian Treaty* (1978), art. IV.

¹⁵³ *Lima Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific*, 12 Nov. 1981 U.N.Doc UNEP/GC/INF.11, 185, art. 3(5). [hereinafter *Lima Convention*].

¹⁵⁴ *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N. Doc. A/CONF.62/122 21 I.L.M. 1245 (entered into force 16 November 1994) [hereinafter *UNCLOS*].

¹⁵⁵ *Association of South East Asian Nations (ASEAN) Agreement on the Conservation of Nature and Natural Resources*, 15 Env'tl Pol'y. & L. 64, 68 (1985), art. 20 [hereinafter *ASEAN Convention*].

¹⁵⁶ *Sands*, *supra* note 98 at 101.

¹⁵⁷ See L. B. Sohn, “The Stockholm Declaration on the Human Environment” (1973) Harv. Int'l L.J., 423 at 485-93.

be conducted at levels that are ‘sustainable’ or ‘optimal.’ The 1946 *International Whaling Convention*, for example, had as its stated objective the achievement of an “optimum level of whale stocks”, restricting whaling operations “to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers.”¹⁵⁸ Similar commitments to limit catches or productivity to ‘maximum sustained’ levels have been agreed for other marine species such as tuna,¹⁵⁹ North Pacific fish,¹⁶⁰ Pacific fur seals,¹⁶¹ and living resources in the EEZ.¹⁶² Other treaties limit catches to “optimum sustainable yields” or subject them to a required standard of ‘optimum utilisation.’ This applies in relation to Antarctic seals,¹⁶³ high seas fisheries,¹⁶⁴ and some highly migratory species.¹⁶⁵

Sustainable use is an equally applicable concept for non-marine resources. The 1968 *African Nature Convention* provides that the utilisation of all natural resources “must aim at satisfying the needs of man according to the carrying capacity of the environment.”¹⁶⁶ Similarly, the 1983 *International Tropical Timber Agreement* encourages “sustainable utilisation and conservation of tropical forests and their genetic resources.”¹⁶⁷ The *ASEAN Convention* was one of the first treaties to require Parties to adopt a standard of “sustainable utilisation of harvested natural resources [...] with a view to attaining the goal of sustainable development.”¹⁶⁸ Further support for sustainable use or management as a legal term may be found in the 1987 *Zambezi Action Plan Agreement*,¹⁶⁹ the *Climate Change Convention*,¹⁷⁰ the *Biodiversity Convention*,¹⁷¹ and the 1992 *OSPAR Convention*.¹⁷²

In the same vein, international legal instruments have aimed for conservation measures and programmes which are rational,¹⁷³ proper,¹⁷⁴ wise¹⁷⁵ or a combination of the above.¹⁷⁶ Other standards introduced by

¹⁵⁸ *International Convention for the Regulation of Whaling*, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 at Preamble. See also Art. V(2).

¹⁵⁹ *Convention for the Establishment of an Inter-American Tuna Commission*, May 31, 1949, 1 U.S.T. 230, 80 U.N.T.S. 3 [hereinafter *Tuna Convention*], at Preamble; *International Convention for the Conservation of Atlantic Tunas*, May 14, 1966, 20 U.S.T. 2887, 673 U.N.T.S. 63, art. IV(2)(b) [hereinafter *Atlantic Tuna Convention*].

¹⁶⁰ *International Convention for the High Seas Fisheries of the North Pacific Ocean*, May 9, 1952, United States-Canada-Japan, 4 U.S.T. 380, T.I.A.S. No. 2786, Preamble and art. IV(1)(b)(ii) [hereinafter *North Pacific Fisheries Convention*].

¹⁶¹ *Ibid.* at preamble, arts. II(1)(a), V(2)(d), and XI.

¹⁶² UNCLLOS, *supra* note 154, art. 61(3).

¹⁶³ *Convention for the Conservation of Antarctic Seals*, June 1, 1972, 29 UST 441, TIAS No. 8826, Preamble.

¹⁶⁴ *High Seas Fishing and Conservation Convention* (1958), which defines conservation at Article 2 as “the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other maritime products.”

¹⁶⁵ UNCLLOS, *supra* note 154, art. 64(1).

¹⁶⁶ *African Convention*, *supra* note 145, Preamble.

¹⁶⁷ *International Tropical Timber Agreement*, 10 January 1994, U.N. Conference on Trade and Development, UN. Doc. TD/TIMBER.2/Misc.7/GE.94-50830 (1994), art. 1(h).

¹⁶⁸ *Supra* note 155, article 1(1); See also art. 9 on the protection of air quality, and art. 12(1) in respect of land use, which is to be based ‘as far as possible on the ecological capacity of the land’.

¹⁶⁹ *Zambezi Action Plan Agreement* (1987), Preamble.

¹⁷⁰ *Supra* note 98, article 3(4).

¹⁷¹ *Ibid.*, Preamble and arts. 1, 8, 11, 12, 16, 17, 18. The Convention defines ‘sustainable use’ in Article 2 as “the use of components of biological diversity in a way and at a rate that does not lead to long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”

¹⁷² *Convention for the Protection of the Marine Environment of the North-East Atlantic*, Sept. 22, 1992, reprinted in 32 I.L.M. 1069 (1993) (entered into force March 25, 1998), Preamble [hereinafter *OSPAR Convention*]. The Convention defines sustainable management as the “management of human activities in such a manner that the marine ecosystem will continue to sustain the legitimate uses of the sea and will continue to meet the needs of present and future generations.”

¹⁷³ See, for example, 1986 *WCED Legal Principles*, para. (i); *Convention on Nature Protection and Wildlife in the Western Hemisphere*, Oct 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 (entered into force 30 April 1942) [hereinafter *Western Hemisphere Convention*], art VII; *Danube Fishing Convention* (1958), Preamble and art. VIII *North-East Atlantic Fisheries Convention*, Jan. 24, 1959, T.I.A.S. No. 7078, 486 U.N.T.S. 158, Preamble and art. V(1)(b); *Black Sea Fishing Convention* (1959), Preamble and arts. 1 and 7; *Southeast Atlantic Fisheries Convention* (1969), Preamble; *Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts*, 12 I.L.M. 1291 (1973) [hereinafter *Baltic Fishing Convention*], arts. I and X(h); *Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries*, opened for signature Oct. 24, 1978 [hereinafter *Northwest Atlantic Fisheries Convention*], art. II(I); *Convention for the Conservation of Salmon in the North Atlantic*, March 2, 1982, 1338 U.N.T.S. 33, TIAS No. 10789 [hereinafter *North Atlantic Salmon Convention*], Preamble; *African Convention on the Conservation of Nature and Natural Resources*, Sept. 15, 1968, 1001 U.N.T.S. 3, art. II; *Amazonian Treaty* (1978), arts I, V and VII; *Convention for the Conservation of Antarctic Seals*, June 1, 1972, 29 UST 441, TIAS No.

international agreements include “judicious exploitation,”¹⁷⁷ “sound environmental management,”¹⁷⁸ “appropriate environmental management,”¹⁷⁹ and “ecologically sound and rational” use of natural resources.¹⁸⁰ The significance of these terms is that each recognises limits placed by international law on the rate of use or manner of exploitation of natural resources. In this way, this terminology integrates development and environmental protection, extending the two distinct concepts represented by Principle 21 of the *Stockholm Declaration* and Principle 2 of the *Rio Declarations*.

This tension between the right to utilise resources and the international duty to use them sustainably is at the core of the debate over resources recognised as a ‘common concern of humanity’ and, more recently, ‘global public goods.’ Both the ‘concept of common heritage of humankind’ and ‘common concern of humankind’ relate to the use of common resources. State sovereignty and the principles and rights that derive from it have historically been applied to the natural resources contained within the national borders of a State. Yet, a large percentage of the world’s surface area lies outside the sovereignty of any one State. Consequently, the first concept, that of the common heritage of mankind, emerged at the end of the 1960s to challenge older concepts of *res nullius* and *res communis* as a legal approach to common resources. *Res nullius*, which in most systems included wild animals and plants, belongs to no one and can be freely appropriated and used. The concept of *res communis*, however, includes common ownership that precludes individual appropriation, but allows common use of the resources. Examples include water, air, and light.

The concept of common heritage of mankind is distinct from both *res nullius* and *res communis*, in part because of its inclusion of the word ‘heritage,’ thereby introducing a temporal aspect to the communal safeguarding of areas incapable of individual State ownership. Special legal regimes have been created for the deep seabed and its subsoil,¹⁸¹ Antarctica,¹⁸² the Moon,¹⁸³ the geostationary orbit of satellites,¹⁸⁴ and areas, sites, and monuments that form essential parts of the cultural heritage of humanity.¹⁸⁵ The nature of

8826, art. 3(1); *North Pacific Fur Seals Convention* (1976), art. II(2)(g). They are the required standard called for by Principles 13 and 14 of the *Stockholm Declaration*. and the 1980 Antarctic Marine Living Resources Convention defines “conservation” objectives as including “rational use” (arts II(1) and (2)) as does the *Jeddah Protocol Concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency*, 14 February 1982, art. 1(1) [hereinafter *Jeddah Protocol*].

¹⁷⁴ *General Fisheries Council for Mediterranean* (1949), Preamble and art. IV(a); *Latin American Forest Institute* (1959), art III(1)(a).

¹⁷⁵ *African Convention*, *supra* note 145, art VII(1); *Stockholm Declaration*, *supra* note 26, Principle r; *South Pacific Natural Resources Convention* (1986), art. V(1); *Ramsar Convention*, *supra* note 131, arts 2(6) and 6(2)(d); *Convention on the Conservation of Migratory Species of Wild Animals*, June 23, 1979, 19 I.L.M. 15 (1980), Preamble [hereinafter *Bonn Convention*].

¹⁷⁶ The use of various terms in a single instrument is illustrated by UNCLOS; it requires conservation at “maximum sustainable yield” for the living resources of the territorial and high seas; the “optimum utilisation” of the living resources found in the EEZ, and the “rational management” of the resources in the Area in accordance with “sound principles of conservation.” See UNCLOS, *supra* note 154, Preamble and arts. 61(3), 62(1), 119(1)(a) and 150(b).

¹⁷⁷ *Act regarding Navigation and Economic Cooperation between the States of the Niger Basin*, Act of 26 October 1963, Preamble [hereinafter *Niger Basin Act*].

¹⁷⁸ *Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region*, U.N. Doc. UNEP/1G.22/7 (March 31, 1981), 20 I.L.M. 746 [hereinafter *Abidjan Convention*], arts 4(1) and 14(3); *Cartagena de Indias Convention*, 5 December 1985, 25 I.L.M. 529 (1986), art. 4(1) [hereinafter *Cartagena de Indias Convention*]; *Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region*, June 21, 1985, I.E.L.M.T. 985:46, art 4(1) [hereinafter *Nairobi Convention*].

¹⁷⁹ *Lima Convention* *supra* note 153, art 3(1).

¹⁸⁰ *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992, 31 I.L.M. 1312, art. 2(2)(b) [hereinafter *Transboundary Waters Convention*].

¹⁸¹ See UNCLOS, *supra* note 154.

¹⁸² *Antarctic Treaty*, Dec. 1, 1959, 402 U.N.T.S. 71 [hereinafter *Antarctic Treaty*].

¹⁸³ *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 5 December 1979 [hereinafter *Moon Treaty*]

¹⁸⁴ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, Jan. 27, 1967 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967) [hereinafter *Outer Space Treaty*].

¹⁸⁵ *World Heritage Convention*, *supra* note 146. See generally United Nations, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea, Concept of the Common Heritage of Mankind* (1996).

the common heritage is a form of trust whose principal features include non-appropriation,¹⁸⁶ international management,¹⁸⁷ shared benefits,¹⁸⁸ and the exclusive use for peaceful purposes.¹⁸⁹

During the drafting of the *Biodiversity Convention*, some States criticised the concept of common heritage of mankind. States having rich biological diversity opposed including such resources as parts of the common heritage of mankind, the benefit of which should be shared with others. However, these views should be understood in historical context. Ashish Kothari, a leading Indian scholar, has argued that the opposition to common heritage, and its eventual abandonment in favour of ‘common concern’ during the CBD negotiations, was due to the historical exploitation of (mainly) developing country biological resources by industrialised countries and their multinational companies, without putting in place processes and mechanisms for the equitable sharing of benefits arising out of such exploitation. This historical exploitation was made possible by adherence to the principle of common heritage. It will be recalled that it was out of fidelity to the common heritage principle that the FAO Undertaking on Plant Genetic Resources provided that such resources shall be the common heritage of mankind.¹⁹⁰ Biodiversity-rich countries insist that biological resources should be the property of the countries in which they are situated, and that while their preservation is of common concern to humanity, they should not be a common heritage of humankind. These views stem directly from the open-access implications of the common heritage principle. Access had not resulted in any material benefits to the centuries-old stewards and custodians of the resources up until the CBD negotiations.¹⁹¹

The *Biodiversity Convention* entrusts States with the conservation and sustainable use of biological diversity on their territories,¹⁹² and thus incorporates the main elements of the concept of common heritage. The *Convention’s* preamble affirms that the conservation of biological diversity is a common concern of humankind and declares that the contracting parties are determined to conserve and sustainably use biological diversity for the benefit of present and future generations. This reinforces the inference that the *Convention* does not ignore some of the essential elements of the common heritage of mankind.

The common heritage of humankind has been applied in attempts to develop an international regulatory regime for resources in the global commons. However, the concept has not been widely accepted when it comes to resources or activities located within sovereign countries. At the same time, a growing consensus has emerged that the planet is ecologically interdependent and that humanity may have a collective interest

¹⁸⁶ The ‘ownership’ of the global commons can be said to remain with all of humanity. Claims by any State that it could assert territorial sovereignty over these areas are rejected by the international community.

¹⁸⁷ National management by one country of the areas covered by common heritage is viewed as undermining the concept that no country should be allowed to appropriate the commons. As a result, the Law of the Sea Convention established an elaborate system for the management of the deep sea-bed, including the creation of a Sea-bed authority. The *Moon Treaty* also makes general reference to the desirability of an international management system once economic development of the moon is feasible. Antarctica, too, is managed co-operatively by a group of States through an elaborate system of treaties and protocols. Finally, it can be administered by individual States under the supervision of an international body, as with the cultural and natural heritage designed by the 1972 *UNESCO Convention for the Protection of the World’s Cultural and Natural Heritage*. The last example shows that, in contrast to the concept of *res communis*, the common heritage of mankind can comprise elements under national sovereignty, like protected cultural areas in Egypt or nature reserves in Kenya, and even can be owned by private persons.

¹⁸⁸ Benefits from the use and exploitation of natural resources in the deep sea-bed and the moon are to be shared among all countries. This is critical for developing countries who do not have access to the technology required to take advantage of these resources. Rather than all benefits going to those who ‘capture’ the resource first, some mechanism is required for making an equitable allocation of the benefits. See *Moon Treaty*, *supra* note 183, art. 11(7)(d) of the, which requires an “equitable sharing” of the benefits received from the moon’s resources.

¹⁸⁹ The *Outer Space Treaty* as well as the subsequent *Moon Treaty* specified that these areas could only be used for peaceful purposes.

¹⁹⁰ See FAO Res 8/83 (1983), art. 1.

¹⁹¹ A. Kothari, “Beyond the Biodiversity Convention: A View from India” in V. Sanchez and C. Juma (eds.) *Biodiplomacy: Genetic Resources and International Relations* (Nairobi: ACTS, 1994) 67 at 72. For an example of the historical exploitation referred to above, see the controversy over the neem tree patent granted to the US pharmaceutical company Grace and Co. For a discussion of that controversy and their effect on the ‘common concern’/‘common heritage’ debate, See E. Marden, “The Neem Tree Patent: International Conflict over the Commodification of Life” 22 *Boston Col. Int’l & Comp. L Rev.* No. 2 (1999), 279.

¹⁹² *Biodiversity Convention*, *supra* note 58, arts. 6-10.

in certain activities that take place wholly within State boundaries. The compromise reached with respect to the *Biodiversity Convention* and the *Climate Change Convention* is that these treaties address common “concerns” of humankind.¹⁹³

The term ‘common interest’ appeared early in international treaties concerning the exploitation of natural resources. The *Convention for the Regulation of Whaling* recognises in its preamble the “interest of the world in safeguarding for future generations the great natural resources represented by the whale stocks” and that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible.¹⁹⁴ The depletion of fish resources began as a local problem, but in the second half of the twentieth century it took on much larger dimensions, and States then recognised that it was in their common interest to take conservation measures. The 1952 *Tokyo Convention for the High Seas Fisheries of the North Pacific Ocean* expresses the conviction of the parties that it will best serve the common interest of mankind, as well as the interests of the contracting parties, to ensure the maximum sustained productivity of the fishery resources of the North Pacific Ocean.¹⁹⁵

A major step in international recognition of the common concern of humanity was the conclusion of the 1959 *Antarctic Treaty*.¹⁹⁶ Its preamble affirmed that “it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes.” The Antarctic Treaty system further developed with the adoption of the *Canberra Convention on the Conservation of Antarctic Marine Living Resources* which made express reference to the “interest of all mankind to preserve the waters surrounding the Antarctic continent for peaceful purposes only.”¹⁹⁷ The most recent addition to the *Antarctic Treaty*¹⁹⁸ achieved full recognition of the common interest. Its preamble expresses the conviction that the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the interest of mankind as a whole and for this purpose it denominates Antarctica a nature reserve, devoted to peace and science.¹⁹⁹

Other international environmental treaties similarly recognise the common concern of humanity. The 1979 *Bonn Convention* States in its preamble that “wild animals in their innumerable forms are an irreplaceable part of the earth’s natural system which must be conserved for the good of mankind [...] [E]ach generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilised, is used wisely.”²⁰⁰ The *Biodiversity Convention* explicitly proclaims the principle of common concern of humanity²⁰¹ by stating “the importance of biological diversity for evolution and for maintaining life sustaining systems in the biosphere” and by “affirming that the conservation of biological diversity is a common concern of mankind.” The *Climate Change Convention* follows the same conception by proclaiming in the first paragraph of its preamble that “change in the Earth’s climate and its adverse effects are a common concern of humankind.”

¹⁹³ The Biodiversity Convention’s preamble affirms that “the conservation of biological diversity is a common concern of humankind,” even though most biodiversity is found within individual States. Likewise, the Climate Change Convention’s preamble acknowledges that “change in the Earth’s climate and its adverse effects are a common concern of humankind.”

¹⁹⁴ *International Convention for the Regulation of Whaling*, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter *Whaling Convention*].

¹⁹⁵ *Tokyo Convention for the High Seas Fisheries of the North Pacific Ocean*, May 9, 1952, Emu. T. 52:35.

¹⁹⁶ *Supra* note 182.

¹⁹⁷ *Convention on the Conservation of Antarctic Marine Living Resources*, May 20, 1980, 19 I.L.M. 841 (1980), preamble. See also Daniel Vignes, “Protection of the Antarctic Marine Fauna and Flora: The Canberra Convention and the Commission Set Up by It” in F. Francioni & T. Scovazzi, eds., *International Law for Antarctica* (Dordrecht: Kluwer Law Int., 1996).

¹⁹⁸ Oct. 4, 1991, 30 I.L.M. 1461 (1991).

¹⁹⁹ See also UN General Assembly *Resolution on the Question of Antarctica*, G.A. Res. 46/41, UN GAOR, 46th Sess. Supp. No 49 UN Doc. A/46/49 (1992) at 83, which implicitly recognises that Antarctica constitutes a common concern of all States.

²⁰⁰ *Bonn Convention*, *supra* note 175.

²⁰¹ See *Schrijver*, *supra* note 130 at 246 on the replacement of the concept of “common heritage of mankind” by “common concern.”

Thus, the principle of sustainable use of natural resources demonstrates an integrative potential – it weaves together economic, environmental and social concerns by mediating between resource use and sustainable consumption, bearing in mind collective concern for the management of certain resources.

3. The principle of equity and the eradication of poverty

Equity and poverty eradication are key principles of international sustainable development law. These principles have been mentioned in a consistent manner 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.²⁰²

The imperative of giving ‘priority to the poor’ and clear legal obligations upon states to establish poverty eradication programmes at the national and international level, have a clear legal basis in various human rights treaties such as the *International Covenant on Economic, Social and Cultural Rights*,²⁰³ the *Universal Declaration on Human Rights*, the *Declaration on the Right to Development*, the *Convention on the Elimination of all forms of Discrimination against Women*, and the *Convention on the Rights of the Child*. This is discussed in further detail in Part IV, Case Study IV on ‘rights-based approaches to ISDL’, below.

Emergence of the principle

The principle of equity and the eradication of poverty finds its roots in Chapter IX of the *Charter of the United Nations*, where the United Nations has the role of promoting higher standards of living, full employment, conditions of economic and social progress and development, respects for human rights, among others.²⁰⁴ Various multilateral declarations have followed on this objective, some of which are mentioned below. Principle 5 of the *Rio Declaration* recognized the indispensable role of poverty alleviation in achieving sustainable development.²⁰⁵ The imperative of the eradication of hunger and poverty was given key importance in *Agenda 21*.²⁰⁶ In the *Programme of Action of the World Summit for Social Development*, states identified the needs relating to poverty eradication, and committed to a programme to resolve these needs.²⁰⁷ The *Millennium Declaration* commits States to a series of particular means and targets, including, the commitment to cut in half the proportion of the world’s people whose income is less than one dollar a day and the proportion of people who suffer from hunger by 2015.²⁰⁸ The *Monterrey Consensus on Financing for Development* sets out a number of objectives relating to poverty eradication, and indicates their importance in the areas of the mobilization of domestic financial resources, foreign direct investment, trade, international cooperation, external debt and the overall monetary, financial and trading system.²⁰⁹

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 our world on a massive scale. This concern has

²⁰² *Our Common Future*, *supra* note 13 at 43.

²⁰³ See in particular, the statement of the Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 2001, UN Doc. E/C.12/2001/10 [hereinafter *CESCR Poverty Statement*].

²⁰⁴ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, arts. 55-56 [hereinafter *UN Charter*].

²⁰⁵ *Rio Declaration*, *supra* note 48, Principle 5.

²⁰⁶ See *Agenda 21*, *supra* note 48, ch. 3, esp. s. 3.1.

²⁰⁷ *World Summit for Social Development Programme of Action*, U.N. Doc. A/CONF.166/9 (1995), ch. 2.

²⁰⁸ *Millennium Declaration*, G.A. Res. 55/9, UN GAOR, 2000, ch. III.

²⁰⁹ *Monterrey Consensus on Financing for Development*, 22 March 2002, U.N. Doc. A/AC.257/32, para. 1 refers to poverty eradication as an overall objective, and poverty eradication is referred to in each chapter as a guiding principle (with the exception of ch. C, Trade, paras. 26-36). However, the latter section refers, *inter alia*, to the need to increase market access for least developed countries, and in light of the overall objective of the Consensus, is clearly directed in part at the eradication of poverty.

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; and they cannot challenge our decisions. But the results of the present profligacy are rapidly closing the options for future generations.”²¹⁰

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 every generation, by virtue of its own effort and responsibility, to secure a proportionate share in the common good of the human species.”²¹¹ According to the report, “[f]uture generations are disadvantaged with respect to the present generation because they can inherit an impoverished quality of life... Future generations are disadvantaged because they are mute, have no representatives among the present generation. Consequently, their interests are often neglected in present socio-economic and political planning. They cannot plea or bargain for reciprocal treatment since they have no voice and nothing they do will affect the current situation.”²¹²

It should be recalled however, that at the root of sustainable development is the belief that the resources of the earth belong to all generations. It follows, therefore, that the present generation has no right to intervene irreversibly and exhaustively in our relations with the natural world so as to deprive future generations of environmental, social and economic opportunities of well-being. No country, continent or generation has an exclusive right to the natural resources of the earth. These resources have been handed over from past generations and consequently, the present generation has an obligation to transmit them in good and even enhanced conditions to posterity.²¹³

Inter-generational equity, as employed in current international instruments calls for fairness in the utilisation of resources between past, present and future generations. It requires attaining a balance between meeting the consumptive demands of existing societies and ensuring that adequate resources are available to meet the needs of future generations.²¹⁴

A corollary concept is intra-generational equity. This term refers to a principle of fairness in the utilisation of resources among human members of the present generation, both at the domestic and global levels.²¹⁵ 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. 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.”²¹⁶

²¹⁰ *Our Common Future*, *supra* note 13.

²¹¹ 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.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ See O. Schachter, *Sharing the World's Resources* (Bangalore: Allied, 1977) at 11-12 [hereinafter Schachter]. See also; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational, 1989); and T. M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford UP, 1995).

²¹⁵ A more controversial view seeks to extend “intra-generational equity” beyond the human species to include fairness toward other life forms. See A. D’amato & S. K. Chopra, “Whales: Their Emerging Right to Life” (1991) 85 *Am. J. Int'l. L.* 1. See also C. D. Stone, *Should Trees Have Standing? Legal Rights for Natural Objects* (Los Altos, California: William Kaufmann, Inc., 1974); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972) (Douglas J. dissenting); C. Giagnocavo & H. Goldstein, “Law Reform or World Reform: The Problem of Environmental Rights” 35 *McGill L. J.* 345.

²¹⁶ See Schachter, *supra* note 214 at 11-12.

Schachter further suggests 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 fulfillment 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.”²¹⁷

Proponents of equity as a legal norm have emphasised that equitable utilisation, and in particular, its intergenerational dimension, regarding management and utilisation of global as well as national resources, is the primary factor defining ‘sustainable development’. They also suggest that intergenerational equity renders sustainable development a distinct objective transcending the rigid confines of conventional views on economic development and environmental protection. For example, the WCED characterized sustainable development in inherently intergenerational terms that distinguished it from other previous types of development that focused merely on economic growth.²¹⁸ Indeed, Brown Weiss argues that, “the notion that future generations have rights to inherit a robust environment provides a solid normative underpinning for environmentally sustainable development. In its absence, sustainable development might depend entirely on a sense of *noblesse oblige* of the present generation.”²¹⁹

There is no doubt that a responsibility towards future generations does exist and this is increasingly reflected in the number of international agreements and treaties that are visionary in their conception. The *UN Charter*, in the preamble states “to save succeeding generations from the scourge of war.” More specifically, the *International Convention for the Regulation of Whaling of 1946* states that the “interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks.”²²⁰ The 1992 *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* states that “water resources shall be managed so, that the needs of the present generation are met without compromising the ability of future generations to meet their needs.”²²¹ The *Treaty on Good Neighbourly Relations and Friendly Cooperation between the Republic of Hungary and the Slovak Republic*, concluded on 19 May 1995,²²² states at Article 9 that “[t]he contracting parties, motivated by their interest concerning care for the natural environment and preservation of acceptable living conditions for future generations, shall cooperate in environmental and nature protection, aiming at preventing and reducing environmental pollution, especially as regards trans-frontier pollution.”

Principle 3 of the *Rio Declaration* provides that “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” The IUCN *Draft International Covenant on Environment and Development* provides that; “inter-generational and intra-generational responsibility, as well as solidarity and cooperation among the peoples of the Earth, are necessary to overcome the obstacles of sustainable development,”²²³ ; and that “the freedom of action of each generation in regard to the environment is qualified by the needs of future generations.”²²⁴ Article 3 of

²¹⁷ “This agreement is evidenced [...] by their concurrence in many international resolutions and by their own policy statements [and] more convincingly, by a continuing series of actions to grant assistance and preferences to those countries in need.” *Ibid.* at 8.

²¹⁸ *Our Common Future*, *supra* note 13 at 8, 43, 47, 156-157, 160 (focusing on ensuring equitable sharing of natural resources and their benefits with the world's poor).

²¹⁹ E. Brown Weiss, “Environmentally Sustainable Competitiveness: A Comment” (1993) 102 *Yale L.J.* 2123.

²²⁰ *Whaling Convention*, *supra* note 194, preamble.

²²¹ *Transboundary Watercourses Convention*, *supra* note 180, art 2, para 6(c).

²²² *Treaty on Good Neighbourly Relations and Friendly Cooperation between the Republic of Hungary and the Slovak Republic*, concluded on 19 May 1995.

²²³ IUCN, *Draft International Covenant on Environment and Development*, (Gland, Switzerland: IUCN, 1995), preamble [hereinafter *IUCN Draft Convention*].

²²⁴ *Ibid.*, principle 4. For other examples, see the *Pacific Fur Seal Arbitration*, *supra* note 29, the *African Convention*, *supra* note 145 (The preamble provides that natural resources should be conserved, utilised and developed “by establishing and maintaining their rational utilization for the present and future welfare of mankind.”); the 1972 *World Heritage Convention*, *supra* note 146

the Climate Change Convention states that: “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.”²²⁵ A few hortatory and soft-law texts such as the *Goa Guidelines on Intergenerational Equity*²²⁶ and the *Declaration Universelle des droits de L’Homme des Generations Futures* adopted at Laguna, Canary Islands, February 1994,²²⁷ seek to develop a normative framework for protecting the interests of future generations. Finally, Principle 4 of the *Draft Principles on Human Rights and the Environment*, recognises a right to an environment “adequate to meet equitably the needs of present generations [...] that does not impair the rights of future generations to meet equitably their needs.”²²⁸

Outside of treaty law and other multilateral instruments, the International Court of Justice has addressed intergenerational aspects of state activities in at least one domestic court case – albeit in a separate opinion. In the *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway),²²⁹ Judge Weeramantry discussed the historico-cultural framework for inter-generational equity in global legal traditions in his extensive separate opinion on the issue of ‘equity.’ He also has insisted upon the recognition of equity as an international legal principle in his dissents in *Nuclear Tests* (New Zealand v. France) 1995²³⁰ and *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (*Nuclear Weapons Advisory Opinion*).²³¹

In *Denmark v. Norway*, Judge Weeramantry referred to intergenerational equity and specifically to “the concept of wise stewardship [of natural resources] [...] and their conservation for the benefit of future generations.”²³² These statements were included in his separate concurring opinion as dicta, and were not decisive in the Court’s decision regarding delimitation of a maritime boundary. In his dissenting opinion in *Nuclear Tests 1995*, he stated: “[t]he case before the court raises, as no case before the court has done, the principle of intergenerational equity - an important and rapidly developing principle of contemporary environmental law. [...] The court has not thus far had occasion to make any pronouncement on this rapidly developing field. [...] [The case] [...] raises in pointed form the possibility of damage to generations yet unborn.”²³³ The Court in *Nuclear Tests 1995* rendered its decision on other grounds before it had the opportunity to address the normative status of intergenerational equity. In *Nuclear Weapons Advisory Opinion*, in which the ICJ was asked to hold whether the threat or use of nuclear weapons by a state was unlawful *per se* under international law, Judge Weeramantry found that; “At any level of discourse, it would be safe to pronounce that no one generation is entitled, for whatever purpose, to inflict such damage on succeeding

(where the parties agree, at art. 4, to protect, conserve, present and transmit cultural and natural heritage to “future generations.”); *Convention on International Trade of Endangered Species and Wild Fauna and Flora*, 3 March 1973, 993 U.N.T.S. 243, T.I.A.S. No. 8249, 12 I.L.M. 1085 (1973), preamble [hereinafter *CITES*]; *Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution*, Apr. 24, 1978, 17 I.L.M. 511 [hereinafter *Kuwait Convention*], preamble; the *Cartagena de Indias Protocol*, *supra* note 178, preamble; the *Jeddah Protocol*, *supra* note 173, art 1(1); the 1976 *South Pacific Nature Convention*, preamble; the *Bonn Convention*, *supra* note 175, preamble; the *Nairobi Convention*, *supra* note 178, art 16(1); the *ASEAN Convention*, *supra* note 155, preamble; the *Transboundary Waters Convention*, *supra* note 180, art. 2(5)(c); and the *Biodiversity Convention*, *supra* note 98, preamble.

²²⁵ *Climate Change Convention*, *supra* note 98, art. 3(1).

²²⁶ Intergenerational equity is referred to as a “principle” that “requires that we avoid actions with harmful and irreversible consequences for our natural and cultural heritage.” See *Goa Guidelines on Intergenerational Equity* adopted by the Advisory Committee to the United Nations University Project on “International Law, Common Patrimony and Intergenerational Equity,” Feb. 15, 1988, reprinted in E. Brown Weiss, “Our Right and Obligations to Future Generations for the Environment” (1990) 84 A.J.I.L. 198 at 293-294.

²²⁷ The declaration was drawn up at a meeting of experts under UNESCO auspices held at L’Institut Tricontinental de la Democratie Parlementaire et des Droits de l’Homme of the University of La Laguna, Canary Islands.

²²⁸ This is a draft text attached as Annex I, to the UN ESCOR, Commission on Human Rights, Sub-commission on Prevention of Discrimination of Minorities, *Review of Further Developments in Fields with which the Sub-Commission has been concerned, Human Rights and the Environment*: Final Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), principle 4.

²²⁹ See *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen* (Denmark v. Norway), 1993 ICJ Rep. 38 (Separate Opinion of Judge Weeramantry) p. 211-279 [hereinafter *Denmark v. Norway*].

²³⁰ See *Nuclear Tests*, *supra* note 138 (dissenting opinion by Judge Weeramantry) 341-342.

²³¹ *Nuclear Weapons*, *supra* note 9 at 888.

²³² *Denmark v. Norway*, *supra* note 229 (separate opinion of Judge Weeramantry) 274.

²³³ *Nuclear Tests*, *supra* note 138 (dissenting opinion by Judge Weeramantry) 341-342.

generations [...] This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law [...] must, in its jurisprudence, pay due recognition to the rights of future generations. [...] The rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.²³⁴ In the main opinion, the Court determined that it could not hold that based on existing international law, in all circumstances use of nuclear weapons would be unlawful, and it also did not discuss the legal status of intergenerational equity. However, it did acknowledge the catastrophic implications for future generations due to environmental harm from nuclear weapons.²³⁵

It is noteworthy that intergenerational equity as a legal norm has been included in the case law of the International Court of Justice, albeit in separate opinions. Separate and dissenting opinions, such as those provided by Judge Weeramantry in the above cases, are useful in offering alternative interpretations on the subject matter and contribute to what many regard as the ICJ's role in developing and clarifying international law on controversial issues.²³⁶ It is likely that the ICJ will be called upon to directly address the normative status of intergenerational equity in the near future.

The concept of generational equity, in both its 'intra-' and 'inter-' generational dimensions, was also at issue before the Philippine Supreme Court in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*.²³⁷ This case addressed intergenerational equity in the context of state management of national forests. In a novel situation under Philippine law, the Philippine Supreme Court permitted a class action brought by Filipino children acting as representatives for themselves and future generations. Petitioners sought to halt cutting by government licensees of remaining national forests. Petitioners alleged that present and continued logging violated their right to a healthy environment under the Philippine Constitution and would entail irreparable harm to them and future generations of the nation. The Court expressly considered the issue of intergenerational responsibility²³⁸ and recognised that plaintiffs' had *locus standi* for their class action on behalf of present and future generations in the Philippines.

In rendering its ruling, the Court accepted petitioners' statistical evidence regarding the amount of forest cover required to maintain a healthy environment for present and future generations.²³⁹ The Court's recognition of the utility of this kind of evidence for determining resource use needs for future generations is a bold attempt at realising the demands posed by intergenerational equity. A subsequent critique of the decision in *Minors Oposa* argued that references to intergenerational equity were not decisive in the Court's ruling and that reliance on this issue was a political matter on the part of the deciding Justices.²⁴⁰ However, this case is significant because it is the only reported ruling by a nation's highest court to openly address intergenerational equity as a factor in rendering its decision²⁴¹ and specifically recognising that future generations have standing to bring an action regarding environmental degradation.

²³⁴ *Nuclear Weapons*, *supra* note 9 at 888.

²³⁵ *Ibid.* at 821.

²³⁶ See H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958).

²³⁷ See *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*, 33 I.L.M. 173 (1994).

²³⁸ *Ibid.* at 185.

²³⁹ *Ibid.* at 177.

²⁴⁰ See D.B. Gatmaytan, "Half a Landmark Case: Reflections on *Oposa v. Factoran*" (1994) 6 *Philippine Natural Resources Law Journal* 30.

²⁴¹ The U.S. Government has previously alleged consideration of future interests in arguments before its own lower courts. See *United States v. 18.2 Acres of Land*, 442 F. Supp. 800, 806 (E.D. Cal. 1977). Additionally, in *Cape May County Chapter, Inc., Isaak Walton League of America v. Macchia*, 329 F. Supp. 504 (D.N.J. 1971), a U.S. federal court permitted a local conservation NGO to bring an action in both its own right and as a representative of future generations to block conversion of a marshland.

Regular references to the rights and interests of “present and future generations” in contemporary international legal instruments²⁴² dealing with sustainable development suggest that the international community has come to recognise the use of natural resources in an inter-temporal context. These references also indicate that generational equity has become integral to international law dealing with environmental protection, resource utilisation and socio-economic development.²⁴³ In both its ‘intra-’ and ‘inter-’ generational dimensions, equity constitutes a bridge for recognized mutual interests between environmental protection, socio-economic development and human rights law. This evolving complementarity is a new phenomenon, as suggested by proponents of environmental justice in general²⁴⁴ and indigenous peoples' rights in particular.²⁴⁵

In their efforts to protect the interests of indigenous communities, the human rights movement has begun to find allies in the environmental and development²⁴⁶ communities. The interdependent relationship between intergenerational equity and sustainable development of natural resources is highlighted in situations involving protection of fragile ecosystems inhabited by long-term occupant communities. Well-publicised examples of co-operation between human rights and conservation advocates in enhancing this relationship include recent concerns about the effects of pollution by domestic and multinational oil companies in indigenous tribal areas in Ecuador's biologically rich Amazon region. The issue is the subject of two recent class action suits brought by Amazonian communities in U.S. federal courts.²⁴⁷

Integration of environment, development and human rights objectives is also manifest in recent instruments concerning indigenous peoples, such as the United Nations²⁴⁸ and Inter-American Commission on Human Rights²⁴⁹ draft declarations on indigenous peoples. These documents reflect a new awareness by human rights proponents that securing the rights of indigenous communities entails protection of their cultural values and knowledge as well as their genetic and other biological/environmental resources for future generations. The international conservation community now recognises this issue as a practical necessity.

²⁴² See *Climate Change Convention*, *supra* note 98, par. 23, preamble; *Biodiversity Convention*, *supra* note 98, para. 23, preamble; *Desertification Convention*, *supra* note 98, para. 26, preamble.

²⁴³ G.F. Maggio, “Inter/intra-Generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources” (1997) 4 *Buff. Envt'l. L.J.* 161. A UNEP Expert Group on International Environmental Law identified intergenerational equity as among the “Concepts and Principles in International Law.” See Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development, UNEP/IEL/WS/3/2, (1996) at 10-14.

²⁴⁴ See D. A. Sarokin & J. Schulkin, “Environmental Justice: Coevolution of Environmental Concerns and Social Justice (1994) 14 *The Environmentalist* 121 [hereinafter *Sarokin & Schulkin*].

²⁴⁵ See M. Colchester, *Salvaging Nature Indigenous Peoples, Protected Areas and Biodiversity Conservation*, (Discussion Paper 55, United Nations Research Institute for Social Development, World Rainforest Movement and WWF, 1994). See also R. K. Hitchcock, “International Human Rights, the Environment, and Indigenous Peoples” (1994) 5 *Colo. J. Int'l Envtl. L. & Pol'y* 1 and B. Rich, *Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development* (Boston : Beacon Press, 1994).

²⁴⁶ See, for example, Second Ibero-American Summit of Heads of State and Government, *Proposal for the Establishment of the Fund of the Indigenous Peoples of Latin America and the Caribbean, Final Version* (1992). See also Human Rights Watch And Natural Resources Defense Council, *Defending The Earth: Abuses Of Human Rights And The Environment* (1992); and Yale Law School, *Earth Rights And Responsibilities: Human Rights And Environmental Protection Conference Report* (1992).

²⁴⁷ See *Aguinda v. Texaco, Inc.*, 93 CIV 7527 S.D.N.Y. (3 November 1993). For examples of collaboration between human rights and environmental groups to protect long-term human occupants and biodiversity, see B.R. Johnston, “Human Rights and the Environment: Examining the Sociocultural Context of Environmental Crisis” Summary Findings from the Society for Applied Anthropology Report on Human Rights and the Environment (1994) at 30-42; and L. Udall, “Irian Jaya's Heart of Gold. Natural Resource Extraction Takes a Heavy Toll on Indonesian Island's Peoples and Habitats” (1995) 10 *World Rivers Review* 10.

²⁴⁸ *Draft United Nations Declaration on the Rights of Indigenous Peoples*, 26 August 1994, 31 *I.L.M.* 541 (1995) [*Indigenous Peoples Declaration*].

²⁴⁹ Organization of American States, Inter-American Commission on Human Rights, *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples*, OEA/Ser/L/V/II. 90 Doc. 9 rev. 1. (Sept. 21, 1995), Art XX.

The 1992 *Biodiversity Convention*, for example, shifts from a so-called ‘defensive posture’ in protecting nature from the impacts of development, to a more proactive effort seeking to use biological resources to meet the needs of people, while ensuring the long-term sustainability of the earth's biotic wealth.²⁵⁰

In addition to the inter-State dimension, intra-generational equity also encompasses what is now referred to as ‘environmental justice’ or ‘intra-generational justice.’²⁵¹ This principle refers to fairness in utilisation and enjoyment of resources including the cost of degradation, disposal and rehabilitation of resources, among all persons and groups both domestically and internationally. Environmental justice has become a significant legal issue in the United States as a result of allegations that areas inhabited by indigenous peoples and other socio-economically marginalised groups have shouldered a disproportionate amount of the nation's waste disposal facilities and other environmentally dangerous activities.²⁵²

The examples considered above demonstrate that the two aspects of generational equity – between generations and within generations – are useful tools for integrating human rights with economic and environmental priorities.

4. The principle of common but differentiated responsibilities

Emergence of the principle

As a nascent principle of international law related to sustainable development, “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.²⁵³ This principle recognises historical differences in the 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.²⁵⁴ Accordingly, 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.”²⁵⁵ Similar language exists in the *Climate Change Convention*, which provides that the parties should act to protect the climate system “on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities.”²⁵⁶

²⁵⁰ This observation has also been confirmed in studies by the World Resources Institute (WRI)²⁵⁰ and other organisations. See esp. World Resources Institute, *Global Biodiversity Strategy* (1992); and R. A. Sedjo, “Ecosystem Management: An Uncharted Path for Public forests” (1995) 10 *Resources for the Future* 1 at 10.

²⁵¹ See L. A. Thrupp, “Draft Social Justice as a Key Element of Sustainable Development” Text of Presentation Given at International Congress “Down to Earth” San Jose, Costa Rica (1994). See also generally *Sarokin & Schulkin*, *supra* note 244. The *Brundtland Commission* also advocated environmental justice as a prerequisite for sustainable development: “Meeting essential needs requires not only a new era of economic growth for nations in which the majority are poor, but an assurance that those poor get their fair share of the resources to sustain that growth.” Specifically regarding conserving biodiversity, it maintained that industrialised nations seeking to reap economic benefits from flora, fauna and other genetic resources located in developing countries “should seek ways to help tropical nations - and particularly the rural people most directly involved with these species - realize some of the economic benefits of these resources.” See *Our Common Future*, *supra* note 13 at 63.

²⁵² See J.A. Hernandez, “How the Feds are Pushing Nuclear Waste on Reservations” (1994) *Cultural Survival Quarterly* 40 at 40-42.

²⁵³ P. Sands, *International Environmental Law*, *supra* note 98 at 217.

²⁵⁴ J. C. Dernbach, “Sustainable Development as a Framework for National Governance” (1998) 49 *Case W. Res.* 1 [hereinafter *Dernbach*]. See also for an overview of this issue, D. French, “Developing States and International Environmental Law: The Importance of Differentiated Responsibilities” (2000) 49 *International & Comparative Law Quarterly* 35.

²⁵⁵ *Rio Declaration*, *supra* note 48, Principle 7.

²⁵⁶ *Climate Change Convention*, *supra* note 98, Art. 3(1).

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.

Application of the principle

In practical terms, the application of the principle has at least two consequences. First, it entitles, or 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. Despite its recent emergence in the current formulation, the principle of common but differentiated responsibility finds its roots prior to UNCED and is supported by state practice at the regional and global levels.²⁵⁷

Common responsibility describes the shared obligations of two or more States towards the protection of a particular environmental resource. Natural resources can be shared, subject to a common legal interest, or the property of no State. Common responsibility is likely to apply where the resource is not the property of, or under the exclusive jurisdiction of, a single State. The concept of common responsibility evolved from the legal rules governing resources labelled 'common heritage of mankind'.

As early as 1949, tuna and other fish were described as being "of common concern" to the parties by reason of their continued use by those parties.²⁵⁸ Outer space and the moon, on the other hand, are the "province of all mankind,"²⁵⁹ waterfowl is "an international resource,"²⁶⁰ natural and cultural heritage are "part of the world heritage of mankind as a whole,"²⁶¹ the conservation of wild animals is "for the good of mankind,"²⁶² resources of the seabed, ocean floor and subsoil are "the common heritage of mankind,"²⁶³ and plant genetic resources have been defined as "a heritage of mankind."²⁶⁴ Recent state practice supports the emergence of the concept of "common concern." This is reflected in the *Climate Change Convention*, which acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind,"²⁶⁵ and in the *Biodiversity Convention*, which affirms that "biological diversity is a common concern of humankind."²⁶⁶ While each of these formulations differ, and must be understood and applied in the context of the circumstances in which they were adopted, the attributions of "commonality" do share common consequences. Although state practice is inconclusive as to the precise legal nature of each formulation, certain legal responsibilities are attributable to all States with respect to these environmental media and natural resources under treaty or customary law as the case may be. While the extent and legal nature of that responsibility will differ for each resource and instrument, the responsibility of each state to prevent harm, in particular through the adoption of environmental standards and international environmental obligations, can also differ.

²⁵⁷ *Sands*, *supra* note 98 at 155.

²⁵⁸ *Tuna Convention*, *supra* note 159, Preamble.

²⁵⁹ *Outer Space Treaty*, *supra* note 184, art. 1

²⁶⁰ *Ramsar Convention*, *supra* note 131, Preamble.

²⁶¹ *World Heritage Convention*, *supra* note 146, Preamble.

²⁶² *Bonn Convention*, *supra* note 175, Preamble.

²⁶³ UNCLOS, *supra* note 154, Preamble; See also G.A. Res. 2749, 25 U.N. GAOR, 25th Sess. Supp. (No. 28) at 24, UN Doc. A/8028 (1970).

²⁶⁴ *Food and Agriculture Organization Undertaking on Plant Genetic Resources* (1983), art. 1.

²⁶⁵ *Climate Change Convention*, *supra* note 98, Preamble. See also G.A. Res. 43/53, U.N. GAOR, 43rd Session, Agenda Item 148, U.N. Doc. A/RES/43/53 (1989), 28 I.L.M. 1326; G.A. Res. 44/207, U.N. GAOR, 2d Comm., 44th Sess., Agenda Item 85, U.N. Doc. A/Res/44/207 (1989); and G.A. Res. 45/212, U.N. GAOR, 2d Comm., 45th Sess., Supp. No. 49A at 147, U.N. Doc. A/45/49 (1991), acknowledging that climate change is a "common concern of mankind" and rejecting the original proposal in the draft prepared by Malta which describes the global climate as the "common heritage of mankind."

²⁶⁶ *Biodiversity Convention*, *supra* note 98, Preamble.

Differentiated responsibility of States for the protection of the environment is widely accepted in treaty and other State practices. It translates into differentiated environmental standards set on the basis of a range of factors, including special needs and circumstances, future economic development of countries, and historic contributions to the creation of an environmental problem. The *Stockholm Declaration* emphasised the need to consider “the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.”²⁶⁷ The 1974 *Charter of Economic Rights and Duties of States* expresses the same principle, only in more precise terms: “The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries.”²⁶⁸ 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.”²⁶⁹

The differentiated approach is also reflected in many treaties. The 1972 *London Convention* the required measures to be adopted by parties “according to their scientific, technical and economic capabilities.”²⁷⁰ The special needs of developing countries are expressly recognised at article 11(3) of the 1976 *Barcelona Convention* and in the preamble to *UNCLOS*, where account is to be taken of their “circumstances and particular requirements,” of their “specific needs and special circumstances,” or of their “special conditions” and “the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country parties.” Other treaties identify the need to take account of States’ “capabilities,”²⁷¹ “economic capacity,” the “need for economic development,”²⁷² or the “means at their disposal and their capabilities.”²⁷³

The principle of differentiated responsibility has also been applied to treaties and other legal instruments for developed countries. In the 1988 EC *Large Combustion Directive*, different levels of emission reductions were set for each member state.²⁷⁴ The 1991 *VOC Protocol* allows parties to specify one of three different ways to achieve reductions.²⁷⁵ And the 1992 *Maastricht Treaty* provides that; “Without prejudice to the principle that the polluter should pay, if a measure [...] involves costs deemed disproportionate for the public authorities of a member state, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of temporary derogations and/or financial support from the Cohesion Fund.”²⁷⁶

Differential responsibility promotes substantive equality between developing and developed States within a regime, rather than mere, formal equality. The aim is to ensure that developing countries can come into compliance with particular legal rules over time – thereby strengthening the regime in the long term. Practically speaking however, differential responsibility does result in different legal obligations. The techniques available in differentiated responsibility include ‘grace periods’ or delayed implementation, less stringent commitments and international assistance, including financial aid and technology transfer.

²⁶⁷ *Stockholm Declaration*, *supra* note 26, Principle 23.

²⁶⁸ *Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX) (Dec. 12, 1974), Art 30; See also G.A. Res. 3201, UN GAOR, 6th Spec. Sess., Supp. No. 1, at 3, UN Doc. A/9559 (1974).

²⁶⁹ *Rio Declaration*, *supra* note 48, Principles 11 and 6; see also the *Climate Change Convention*, *supra* note 98, Preamble

²⁷⁰ *London Convention*, *supra* note 151, art. II.

²⁷¹ *Abidjan Convention*, *supra* note 178, art4(1)

²⁷² *UNCLOS*, *supra* note 154, art. 207

²⁷³ *Vienna Convention*, *supra* note 120, art. 2(2)

²⁷⁴ Council Directive 88/609/EEC, 1988 O.J. (L 336) 1 (on limitation of emissions from large combustion plants).

²⁷⁵ *Protocol to the 1979 Convention on Long Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds and Their Transboundary Fluxes*, Nov. 18, 1991, 31 I.L.M. 568, art. 2, para. 2.

²⁷⁶ *European Union Treaty*, Feb. 1, 1992, 31 I.L.M. 247 (1992), Title XVI, Article 130 s(5) [hereinafter *Maastricht Treaty*].

Under the 1987 *Montreal Protocol* the special situation of developing countries entitles them, provided they meet certain conditions, to delay their compliance with control measures.²⁷⁷ Under the *Climate Change Convention*, the principle of common but differentiated responsibilities requires specific commitments only for developed country parties, and allows for differentiation in reporting requirements.²⁷⁸

Other means of implementing the concept of differentiated responsibility include international environmental funds from such institutions as the UNEP Environmental Fund and the World Heritage Fund in the 1970's. A key example of implementation in this context is in relation to the ozone layer and the Multilateral Fund for the Montreal Protocol. Financing mechanisms, partly implemented by the Global Environmental Facility,²⁷⁹ are established under the *Climate Change*, *Biodiversity* and *Desertification Conventions*. These mechanisms provide financial grants for implementing environmental projects and environmentally sound technology. An emerging aspect of common but differentiated responsibility is differentiation within developing countries on the basis of particular situations. For example, the *Climate Change Convention* recognises the “special needs and special circumstances of developing country parties, especially those that are particularly vulnerable to the adverse effects of climate change.”²⁸⁰ Similarly, the *Desertification Convention* requires that “Parties [...] give priority to affected African country parties, in the light of the particular situation prevailing in that region, while not neglecting affected developing country parties in other regions.”²⁸¹

Recognition of common but differentiated responsibilities strengthens the integrative potential of international law relating to sustainable development by addressing the balance between global environmental problems and economic development.²⁸² As developed countries have played the greatest role in creating most global environmental problems, and have superior ability to address them, they are expected to take the lead on environmental problems. As a result, in addition to moving toward sustainable development on their own, developed countries are urged to provide financial, technological, and other assistance to help developing countries fulfil their sustainable development responsibilities.²⁸³ In *Agenda 21*, developed countries reaffirmed their previous commitments to reach the accepted United Nations target of contributing 0.7% of their annual gross national product to official development assistance. These contributions were expected to fund technical assistance, facilitate the use of environmental technologies in developing countries, and help developing countries improve their capacity to govern in a responsible and sustainable manner.²⁸⁴

As the above analysis demonstrates, States have common responsibilities to protect the environment and promote sustainable development, but because of different social, economic, and ecological situations, countries must shoulder different responsibilities. The principle of common but differentiated responsibilities therefore provides for asymmetrical rights and obligations regarding environmental

²⁷⁷ *Vienna Convention*, *supra* note 120, Preamble.

²⁷⁸ *Kyoto Protocol*, *supra* note 111, art. 4.1, 4.2.

²⁷⁹ By June 2002, the GEF provided resources in the areas of climate change, biodiversity, pollution of international water-courses and depletion of the ozone layer.

²⁸⁰ *Climate Change*, *supra* note 98, art.3

²⁸¹ *Desertification Convention*, *supra* note 98, art.7.

²⁸² See S. R. Chowhury, “Common but Differentiated State Responsibility in International Environmental Law: From Stockholm (1972) to Rio (1992)” in K. Ginther et al., *Sustainable Development and Good Governance* (The Hague: Nijhoff Dordrecht, 1995) at 322, 331 (arguing that the right to formulate development policies is indisputably tied to the right to self-determination).

²⁸³ *Climate Change Convention*, *supra* note 98, art 3(2), stating that policies and measures “should be appropriate for the specific conditions of each Party and should be integrated with national development programs.” See also *Biodiversity Convention*, *supra* note 98, arts. 20, 21, stating that developing-country implementation of convention “will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties”; *London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, June 29, 1990, UNEP/OZ.L.Pro.2.3 (Annex II), art. 10.

²⁸⁴ See *Agenda 21*, *supra* note 48, para. 33.13, 33.18 (where the Secretariat of the Conference estimating the average annual costs of implementing *Agenda 21* between 1993 and 2000 at \$600 billion).

standards. This approach appears to be a workable way of inducing broad State acceptance of treaty obligations, while avoiding the type of problems typically associated with a lowest common denominator approach. The principle also reflects the core elements of equity, placing more responsibility on wealthier countries and those more responsible for causing specific global problems. Perhaps more importantly, the principle also presents a conceptual framework for compromise and co-operation in meeting environmental challenges since it allows countries that are in different positions with respect to specific environmental issues to be treated differently.

5. Precaution regarding human health, natural resources and ecosystems

Emergence of precaution

The origins of precaution²⁸⁵ appear to lie in national law, notably the German law, or *Vorsorgeprinzip*, which is also considered the most important principle of German environmental policy.²⁸⁶ Within international law, the concept is enshrined in Article 15 of the 1992 *Rio Declaration* on Environment and Development where the most widely accepted elaboration of the concept of precaution is found. It 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.”²⁸⁷ 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.²⁸⁸ Consequently, precaution has received widespread support by the international community as a valuable tool to integrate development, both economic and social, with environmental protection.

It was first explicitly introduced into international negotiations in the *North Sea Ministerial Conferences*. As early as 1980, the German Council of Experts in Environmental Matters found that the principle was a “requirement for a successful environmental policy for the North Sea ecosystem.”²⁸⁹ The principle was included in the *Final Declaration of the Second International North Sea Conference* in 1987, where the ministers noted; “Accepting that, in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.”²⁹⁰

Precaution was repeated at the third *North Sea Conference* in 1990, where the participants agreed to “continue to apply the Precautionary Principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic, and liable to bioaccumulate even where there is no scientific evidence

²⁸⁵ 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 manual.

²⁸⁶ 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.

²⁸⁷ *Rio Declaration*, *supra* note 48.

²⁸⁸ *Dernbach*, *supra* note 254.

²⁸⁹ P. L. Gündling, “The Status in International Law of the Principle of Precautionary Action” (1990) 5 *Int’l J. of Estuarine & Coastal L.* 23 at 24.

²⁹⁰ *Second International Conference on the Protection of the North Sea: Ministerial Declaration Calling for Reduction of Pollution*, Nov. 25, 1987, 27 *I.L.M.* 835 (1988), art. VII.

to prove a causal link between emissions and effects.”²⁹¹ Eventually this process led to the principle’s inclusion in the 1992 *OSPAR Convention*.²⁹²

Although the text of the 1973 *Convention on the International Trade in Endangered Species of Wild Flora and Fauna* (CITES) does not explicitly invoke the principle, in 1994, the Conference of the Parties clearly endorsed it. In fact, at the Ninth Meeting of the Conference of the Parties to *CITES*, States adopted a resolution to incorporate the precautionary principle in the procedure for listing species in need of protection. The resolution reads: “Recognizing that by virtue of the precautionary principle, in cases of uncertainty, the Parties shall act in the best interest of the conservation of the species when considering proposals for amendment of Appendices I and II; [...] resolves that when considering any proposal to amend Appendix I or II the Parties shall apply the precautionary principle so that scientific uncertainty should not be used as a reason for failing to act in the best interest of the conservation of the species.”²⁹³

The *Vienna Convention* and its *Montreal Protocol*, concerning protection of the ozone layer, also provide important examples of the precautionary principle. The preamble to the *Montreal Protocol* explicitly states that Parties to this protocol are “determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations.”²⁹⁴ The *Protocol* and its subsequent revisions are considered as taking a precautionary approach because they adopt strict policy measures despite uncertainty.

By 1992, UNCED significantly furthered the consensus around the precautionary principle. As noted above, Principle 15 of the *Rio Declaration* was adopted. In addition, UNCED delegates also invoked the precautionary principle in both the *Biodiversity Convention*²⁹⁵ and the *Climate Change Convention*,²⁹⁶ as well as *Agenda 21*.²⁹⁷

The precautionary principle has also appeared in regional declarations and treaties. In Europe, in addition to the *North Sea Conferences* noted above, the *Bergen Ministerial Declaration on Sustainable Development* in the Economic Commission for Europe Regions, stated: “In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation where there are threats of serious or irreversible damage. Lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”²⁹⁸

Early the following year, over fifty African countries negotiated the *Bamako Convention*, which provides: “[e]ach Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter alia, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The parties shall co-operate with each other in taking the appropriate measures to implement the precautionary

²⁹¹ *Declaration of the Third International Conference on Protection of the North Sea*, March 7-8, 1990, reprinted at 1 Yb. I.E.L. 658 at 662-73..

²⁹² See *Convention for the Protection of the Marine Environment of the North-East Atlantic*, Sept. 22, 1992, reprinted in 32 I.L.M. 1069 (1993), entered into force March 25, 1998 [hereinafter *North East Atlantic Convention*], art. 2(2)(a).

²⁹³ Resolution of the Conference of the Parties, Criteria for Amendment of Appendices I and II, Ninth Meeting of the Conference of the Parties, Fort Lauderdale (USA), November 7-18, 1994, Com.9.24. See also J. Cameron & J. Abouchar, “The Status of the Precautionary Principle in International Law” in D. Freestone & E. Hey, eds., *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague: Kluwer, 1996) at 46.

²⁹⁴ *Montreal Protocol*, *supra* note 119, preamble.

²⁹⁵ *Biodiversity Convention*, *supra* note 98, preamble.

²⁹⁶ *Climate Change*, *supra* note 98, art. 3(3).

²⁹⁷ *Agenda 21*, *supra* note 48, ch. 17, 18 and 35.

²⁹⁸ *Bergen Declaration on Sustainable Development in the ECE Region*, May 16, 1990, UN Doc. A/CONF. 151/PC/10), reprinted at 1 Yb. I.E.L. 424 (1990) at para. 7.

principle to pollution through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on the assimilative capacity assumptions.”²⁹⁹ In Asia, the 1991 *Ministerial Conference on the Environment of the United Nations Economic and Social Commission for Asia and the Pacific* invoked the precautionary principle: “[I]n order to achieve sustainable development, policies must be based on the precautionary principle.”³⁰⁰

In 1993, the European Union officially adopted the precautionary principle as a basis for all community environmental policy. According to Article 130r(2) of the *Treaty Establishing the European Economic Community*, as amended by the *Treaty on European Union* (the *Maastricht Treaty*), “[c]ommunity policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at the source and that the polluter should pay.” As a “constitutional” document of the European Union, the *Maastricht treaty* will guide future adoption of EU environmental policy.

Since the early 1990s many European regional agreements have also included the precautionary principle, including the *ECE Transboundary Watercourses Convention*,³⁰¹ the *Baltic Sea Convention*,³⁰² and the *North East Atlantic Convention*.³⁰³ Several of the protocols to the *Convention on Long-Range Transboundary Air Pollution* also specifically invoke the precautionary principle.³⁰⁴ Finally, in 1995, fifty-nine countries signed the *Straddling Stocks Agreement*.³⁰⁵ Article 6 of the Agreement deals entirely with application of the precautionary approach: “1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment. 2. States shall be more cautious when information is uncertain, unreliable, or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.”³⁰⁶ Article 6 thus includes explicitly the affirmative requirement to be “more cautious” in the face of uncertainty.

Precaution has also appeared in international trade law. The World Trade Organization’s *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) provides that Members may “provisionally” adopt SPS measures “where relevant scientific evidence is insufficient.”

²⁹⁹ *Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 29 January 1991, 30 I.L.M. 775 (1991), art. 4(3)(f) [hereinafter *Bamako Convention*].

³⁰⁰ Report of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) Ministerial Meeting in the Environment, Bangkok, *Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific* (1990) at para. 19

³⁰¹ See *Transboundary Waters Convention*, *supra* note 180, which provides at art. 2(5)(a) that “the Parties shall be guided by the [...] precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand.”

³⁰² See *Convention on the Protection of the Marine Environment of the Baltic Sea Area*, April 9, 1992, stating at art. 3(2) that “the Contracting Parties shall apply the precautionary principle *sic*, i.e., to take preventative measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects.”

³⁰³ See *North-East Atlantic Convention*, *supra* 292, art. 2(2)(a).

³⁰⁴ *Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants*, June 25, 1998, UN Doc. EB.AIR/1998/2, preamble. See also *Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions*, June 14, 1994, UN Doc. EB.AIR/R.84, 33 I.L.M. 1542 (1994), which provides in the preamble that parties are “[r]esolved to take precautionary measures to anticipate, prevent or minimize emissions of air pollutants and mitigate their adverse effects”; *Protocol to the Convention on Long-Range Transboundary Air Pollution on Heavy Metals*, June 25, 1998, UN Doc. EB.AIR/1998/1, stating in the preamble that parties are “[r]esolved to take measures to anticipate, prevent or minimize emissions of certain heavy metals and their related compounds, taking into account the application of the precautionary approach, as set forth in principle 15 of the Rio Declaration on Environment and Development.”

³⁰⁵ *Agreement for the Implementation of the Provisions of the U.N. 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*, 4 August 1995, UN Doc A/CONF.164/38 (1995) 34 I.L.M. 1542, art. 5(c) [hereinafter *Straddling Stocks Agreement*].

³⁰⁶ *Ibid.*, arts. 6(1) & (2).

In full, Article 5.7 provides: “In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.” In *Hormones*,³⁰⁷ the Appellate Body explicitly discussed the relationship of the precautionary principle to the SPS Agreement. It noted that “the precautionary principle finds reflection in Article 5.7.”³⁰⁸ It also found that the principle is reflected in the sixth paragraph of the preamble and in Article 3.3, which explicitly recognizes “the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations.”³⁰⁹ Moreover, while the *Agreement on Technical Barriers to Trade* (TBT Agreement) does not explicitly incorporate a precautionary approach in its text, it does provide in the Preamble that: “no country should be prevented from taking measures ... for the protection of human, animal or plant life or health [or] of the environment, ... at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement.” This statement acknowledging the right of a WTO Member to set the level of protection “at the level it considers appropriate” parallels that in the SPS Preamble and Article 3.3, which the Appellate Body has stated are reflections of the precautionary principle.

On the basis of the aforementioned evidence, scholars have claimed that at a minimum, however, there is sufficient evidence of state practice to justify the conclusion that the principle, as elaborated in the *Rio Declaration*, the *Climate Change* and the *Biodiversity Conventions*, is receiving sufficiently broad support to allow a good argument to be made that it reflects a principle of customary international law.³¹⁰

Application of precaution

The value of precaution lies primarily in its assumption that natural systems are vulnerable, as opposed to being resilient or invulnerable,³¹¹ thereby giving the benefit of the doubt to environmental protection when there is scientific uncertainty. In its application, then, precaution shifts the burden of proof from those supporting natural systems to those supporting development.³¹² The principle is premised on the preference of preventing pollution to subsequent remediation, the relevance of scientific data to governmental decision-making and the obligation to take precautionary measures that are in proportion to the potential damage.³¹³

Nevertheless, much of the confusion surrounding the interpretation of precaution relates to the distinction between precaution and more traditional preventive standards. Precaution, both at its conceptual core and

³⁰⁷ *Supra* note 118.

³⁰⁸ *Ibid.*, at para. 124.

³⁰⁹ *Ibid.*

³¹⁰ *Sands, supra* note 98 at 112. Support for the emerging customary law status of precaution has been expressed by national courts; see e.g. *114957 Canada Ltée (Spraytech, société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 (Supreme Court of Canada, per L'Heureux-Dubé J.).

³¹¹ See A. M. H. Clayton & N. J. Radcliffe, *Sustainability: A Systems Approach*, (London: Earthscan, 1996) at 213.

³¹² See B. Weintraub, “Science, International Environmental Regulation, and the Precautionary Principle: Setting Standards and Defining Terms” (1992) 1 N.Y.U. Envtl. L.J. 173 at 178-180; D. A. Wirth, “The Rio Declaration on Environment and Development: Two Steps forward and One Back, or Vice Versa?” (1995) 29 Ga. L. Rev. 599 at 634.

³¹³ See J. E. Hickey, Jr., & V. R. Walker, “Refining the Precautionary Principle in International Environmental Law” (1995) 14 Va. Envtl. L.J. 423 at 436. The principle does not answer certain questions, however: the level of potential damage, the level of certainty required, and the circumstances under which the government would act (as opposed to the circumstances under which it would refrain from acting).

its practical implications, is preventive. However, not all preventive standards are precautionary. More precisely, any particular preventive standard may be either non-precautionary or precautionary in various degrees. By contrast, any given precautionary standard may be preventive in various degrees, but cannot be non-preventive.³¹⁴

For example, according to the terms of the 1990 *International Maritime Organization International Convention on Oil Pollution Preparedness, Response and Cooperation*,³¹⁵ parties to it, “recognising the serious threat posed to the marine environment by oil pollution incidents involving ships, offshore units, sea ports and oil handling facilities,” noted that they were “mindful of the importance of the precautionary measures and prevention in avoiding oil pollution in the first instance.”³¹⁶ Despite the presence of precautionary language, there are few precautionary elements within the standards set. The threats posed to the marine environment are clear. Measures are being taken to prevent such known threats from being realised. The certainty of the environmental damage that would result from a failure to adhere to those standards would signify that the convention is not precautionary, but rather preventive, in its intention. The terms of the convention may be contrasted with those of the *Conference for the Protection of Coasts and Waters of the North East Atlantic Against Pollution Due to HydroCarbons or Other Harmful Substances*. The Conference’s final Act declared the need for measures designed to prevent discharges of “[o]ther harmful substances, where the latter were defined as substances the release of which into the marine environment *may* lead to injury to human health, to ecosystems or living resources, or to the coasts or related interests of the Parties.”³¹⁷ The risks to be reduced in this case are of an unknown nature. It is unclear what environmental damage the release of these “other harmful substances” into the marine environment would cause. The standard set is obviously preventive in intent, since it clearly seeks to prevent environmental damage, but it is also precautionary, in that the standards set are a response to the uncertainty surrounding the environmental effects of particular discharges. Of crucial importance, of course, is the term ‘may.’ This example provides us with the key element of the conceptual core of the precaution.

A lack of certainty about the cause and effect relationships, or the extent of possible environmental harm, does not allow the delaying of some kind of regulatory mechanism over the activity in question. Precaution means that where the environmental risks of regulatory inaction are in some way uncertain but non-negligible, regulatory inaction is unjustified. Nollkaemper rightly inquires “whether or not [precaution] distinguishes itself in the already dense normative scenery in this field”³¹⁸ The conceptual core of precaution, discussed above, suggests that the concept does contribute, rather than obfuscate this normative scenery.

Precaution is especially important for sustainable development because the carrying capacity of the global environment, as well as regional ecosystems, is mostly unknown.³¹⁹ Although it is generally agreed that the environment can tolerate some abuse, there is a tendency to believe and act as if the environment can tolerate a particular human activity or set of activities unless scientific information demonstrates otherwise. Because the quality of human life ultimately depends on these natural resources, we must be careful to protect them. As such, the precautionary principle provides a useful tool that to ensure that development trends do not have a detrimental effect on the environment, particularly those caused by unknown risks.³²⁰

³¹⁴ J. Cameron, W. Wade-Gery & J. Abouchar, “Precautionary Principle and Future Generations” in E. Agius, ed., *Future Generations and International Law* (London: Earthscan Publications, 1998).

³¹⁵ *Final Act of the Conference on Oil Pollution Preparedness, Response and Cooperation*, done at London, November 30, 1990, 30 I.L.M. 733 (1991).

³¹⁶ *Ibid.*, at 735.

³¹⁷ *Final Act of the Conference for the Protection of Coasts and Waters of the North East Atlantic Against Pollution Due to HydroCarbons or Other Harmful Substances, and Accord of Cooperation*, done at Lisbon, October 17, 1990, 30 I.L.M. 1227 (1991) [emphasis added].

³¹⁸ Nollkaemper, *supra* note 286 at 107. Note that Nollkaemper responds differently to this question.

³¹⁹ See D. H. Meadows et al., *Beyond the Limits* (New York: Universe Books, 1972) at 1-14.

³²⁰ G. Maggio & O. J. Lynch, *Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society* (World Resources Institute, 1996) at 75.

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

International law relating to sustainable development faces several difficult and worsening problems. It is clear that sovereign governments should energise and mobilise every part of society to do its best to help achieve national goals.³²¹ In this regard, government efforts should be based on the participation of concerned individuals and organisations, and should motivate non-governmental actors to further sustainable development.³²² Recent international instruments, such as *Agenda 21*, the *Desertification Convention*, the *Aarhus Convention* and the *Beijing Declaration*, make clear that participatory partnerships involving both state and non-state actors are developing rapidly as a means for facilitating a more equitable society, both in economic development and environmental protection.

Emergence of the principle

One of the first major international documents to make public participation a central developmental objective, including the achievement of equitable socio-economic development, was the 1986 United Nations General Assembly *Declaration on the Right to Development*. Its preamble recognises that “development is 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 arising there from.” Article 1 of the Declaration, which defines the ‘right to development,’ recognises universal public participation as essential for the expression of this right. It asserts that 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 social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

The role of public participation as a necessary means for achieving sustainable development was first 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.

Although the UNCED and related texts do not refer to ‘participation’ as a right, they do indicate that participation is vital in the process of sustainable development. These texts also acknowledge that international law regarding sustainable development has a central role in promoting participation on all levels. Principle 27 of the *Rio Declaration*, for example, provides that “States and people shall cooperate in good faith in a spirit of partnership in the fulfilment of the Principles embodied in this Declaration and in the further development of international law in the field of sustainable development.”

The preamble to the *Rio Declaration* calls for the establishment of a “new and equitable global partnership” which will be realised through new levels of co-operation among States and with non-state actors, namely

³²¹ In a sustainable system, the government “becomes an advocate for excellence, and oversees and guarantees the integrity of the process.” The Aspen Institute, *The Alternative Path: A Cleaner, Cheaper Way to Protect and Enhance the Environment* (1996) at 30. This requires government to monitor substantive progress as well as the effectiveness of public participation and other processes. Public participation by nongovernmental actors extends not just to national governance but also to international decisions. See G. Maggio & O. J. Lynch, *Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society* (World Resources Institute, 1996) at 38-43.

³²² See *Agenda 21*, *supra* note 48 at para 8.3(d), 8.4(e), and 23.2, providing that sustainable development requires “broad public participation in decision-making.”

“key sectors of societies and people.” This new form of co-operation is the right to participation. *Agenda 21* provides that “one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making.” Early manifestations of this right to participate at national levels are recognized in several major international human rights instruments, foremost among them being Article 25 of the ICCPR and Article 21 of the UNDHR. More recently, participation has become intimately linked with achieving objectives in international environmental law, as well as economic development.

Agenda 21 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.³²³ Public participation in the development and implementation of environmental and other laws is also encouraged.³²⁴ These ‘Major Groups’ will continue to play a role in the World Summit on Sustainable Development in Johannesburg.

Publicists such as Kiss and 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.”³²⁵

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 right to participation is treated as a means for facilitating the realisation of other human rights in the 1994 *Draft Principles on Human Rights and the Environment*. It maintains that “[a]ll persons have the right to active, free and meaningful participation in planning and decision-making and processes that may have an impact on the environment and development. This includes a right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.” The IUCN *Draft Covenant on Environment and Development* also refers to the right to public participation as a facilitating right, stating that “[a]ll persons [...] have [...] the right to participate in relevant decision-making processes.”

This understanding of participation at the inter-state level is encapsulated in the texts of several recent international legal materials. It has contributed to the refinement of the developing countries' agenda, during the past three decades. A notable landmark in this effort was a concerted focus on establishing a New International Economic Order (NIEO). Another is the *Kuala Lumpur Declaration*, a developing country position on priorities for the Rio Conference in 1992. In that declaration, the G-77 countries called for inclusion of the concepts of ‘common but differentiated responsibilities,’ ‘technology transfer,’ and

³²³ *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.”

³²⁴ *Rio Declaration*, *supra* note 48, 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*, *supra* note 48, principle. 10; see also *Agenda 21* at para. 27.13, recommending that nongovernmental organisations have the right to protect the public interest by law.

³²⁵ *Kiss & Shelton*, *supra* note 13 at 204.

‘equitable sharing of benefits’ in UNCED documents as necessary if ‘participatory partnerships’ for achieving sustainable development are going to be successfully forged.

Application of the principle

Since the United Nations Conference on Environment and Development (UNCED), there has been widespread agreement in international legal materials dealing with the environment and socio-economic development that active ‘participation’ by affected groups is not only desirable but necessary if international legal sustainable development objectives are to be met. These instruments reflect the emergence of three dimensions to the concept of ‘public participation’.

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 decisions and activities of government.

Kiss refers to this aspect of participation as ‘obtaining information:’ “Obtaining information is a prerequisite for the major role played by the public, especially in environmental impact processes or other permitting procedures.”³²⁶ In addition, *Agenda 21* recommends that governments ensure that non-State actors have access to information necessary for effective participation.³²⁷ By including diverse groups as necessary participants for achieving sustainable development, *Agenda 21* and the other UNCED materials challenged longstanding assumptions regarding the role of government as the only legitimate player in developing and implementing international standards and legal rights and obligations. Recognising a place for non-State actors in the drafting and amending of international legal instruments for environmental protection and sustainable development is one of the major developments to come out of the UNCED.

Third, those segments of the population whose environmental rights are affected by State decisions should have a right of access to justice. This aspect of public participation has developed significantly within Europe and is discussed further below.

The 1998 *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*³²⁸ (*Aarhus Convention* has 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 1998.³²⁹ 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

³²⁶ *Ibid.*, at 204.

³²⁷ *Agenda 21*, *supra* note 48, para. 40.17-40.30, recommending more effective public dissemination of data related to sustainable development; *Sands*, *supra* note 98 at 596-628, offering detailed explication of types of environmental information required under *Agenda 21* and other international agreements. National governments also are urged to educate the public about the challenges and opportunities of sustainable development. See *Agenda 21*, para 8.11, 36.10.

³²⁸ 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 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 but to national activities

³²⁹ 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; *Consorzio Gruppo di Azione Locale "Murgia Messapica" v. Commission*, T-465/93, [1994] E.C.R. II-361.

interests are protected and the law is enforced." There are three such rights of access that Parties undertake 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.³³⁰

The provisions of article 9(2) and 9(3) offer the greatest potential for civil society organisations (CSOs) seeking to bring enforcement actions against Community institutions. Article 9(2) of 1998 *Aarhus Convention* obligates the Parties to provide access to justice to members of the public having either a "sufficient interest" in a matter or "maintaining impairment of a right."³³¹ Whether the language of article 9(2) creates an obligation to provide a remedy to CSOs in matters involving activities subject to article 6 is still in question. Decisions encompassed by article 6 (and hence potentially challengeable under article 9(2)) are only those debated to permit the proposed activity. Generally, permitting decisions fall within the jurisdiction of the member States rather than Community institutions. Therefore, a decision concerning funding to support the construction of power stations, such as the *Greenpeace* case, would most likely not be considered to rest "on whether to permit" the activity.³³²

The most far-reaching of the access to justice provisions is potentially that contained in article 9(3).³³³ Access to justice for members of the public to enforce environmental laws was a hotly debated issue in the negotiations leading up to the Aarhus Conference. The result of this debate is reflected in the terms of article 9(3), which provides: "In addition and without prejudice to the review procedures referred to in [articles 9(1) and (2)] above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."³³⁴ Rather than preserving the status quo, however, the 1998 *Aarhus Convention* may provide a basis for the European Court of Justice to reconsider its application of the "direct

³³⁰ 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."

³³¹ Parties must determine whether an applicant has sufficient interest or maintains an impairment of a right in accordance with the requirements of national law and consistent "with the objective of giving the public concerned wide access to justice within the scope of the Convention." Many environmental CSOs will meet the definition of "the public concerned" in article 2(5) of the Convention. Moreover, CSOs may also have rights capable of being impaired for the purposes of invoking article 9(2).

³³² *Greenpeace Int'l v. Commission*, C-321/95 P, [1998] E.C.R. I-1651 [hereinafter *Greenpeace Case*]. The case was brought by a number of individuals claiming to be affected by the decision of the European Commission, two local environmental associations based in the Canary Islands (Tagoror Ecologista Alternativo (TEA) and Comision Canaria Contra la Contaminacion (CIC)), and Greenpeace Spain. The individual applicants sought to justify their claims on a number of bases, including residence in the area of the works in question, ownership of real estate in the area, the carrying on of occupational activity within the area and alleged negative impacts on health, tourism, fishing, farming, education of the young, local flora and fauna, and occupations connected with windsurfing in the islands. At para. 28, the ECJ upheld the decision of the Court of First Instance denying the individual applicants standing on the basis that "where . . . the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act."

³³³ See P. Sands, "European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection" (1991) 100 Yale L.J. 2511 at 2519.

³³⁴ As members of the "public," NGOs are entitled to challenge the actions of public authorities that contravene environmental laws. Prospective challengers, however, must "meet the criteria, if any, laid down in [a Party's] national law." In the EU context, where NGOs seek to challenge the actions of Community institutions that allegedly contravene provisions of Community environmental laws, these criteria would seem to include the article 173 requirements of "direct and individual concern."

and individual concern" criterion in environmental cases.³³⁵ Effective judicial recourse is mainly achieved within the domestic legal order of the Member States, as both the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg involve a slow, cumbersome and costly procedure of redress. However, recent judicial activism at the level of these courts, securely grounded on the basic principles of the founding treaties and the protection of human rights worldwide, has significantly advanced openness. In the European Court of Justice, the perceived "democratic deficit" created by its ruling in the *Greenpeace* case may be remedied by implementing the *Aarhus Convention's* access to justice provisions. As such, the 1998 *Aarhus Convention* may give CSOs standing to bring their own suit to the European Court of Justice to challenge acts of Community institutions that allegedly violate Community environmental law. As the European Community proceeds to ratify the treaty, the European Court of Justice may need to reconsider its interpretation of the "direct and individual concern" criteria of article 173 to allow the public and CSOs to vindicate the environmental rights expressed in the treaty.

The need to broaden the type of participants recognised as necessary for sustainable development has transformed international law-making. Public participation in the design and implementation of objectives in international law relating to sustainable development has become standard in both hard and soft law. One of the most innovative instruments in this regard, the 1994 UN *Desertification Convention*, includes participation among the objectives and obligations of States.

Article 3 of the *Desertification Convention* states that "[i]n order to achieve the objectives 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 [...] are taken with the participation of populations and local communities." In Article 5, signatories to the Convention commit themselves to "[u]ndertake to [...] promote awareness and facilitate the participation of local populations, particularly women and youth with the support of non-governmental organisations, in efforts to combat desertification." In Article 9, they promise that "[i]n carrying out their obligations [...] affected country Parties [...] shall, as appropriate, prepare, make public and implement national action programmes. [...] Such programmes shall be updated through a continuing participatory process."

Participation within international law relating to sustainable development also embodies a framework in which critical decisions can be made at the level most consistent with effectiveness. *Agenda 21* calls on national governments to delegate sustainable development responsibilities 'to the lowest level of public authority consistent with effective action.'³³⁶ This is well known within the European Community as the principle of subsidiarity.³³⁷ In federal systems, for example, national governments would delegate to states or provinces responsibilities for sustainable development that would be most effectively carried by those levels, whereupon these governments would delegate those responsibilities best managed locally to local governments. Subsidiarity attempts to ensure that national policies are carried out in a manner that fosters self-determination and accountability at a local level, including political liberty, flexibility, preservation of community identity, social and cultural diversity, and respect for distinct communities within States.³³⁸

In most States, the application of subsidiarity equates with a decentralisation of power and increased local decision-making. Indeed, it may be that interconnections between the environment, the economy and social conditions are more readily visible at the local level, typically less complex, easier to understand and

³³⁵ The appellants in *Greenpeace* relied on the judgments of the ECJ in *Procureur de la Republique v. Association de Defense des Bruleurs d'Huiles Usagees* C-240/83, [1985] E.C.R. 531, and *Commission v. Denmark*, C-131/88, [1988] E.C.R. 4607, which declared environmental protection to be one of the Community's essential objectives; *Commission v. Germany*, C-361/88, [1991] E.C.R. I-825 and I-2567, which found that Community environmental legislation can create rights and obligations for individuals, and *Commission v. Germany*, C-431/92, [1995] E.C.R. I-2189, which holds that Directive 85/337 creates individual rights of participation in the environmental impact assessment procedure.

³³⁶ *Agenda 21*, *supra* note 48, para. 8.5(g).

³³⁷ G. A. Bermann, "Taking Subsidiarity Seriously: Federalism in The European Community and the United States" (1994) 94 Colum. L. Rev. 331 at 338.

³³⁸ *Ibid.*, at 339-44. See also *Dernbach*, *supra* note 254.

thus often easier to address.³³⁹ In short, the public's dependence on the resources and particular ecosystems in question provides its own regulatory framework. Decentralisation on the whole brings the government closer to the people and, in one commentator's words, has the ability "to release the energies of ordinary people, enabling them to take charge of their lives."³⁴⁰

The debate over conservation of biologically diverse resources provides a useful example for the role of public participation. For non-State actors, participation leading to sustainable development requires that affected groups, such as local communities inhabiting and utilising biologically rich areas, play an active role in shaping and implementing laws for the protection of local species and ecosystems. At the inter-state level, it means that conservation of biodiversity is no longer considered just another aspect of industrialised country aid to the developing world. Rather, the biodiversity-rich 'South' must be assured of greater symmetry with the technologically and financially wealthier 'North' over the conservation and utilisation of biodiversity. As such, increased participation in the institutions and processes of international law is often a prerequisite for the successful design and implementation of socio-economic and environmental objectives. Neither environmental nor developmental strategies are likely to be sustainable unless all affected actors, both State and non-State, and particularly those with special dependencies on the resources at issue, are involved in decision-making.

7. The principle of good governance

The challenge for all societies is to create a system of governance that promotes, supports and sustains human development – especially among the poorest and most marginalized peoples. The search for a clearly articulated concept of governance, however, has only just begun. Governance can and must be seen as the exercise 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.³⁴¹

The term 'governance', though widely used and well popularised, has yet to be thoroughly defined. It has been used mainly by international financial and development institutions to depict improper or unsatisfactory functioning of governmental machinery or the need for more efficient administration.³⁴² There have been varied, if perfunctory definitions of the term. The World Bank states that "Governance [is] the exercise of political power to manage a nation's affairs."³⁴³ 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."³⁴⁴ There are a number of reasons why attempts at a solid definition of good governance may have failed. Clearly, the concept is heavily value-laden. It is also very general in its orientation. Moreover, the elements of 'good' governance are not incontestable in themselves. This section addresses these issues.

³³⁹ See J. S. Adams & T. O. Mcshane, *The Myth of Wild Africa: Conservation Without Illusion*, (New York: Norton, 1996) (stating that wildlife conservation can succeed only if it is directly related to rural economic development); see also Kenya Wildlife Service, *Wildlife-Human Conflicts in Kenya* (1994) (recommending actions to share benefits of wildlife with landowners).

³⁴⁰ J. Holmberg, *Defending the Future: A Guide to Sustainable Development* (London: Earthscan, 1988).

³⁴¹ P. Uvin & I. Biagiotti, "Global Governance and the 'New' Political Conditionality" (1996) 2 *Global Governance: A Review of Multilateralism and International Organizations* 377.

³⁴² 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.

³⁴³ See World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (1989) [hereinafter World Bank, *Africa*].

³⁴⁴ G. Hyden & M. Bratton, eds., *Governance and Politics in Africa* (Boulder: Lynne Rienner Publishers, 1993) at 7.

The use of the term ‘governance’, in its contemporary form, is attributed to the World Bank.³⁴⁵ In a foreword to the 1989 *World Development Report*, the President of the Bank stated that “private sector initiative and market mechanisms are important, but they must go hand-in-hand with good governance.”³⁴⁶ Indeed, the entire report contained extensive references to the substance of ‘governance’. In 1992, the World Bank published a report entitled *Governance and Development*, which in many respects represented the promulgation of good governance as a major variable in economic development. It discussed in more detail some of the signposts of ‘good governance’ as perceived by the institution. These include public sector management, legal framework, accountability and transparency. Following the 1992 publication closely, the World Bank described in 1994 some of its experiences with a team working in concrete situations.³⁴⁷ In that material, the World Bank indicated its sensitivity to the political dimensions of governance and its restraint in that regard. It did, however, confirm the consultative role it must play with governments and other funding agencies in ‘governance matters’. Finally, in a bold acknowledgement of the critical role the State plays in economic development, the World Bank in 1997 announced that the State apparatus, combined with ‘good governance’ is a necessary condition for development.³⁴⁸

A number of other development-oriented institutions have paid attention to the issue of governance. For example, in 1997 the International Monetary Fund (IMF) decided to incorporate governance as a criterion for assistance.³⁴⁹ However, given its preoccupation with macroeconomic management issues, the IMF has been less conspicuous in its interest in ‘good governance’. Nevertheless, it proposed to co-ordinate its concerns on governance with other bilateral and multilateral funding sources.³⁵⁰ Furthermore, the United Nations Development Program (UNDP) has stated that “it is only with good governance that we can find solutions to poverty, inequity and insecurity.”³⁵¹ The Organisation for Economic Co-operation and Development (OECD) also stated its preparedness to rely on governance as a test for assistance to poor countries.³⁵² The African Development Bank, the Asian Development Bank, bilateral development agencies such as the British Overseas Development Agency, the Danish Development Agency, the United States Development Agency and others, have all, at various times and occasions since the late 1980s, stressed the importance of governance as a critical factor in development.³⁵³

It is hardly challenged that the concept of good governance, in its modern form, owes its popularity to the international financial and development institutions. The substance of governance, however, has earlier origins.³⁵⁴ In the early twentieth century, for example, Max Weber outlined the functions of a bureaucracy

³⁴⁵ See A. Tolentino, “Good Governance Through Popular Participation in Sustainable Development” in K. Ginther et al., *Sustainable Development and Good Governance* (The Hague: Nijhoff Dordrecht, 1995) at 142.; World Bank, *Governance: The World Bank's Experience* (1994) at vii [hereinafter World Bank, *Governance*].

³⁴⁶ See World Bank, *Africa*, *supra* note 343 at xii.

³⁴⁷ *Ibid.*

³⁴⁸ See World Bank, *The State in a Changing World* (1997). Besides these publications, the World Bank also released materials dealing with governance at various times. Examples include, L. Frischtak, *Autonomies of Development: Governance Capacity and Adjustment Responses* (1993); L. Mills & I. Serageldin, *Governance and the External Factor* (1992).

³⁴⁹ See generally International Monetary Fund, *Good Governance: The IMF's Role* (1997); International Monetary Fund, *Code of Good Practices on Fiscal Transparency - Declaration of Principles*, April 16, 1998, 37 I.L.M. 942 (1998) at 942 [hereinafter IMF, *Governance*].

³⁵⁰ IMF, *Governance*, *ibid.*

³⁵¹ United Nations Development Program, *Governance Policy Paper* (1997) at 1 [hereinafter UNEP, *Governance*].

³⁵² The European Union also resolved in 1991 to condition its development relationships with poor countries on good governance. See P.J.I.M. de Waart, “Securing Access to Safe Drinking Water through Trade and International Migration”, in E. Brans et al., eds., *The Scarcity of Water: Emerging Legal and Policy Responses* (New York: Kluwer Law International, 1997) at 116-17.

³⁵³ See T. M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995) [hereinafter *Franck*].

³⁵⁴ The works of classical philosophers such as Thomas Hobbes, Jean J. Rousseau, Montesquieu, Machiavelli, Plato, Confucius, J.S. Mill, Adam Smith, Karl Marx and many others, have all hinged on the idea of proper governance of society. See G. H. Sabine, *A History of Political Theory* (New York: Holt, Rinehart and Winston, 1961); D. Held, *Models of Democracy* (Stanford: Stanford University Press, 1987).

that would facilitate development.³⁵⁵ He called for the strict observance of rule of law and legal rationality and advised against admixture of private interests with the public responsibilities of the bureaucrat.³⁵⁶ In the 1960s, the modernists, largely under the sponsorship of the United States, researched the place of law in efficient administration of newly independent developing countries.

Application of the principle

There appear to be two key approaches to current discussions on governance. The first emphasises the domestic dynamics of good governance, while the second focuses on the international dimensions of governance. The domestic approach argues for stringent reforms in developing countries that are seen to lack sufficient progress towards good governance.³⁵⁷ The international approach points to an emerging requirement of democratic governance under international law.³⁵⁸ Both positions do stress a patent, and even passionate stewarding of developing countries by developed States, using good governance as a critical benchmark.

Integrating these two approaches, the UNDP has identified a set of characteristics for good governance.³⁵⁹ They are participation,³⁶⁰ rule of law,³⁶¹ transparency,³⁶² responsiveness,³⁶³ consensus orientation,³⁶⁴ equity,³⁶⁵ effectiveness and efficiency,³⁶⁶ accountability,³⁶⁷ and strategic vision.³⁶⁸ 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. Clearly, these elements

³⁵⁵ For a relevant discussion of Weber, see W. J. Mommsen, *The Age of Bureaucracy: Perspectives on the Political Sociology of Max Weber* (Oxford: Oxford University Press, 1974).

³⁵⁶ See generally G. Roth & C. Wittich, eds., *Max Weber, Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1968).

³⁵⁷ P. McAuslan, "Good Governance and Aid in Africa" (1996) 40 *J. Afr. L.* 168 at 168-82.

³⁵⁸ *Franck, supra* note 353 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.

³⁵⁹ UNEP, *Governance, supra* note 351. 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.

³⁶⁰ 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.

³⁶¹ Legal frameworks should be fair and enforced impartially, particularly the laws on human rights.

³⁶² 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.

³⁶³ Institutions and processes try to serve all stakeholders.

³⁶⁴ 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.

³⁶⁵ All men and women have opportunities to improve or maintain their well-being.

³⁶⁶ Processes and institutions produce results that meet needs while making the best use of resources.

³⁶⁷ 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.

³⁶⁸ 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.

are crucial for the adoption and promulgation of the principles of international law relating to sustainable development.

PART IV: THE PRACTICES

Case Studies of integrated instruments in ISDL

The case studies below provide examples of international legal instruments and regimes at the various degrees of integration identified in Part I. We consider parallel yet interdependent regimes, regimes in the process of integrating environmental, economic and social law, and examples of innovative, fully integrated instruments within regimes. In the first case study, the Sustainability Impact Assessment (SIA) is examined as an example of an integrated ISDL tool, describing stakeholder participation strategies and recent innovations in integrated assessment procedures. The second case study surveys Regional Integration Agreements (RIAs) for the use of innovative instruments (at different degrees of integration) to address environmental and social concerns in four subsidiary economic integration arrangements, with notes on mechanisms to ensure increased openness. The third case study examines distinctive approaches to compliance-building within ISDL, identifying how ISDL supports effective compliance. Finally, a fourth case study focuses on rights-based approaches within ISDL, demonstrating the utility of cross-fertilisation between human rights, economic and environmental regimes.

Case Study I – Sustainability Impact Assessments (SIAs)

The introduction of impact assessment procedures is becoming one of the most obvious examples of ‘integrated thinking’ in the international arena.³⁶⁹ The whole terrain, originally centred upon environmental impact assessments (EIAs) of specific projects, has broadened dramatically. There have been significant increases in the range of activities to which assessments are applied, and a widening of the scope of assessment criteria beyond purely environmental ones.³⁷⁰ At the same time, increasing attention is being given to public participation and decision-making at different levels.

This case study presents impact assessment as an instrument initially at the ‘third degree’ of integration, but which is evolving towards the ‘fourth degree’, becoming a highly integrated mechanism in which economic, social and environmental considerations are woven together.

Environmental Impact Assessment

An environmental impact assessment is a procedure that is carried out to determine possible effects of a proposed activity on the environment. It usually includes a preliminary scientific or information-gathering phase and a report, which is then followed by a decision to proceed, sometimes in tandem with additional measures such as full investigations and studies, public meetings or consultations and the publication of extensive studies with recommended mitigation measures. The earliest mandatory EIA procedures were

³⁶⁹ Although international law may not currently require development to be sustainable, international law can require development decisions to be the outcome of a process which promotes sustainable development – including the carrying out of EIA on the correct levels and ensuring public participation in decision making. See S. Nooteboom & K. Wieringa, “Comparing strategic environmental assessment and integrated environmental assessment”, *Journal of Environmental Assessment Policy and Management*, (1999) Vol. 1, No. 4 at 441-57; and D. Devuys, “Sustainability assessment: the application of a methodological framework”, *Journal of Environmental Assessment Policy and Management*, (1999) Vol. 1, No. 4 at 459-87.

³⁷⁰ Early EIA procedures were not as integrated. According to M. Lee and C. Kirkpatrick, in M. Lee and C. Kirkpatrick, eds., (Manchester: Manchester UP, 2000) [hereinafter *Lee & Kirkpatrick*], at 2 (citing Canter 1996, ch. 1; Clark and Canter 1997; Wood 1995 ch. 2) “[t]he US National Environmental Protection Act (NEPA) was not an example of integrated appraisal, rather choosing to establish a specialised environmental appraisal separate from and largely additional to the technical, financial and economic appraisals that were in practice and encouraged by legal requirements.”

introduced in the 1970s by the US *National Environmental Protection Act*.³⁷¹ The impetus behind such regimes has been changing, but originally the motivation stemmed from a need to balance different domestic agendas. As with certain other emerging themes in contemporary international law, the idea of EIA arose in national policy and was then adopted into the international arena.³⁷² EIA norms have then ‘filtered back’ from international to national and regional laws in three ways:

- through the influence of ‘soft law’
- under state obligations to implement specific international law instruments
- to some extent at least, under obligations in customary international law³⁷³

There is now a general international acknowledgement of the growing importance of EIA as a national instrument, and there are currently regulations for project level EIA in over 100 countries. There are also tremendous variations in the number of assessments carried out in each country. According to a 1993 European Commission study, in France, 5,500 assessments were carried out per annum; in the United Kingdom, 189; in Italy there were 28; and in Denmark six. There were also considerable variations in the types of projects assessed, particularly with regard to situations where assessment was discretionary. In Flanders, for example, 71 percent of the projects assessed were in agriculture. All projects assessed in Italy were infrastructure projects. This was also the highest category for the United Kingdom at 49 percent. The highest number in Spain, also at 49 percent, was in mining. The increasing recognition of the EIA’s utility on a national level is reflected in Principle 17 of the 1992 *Rio Declaration*, which provides: “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.”³⁷⁴ Indeed, in some cases, civil society groups wielding demands for EIAs have been able to appeal to courts for enforcement of their requests, obliging governments to comply with EIA requirements.³⁷⁵

At the international level, obligations in international environmental law to conduct EIAs arose first in the context of the potential transboundary impacts of particular projects, and were largely the cumulative corollary of a State’s international environmental law obligations. These include obligations under customary international law first described in the early US-Canada *Trail-Smelter* dispute, to ensure that activities within State jurisdiction or control do not damage the environment of other States.³⁷⁶ The International Court of Justice has also found a duty to conduct EIAs before proceeding with serious transboundary projects under customary international law, as well as a duty to consult and co-operate in the implementation of projects which might affect other States interests under treaty and customary

³⁷¹ 42 U.S.C. § 4321-47. The Act applies only to US Federal Government projects.

³⁷² See EC, Commission, *Communication from the European Commission on the Precautionary Principle*, COM 1 (2000), WTO doc. WT/CTE/W/147G/TBT/W/ 137 (27 June 2000); and Bundesimmissionsschutzgesetz—BImSchG, Art. 5.2: “Installations subject to authorization are to be constructed and operated in such a manner that ... 2. Precaution is taken against damaging environmental effects...” and G. Feldhaus, “Der Vorsorgegrundsatz des Bundes-Immissionsschutzgesetzes,” *Deutsches Verwaltungsblatt* 1980, at 133-139; Rat von Sachverständigen für Umweltfragen, *Umweltprobleme der Nordsee* (Stuttgart: Kiepenheuer & Witsch, 1980) at 444-446; and G. Hartkopf and E. Bohne, *Umweltpolitik, vol. 1: Grundlagen, Analysen, und Perspektiven* (Opladen: Westdeutscher Verlag, 1983) at 112-113, where it is noted that the precautionary principle originated in Germany.

³⁷³ For a survey of hard and soft legal obligations to conduct EIAs, see P. N. Okowa, “Procedural Obligations in International Environmental Agreements” (1996) *Brit. Y.B. of Int’l L.* 275.

³⁷⁴ *Rio Declaration*, *supra* note 48, Principle 17.

³⁷⁵ In *Quebec v. Canada*, [1994] S.C.J. No. 13 (online: QuickLaw), a group of Parties, including local aboriginal communities, successfully applied for an injunction to suspend the transportation of produced hydroelectric power to the United States until an EIA of the operation was completed.

³⁷⁶ This principle follows the well-established legal maxim: “*sic utere tuo ut alienum non laedas*.” The obligation to refrain from injuring other States is recognized as a fundamental norm of international customary law. See *Corfu Channel*, *supra* note 139 at 22 and *Trail Smelter*, *supra* note 32 at 699 “[n]oting that a state was held internationally responsible for causing transboundary harm”. For ‘soft’ law to this effect, see the *Rio Declaration*, *supra* note 48, Principle 2. See also the *Stockholm Declaration*, *supra* note 26, Principle 21;

obligations.³⁷⁷ Debatably, there is also a need to act in accordance with the precautionary principle and the principle of prevention.³⁷⁸ The same underlying international environmental law obligations in relation to areas beyond the limits of national jurisdiction has similarly led to EIA obligations when activities are proposed to take place in areas of common concern or heritage of humanity. Obligations to conduct a variety of EIA procedures are found in the 1991 *Protocol to the Antarctic Treaty on Environmental Protection*,³⁷⁹ and under the 1982 *UN Convention on the Law of the Sea (UNCLOS)*.³⁸⁰ It is also likely that there is a customary international law obligation to do an EIA in such circumstances.

EIA has often been considered an essential tool in the implementation of other emerging legal obligations. With the growing recognition of international interdependence, and of the significance that certain largely domestic activities can have on issues that are of concern to the international community at large, international obligations to conduct EIAs have also arisen in relation to specific issue areas, such as biodiversity³⁸¹ and climate change.³⁸² Here again, arguments have been made for international customary law obligations in these respects, especially in relation to biodiversity.³⁸³

Extension of EIAs to Include Social Criteria

In the early years of EIA, environmental impacts were considered to be only changes which affected the natural, biophysical environment. However the institutionalisation of EIA, with its public disclosure and consultation processes, acted as a magnet for individuals, groups and agencies that wanted other potential impacts to be incorporated into decision-making processes. It was not before long that at the national project level, the inclusion of social and health impacts in EIAs was standard, either as part of the EIA

³⁷⁷ For an expression of the customary principle, see *Gabčíkovo-Nagymaros*, *supra* note 23 at 206. Judge Schwebel, speaking for the majority, took judicial notice of the vulnerability of the environment and the importance of having risks assessed on a continuous basis. These provisions were construed by Judge Weeramantry in a minority opinion as "building in" the principle of EIA. He added that a duty of EIA is to be read into treaties whose subject can reasonably be considered to have a significant impact upon the environment. See also the discussion of the Court in the *1995 Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 Case Concerning Nuclear Tests (New Zealand v. France)* [1995] 106 I.L.R. 1 [hereinafter *Nuclear Tests II*]. In the earlier dispute in 1973, France publicly declared its intention to cease atmospheric tests, which led to a resolution of their dispute with New Zealand and Australia concerning the legality of the tests in the South Pacific. See *Nuclear Tests I*, *supra* note 138. The Experts Group on Environmental Law of the World Commission on Environment and Development then identified EIA as an emerging principle of international law. For examples of treaty obligations in this respect, see the *Watercourses Convention*, *supra* note 98 and the *Transboundary Waters Convention*, *supra* note 180 at art. 3 (1)(h), where States are required to develop, adopt, implement, and, as far as possible, render compatible relevant measures to ensure that an EIA is applied. See also the International Law Commission (ILC) *Draft Articles on the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/46/10 (1991) at 161 and U.N. Doc. A/CN.4/L492 & Add. 1 (1994).

³⁷⁸ *Rio Declaration*, *supra* note 48 at Principle 15: "In order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

³⁷⁹ See the *Antarctic Environmental Protocol*, 30 I.L.M. 1461 (1991), article 23(1). Nine Parties have ratified the Protocol to date but all Antarctic Treaty Consultative Parties, amounting to 26, are required to bring it into force. See also *Convention on the Conservation of Antarctic Marine Living Resources*, 20 May 1980, T.I.A.S. No. 10240, 1329 U.N.T.S. 48 (1980).

³⁸⁰ UNCLOS, *supra* note 154, preamble, arts. 192, 194. See also *Straddling Stocks Agreement*, *supra* note 305, preamble and arts. 2, 5 addressing issues such as the inadequate management of high seas fisheries, the over-utilization of fishing resources, and the inadequate regulation of fishing vessels. UNCLOS States, at Art. 206: "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205."

³⁸¹ See *Biodiversity Convention*, *supra* note 98. Flexible language defining the international EIA requirement is evident at Art. 14 (1)(a), that requires Parties "as far as possible and as appropriate . . . [to] . . . introduce appropriate procedures . . . [requiring environmental impact assessment of proposed projects that are] . . . likely to have significant adverse effects on biological diversity."

³⁸² *Climate Change Convention*, *supra* note 98, art. 9

³⁸³ See, for example, arguments in the *Case Concerning the Island of Kasikili-Sedudu* (Botswana v. Namibia) before the ICJ.

itself or alongside it. This was due to a fairly wide agreement that these considerations should be necessary and logical components of EIAs.³⁸⁴

Some international instruments relating to EIA focus only on potential effects of a proposed activity on the specific environmental issue covered by the instrument including the 1991 *Antarctic Treaty Protocol* and the 1982 *UNCLOS*.³⁸⁵ This may be because it is implicit that the reason for concluding these Conventions and their EIA aspects stems largely from anthropocentric concerns, or because given the subject matter they are arguably less likely to involve direct social effects. In other international treaty law, the ‘human factor’ is becoming more explicit. This can be seen both in the general framework of the 1992 *UN Biodiversity Convention* and the 1994 *UN Convention to Combat Desertification*,³⁸⁶ and in specific assessment related provisions of particular treaties. For example, Article 4(2)(f) of the 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* specifically requires information on effects on human health and the environment.³⁸⁷ Article 4(1) of the 1992 *UN Framework Convention on Climate Change* refers to ‘impact assessments formulated with a view to minimising adverse effects on the economy, on public health and on the quality of the environment.’ The 1991 *Esposo Convention*, upon which the European Communities EIA Directive is modelled, refers in Article 1(vii) to ‘any effect ... on the environment including human health and safety [and] includes effects on cultural heritage or socio-economic conditions’.

International development banks and financial institutions also include social assessment aspects, both in their EIA procedures and separately. Indeed, the World Bank was the first to introduce environmental impact assessment requirements in 1991, and this initiative has since been replicated in other international organisations. The World Bank’s current EIA requirements call for EIAs to address a number of issues including indigenous peoples and socio-cultural aspects of development.³⁸⁸ As such, in EIAs across the board, social impacts are increasingly being considered alongside environmental impacts. Debate continues regarding the benefits and drawbacks of integrated – as compared to thematic – parallel assessment. Recent proposals for sustainability assessments are giving an innovative perspective to these discussions. Sustainability assessments are discussed below.

Strategic Assessment: From Projects to Policies, Plans and Programmes

Over the last 25 years, EIAs have evolved into a comprehensive and versatile instrument. However, many authors suggest that they have not yet been able to play a significant role in reducing the serious global and

³⁸⁴ C. Kirkpatrick, (1998) *The Impact of the Uruguay Round on Least Developed Countries' External Trade: Strengthening the Capacity of LDCs to Participate Effectively in the World Trade Organisation and to Integrate into the Trading System*, (Manchester: MUP, 1998); UNCTAD and GATT *An Analysis of the Proposed Uruguay Round Agreement with Particular Emphasis on Aspects of Interest to Developing Countries*, (Geneva: GATT Secretariat, 1993), MTN.TNC/W/122; World Bank *Social Indicators of Development* (Washington DC.: World Bank, 1995); World Bank *World Development Report. Knowledge for Development* (Oxford: Oxford University Press 1999); World Bank *World Development Indicators*, CD-ROM (Washington D. C.: The International Bank for Reconstruction and Development/The World Bank, 1999). See also UNEP, *Environmental Impact Assessment: Issues, Trends and Practice*, (Geneva: UNEP, June 1996) at paras. 4.24-5, Appendix I.

³⁸⁵ *UNCLOS*, *supra* note 154, Part XII, art. 206.

³⁸⁶ *Supra* note 98.

³⁸⁷ *Supra* note 133.

³⁸⁸ See D. Bradlow, “A Test Case for the World Bank” (1996) 11 *Am. U. J. Int'l L. & Pol'y* 247 at 262. For an up-to-date summary of Inspection Panel decisions, see the report by the Center for International Environmental Law, online: <http://www.ciel.org/wbip.html>. See I. F. I. Shihata, “The World Bank and the Environment: Legal Instruments for Achieving Environmental Objectives” in I. F. I. Shihata, *The World Bank in a Changing World, Vol. II* (Cairo: Martinus Nijhoff Publishers, 1995), and I. F. I. Shihata, “The World Bank and the Environment: A Legal Perspective” (1992) 16 *Maryland Journal of International Law and Trade* 1. See also The World Bank, *The World Bank Inspection Panel, Resolution 93-10*, online: World Bank <http://www.worldbank.org/html/ins-panel/operatingprocedures.html>, “An “affected party” is any party that is not a single individual, whose rights or interests have been directly affected in the course of a Bank operation. It can also be a local representative or another representative, such as a foreign NGO, in exceptional cases where appropriate representation is not locally available and the Executive Directors agree. The eligibility requirement for bringing a complaint has been narrowly interpreted by World Bank counsel.”

regional environmental problems caused by economic growth.³⁸⁹ Scales and rates of environmental deterioration and resource depletion are more significant now than when EIAs were introduced in the 1970s. EIAs are conventionally applied to projects, representing a limited response to these problems. It has been recognised that there is a need to adopt more proactive, integrated approaches that deal with the multiple causes of deterioration in quality of life and related environmental conditions. Often, problems are caused by initiatives such as government macro-economic policies, energy and transport plans which fail to adequately integrate sustainable development priorities.³⁹⁰ On the international level, there are other non-project level actions that can have significant environmental consequences, such as structural and sectoral adjustment programmes, international trade liberalisation agreements and fundamental policy initiatives (for example, privatization).³⁹¹ In addition, structural, scale, technology and product effects of trade and investment liberalisation policies can have an impact on environmental and social systems.³⁹²

A response to this situation has been to supplement project level EIAs with cumulative or strategic environmental assessment procedures (SEAs). 'Project' usually means the execution of particular construction works or of other particular interventions in the natural surroundings and landscape, including those involving the extraction of minerals. At the national and international level, project-level assessment is primarily carried out in relation to development concerns, and increasingly in relation to investment or loan decisions for such particular initiatives. Strategic-level assessments are more complex. They extend the scope of project level regulatory provisions, sometimes by less formal arrangements, to cover earlier stages in planning cycles, in particular, policies, plans and programmes (PPPs).³⁹³ For example, strategic assessments can apply to rolling national, regional or local development plans, or sectoral investment strategies. According to the European Commission, which recently commissioned a study into the relationship between project-level EIA and strategic level assessment (SEA), SEA does not replace project-level EIA, but rather complements it. By definition, SEA addresses alternatives not addressed at project level. It also often results in reducing the time and cost needed at the lower project level.³⁹⁴ As such, while there is no internationally agreed definition of what either the narrow project or broader strategic assessments should cover, there is a consensus on the need for both EIAs and SEAs, and a view that the benefits will outweigh the costs.

Currently, several international instruments provide for strategic environmental assessment, and this approach appears to be gaining strength. A leading effort was made in the 1991 *Espoo Convention on Environmental Impact Assessment in a Transboundary Context*.³⁹⁵ While this convention is limited to cases of effects that are transboundary rather than global, and applies to member States, it is one of the most complete and progressive examples of EIA requirements in international environmental law.

The 1991 *Espoo Convention*, at Article 2(7) provides that "environmental impact assessments as required by this convention shall, as a minimum requirement, be undertaken at the project level of the proposed

³⁸⁹ E. Brown Weiss, "International Environmental Law: Contemporary Issues and the Emergence of a New World Order" (1993) 81 Geo. L.J. 675 [hereinafter *Brown Weiss*, New World Order]; See also B. Clark, "Environmental Impact Assessment (EIA): Scope and Objectives" in *Perspectives on Environmental Impact Assessment* (Dordrecht: D. Reidel Publishing Co, 1984) 3.

³⁹⁰ UNEP, *Environmental Impact Assessment; Issues, Trends and Practice*, (Geneva: UNEP, 1996), para 6.1 [hereinafter UNEP, *EIA*].

³⁹¹ M. Lee & C. Kirkpatrick, *supra* note 370 at 2, citing Sadler *et al.*, 1998, (Sadler & Verheem, 1996).

³⁹² The North American Commission for Environmental Cooperation (NACEC) has designed a framework for assessing environmental effects of the North American Free Trade Agreement (NAFTA), NACEC, *Assessing Environmental Effects of the North American Free Trade Agreement (NAFTA): An Analytic Framework (Phase II) and Issue Studies* (Montreal: NACEC, 1999). See also D. C. Esty, *Greening the GATT* (Chicago: Institute for International Economics, 1994) [hereinafter *Esty*]; UNCTAD *Newly Emerging Environmental Policies with a Possible Trade Impact: A Preliminary Discussion – Report by the UNCTAD Secretariat*, (New York: United Nations, 1995); and UNCTAD *Trade and the Environment: Issues of Key Interest to the Least Developed Countries*, (New York: United Nations, 1997).

³⁹³ UNEP, *EIA*, *supra* note 390, paras 6.30-6.47.

³⁹⁴ S Nooteboom, *Strategic Decisions and Project Decisions: Interactions and Benefits* (Ministry of Housing Spatial Planning and the Environment of The Netherlands, with the support of the European Commission DGXI, 1999) at 5-6.

³⁹⁵ *Espoo Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 30 I.L.M. 800 [hereinafter *Espoo Convention*].

activity.” In less binding language, “to the extent appropriate, the Parties also commit to apply the principles of environmental impact assessment to policies, plans and programmes.” According to Gray, the 1991 *Espoo Convention* provides for EIA requirements in a transboundary context.³⁹⁶ It was negotiated under the auspices of the United Nations Economic Commission of Europe and consists of 28 Parties whom have ratified the Agreement. The Treaty creates obligations to take all appropriate and effective measures to prevent, reduce, and control significant adverse transboundary environmental impact from proposed activities, and ensures that affected Parties are notified of a proposed activity, listed in Appendix I, that is likely to cause a significant adverse transboundary impact. States are required to establish an EIA procedure for so-called ‘Appendix I’ activities. Where a project does not fall under the projects enumerated in the Appendix, an affected party can request an EIA if the project may cause significant adverse transboundary impact. A decision by the affected party not to participate in an EIA gives the party of origin the freedom not to carry out an assessment subject to its national law. Where the Parties are unable to agree whether the impact is likely, the question can be submitted to an inquiry commission. Providing for the arbitration of such disputes is crucial because it avoids any reliance on a dubious EIA done by the state of origin.³⁹⁷ The affected state may have different standards, thresholds, or past experiences that contribute to the characterization of the environmental impact. Thus, the *Espoo Convention* creates conditions for dialogue and for the exchange of cultural perceptions of the environment.

Key provisions of the 1991 *Espoo Convention* relate to public participation. The public in the affected area has a right to be informed of and to participate in the EIA procedure, even though the procedure takes place in another country. Public participation in making comments or objections to the competent authority of the party of origin is permitted during interstate discussions concerning the significance of the transboundary environmental impact. The level of participation is equivalent to what is offered to the public in the party of origin, with a baseline requirement that the public is informed and provided with possibilities for making comments or objections on the proposed activity. Although novel in principle, the greatest challenge for the 1991 *Espoo Convention* regime will be how the responsibilities for facilitating cross-boundary consultation will be allocated. The 1991 *Espoo Convention* does not expressly resolve which party is under the obligation. Having two consultation/decision making processes operating simultaneously can be problematic because public participation commences at different stages in the EIA process amongst the Parties. In addition, the scoping process – establishing the scope of the assessment – may differ in relation to public access, there may be temporal or substantive inconsistencies for information provided to the public, post-project analysis obligations can vary and there may be contrasting levels of public participation and available remedies. This could lead to abuse as affected Parties may engage another State's judicial system simply because it facilitates public participation more favourably. There are also jurisdictional problems associated with one State conducting public hearings in another State. The development of a coordinated procedure that reflects the political and cultural elements of government decision-making of the neighbouring States will be critical to the proper functioning of trans-frontier public participation in the 1991 *Espoo Convention*. The treaty does not usurp the application of the Parties' existing EIA legislation. Sovereignty over decisions concerning the environment is upheld. A process is outlined in the 1991 *Espoo Convention* but its substantive details are left to the discretion of the Parties. The outcome of an EIA must be taken into account, including public comments and the results of consultations between the Parties, when decisions are made concerning a proposed activity. However, the wording falls short of mandating action recommended in the EIA.

As a regime, the 1991 *Espoo Convention* demonstrates the need for the precarious balance between internationally-prescribed EIA procedures and state freedom to govern their environment.³⁹⁸ Generally, the EIA procedure of the party of origin applies thereby respecting existing procedures in the particular state. However, the balance is tipped away from state discretion when significant transboundary effects flow

³⁹⁶ K. R. Gray, “International Environmental Impact Assessment” (2000) 11 *Colo. J. Int'l Env'tl. L. & Pol'y* 83.

³⁹⁷ See A. Weale, “Ecological Modernisation and the Integration of European Environmental Policy” in J. D. Liefferink et al., eds., *European Integration and Environmental Policy* (Cambridge: CUP, 1993)196 at 208.

³⁹⁸ D.R. Brown, “Transboundary Environmental Impacts in a European Context” (1997) 3 *Eur. Env't* 80.

from a project. The 1991 *Espoo Convention* EIA procedures apply so that the affected party can initiate intervening measures to wrestle full sovereignty over the EIA process away from the party of origin. The 1991 *Espoo Convention* was primarily a creation of developed countries, despite the majority of signatories having economies in transition. It reviews scientific information and assesses risk, and development is permitted following the completion of an EIA and the undertaking of potential mitigating measures. The acceptance of EIA reveals a common outlook of industrialized countries that projects having significant environmental impacts in another country must be reviewed.³⁹⁹

The European Community has adopted new *Directives on Strategic Environmental Assessment*, which apply fully to plans and programmes, and also take development policies into account.⁴⁰⁰ The 1991 *Espoo Convention* and the 1998 *Aarhus Convention*⁴⁰¹ secretariats are also currently working together on a protocol to the 1991 *Espoo Convention* dealing with SEA. In addition, certain particularly comprehensive treaties, while not specifically obliging Parties to undertake SEAs, require or recommend that appropriate arrangements are made along those lines. The 1992 *UN Convention on Biological Diversity*, provides in Article 14(b) that each Contracting Party, as far as possible and where appropriate, shall introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.⁴⁰² As will be seen below, there have also been voluntary initiatives to assess certain strategic-level activities in the international arena.

Sustainability Impact Assessments

The potential value of EIA as an instrument to promote sustainable development was recognised in Principle 17 of the 1992 *Rio Declaration*. More recently however, there have been innovative efforts in cooperation with civil society organisations, on the domestic and international levels, to devise and apply ‘sustainability impact assessments’ (SIAs) which take environmental, social and economic factors into consideration.⁴⁰³ The new SIA instruments apply to policies, plans and programmes, as well as projects, to seek strategies which will result in long term sustainability.⁴⁰⁴ They are based on procedural innovations,

³⁹⁹ See also the EC, *Council Resolution 93/138 on the European Community's Fifth Environmental Action Programme*, [1993] O.J. C. 138/1 at 3, which recognized that continued human activity and further economic and social development depended upon the quality of the environment and its natural resources.

⁴⁰⁰ The Council has adopted two new EIA Directives. The first measure amends the original EC *Directive 85/337* on EIAs, while EC *Directive 97/C 129/08* extends the EIA requirements to plans and programs on the environment, better known as strategic environmental assessment (SEA). The amended Directive, which is now in force, moves several Annex II projects to Annex I, consistent with Annex I projects listed in the 1991 *Espoo Convention*. EC *Directive 97/C* was proposed to preempt project decisions where alternatives could not be pursued, while allowing for an assessment of the cumulative environmental impacts of a series of projects. Since plans and programs anticipate a series of consent decisions, there was a need to set a framework for future decisions subject to minimal procedural requirements ensuring a high level of environmental protection and progress towards sustainable development. Plans and programs are restricted to those prepared and adopted by a competent authority or subject to preparation and adoption by such authority, pursuant to a legislative acts, and which set a framework for future development consents of projects making reference to their size, location, nature or operating conditions. This advances the EIA requirement to an earlier stage in accordance with a precautionary approach to environmental regulation. Under this proactive EIA strategy, environmentally risky decisions can be precluded before any impact is sustained. EC *Directive 97/C* sets out only broad principles leaving the procedural details to the member States.

⁴⁰¹ *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, 38 I.L.M. 517, online: UNECE <<http://www.unece.org/env/pp>> [hereinafter *Aarhus Convention*].

⁴⁰² *Biodiversity Convention*, *supra* note 98.

⁴⁰³ Sustainability Impact Assessments have recently been done on a national level by governments and NGOs in the Netherlands, Philippines, Indonesia and in the USA. See for example Oxfam, *Trade Liberalisation as a Threat to Livelihoods: the Corn Sector in the Philippines*, (1998) online: <http://www.oxfam.org.uk/policy/research/corn.htm>; A. Strutt & K. Anderson “Estimating Environmental Effects of Trade Agreements with Global CGE Models: A GTAP Application to Indonesia” (paper presented at Workshop on *Methodologies for Environmental Assessment of Trade Liberalisation Agreements*, OECD, Paris, October 1999). They have been conducted at the level of Europe in the EC, for example in relation to transport strategy, see OECD *Freight and the Environment: Effects of Trade Liberalisation and Transport Sector Reforms* (Paris: OECD, 1997).

⁴⁰⁴ M. Perrin. “Sustainability Assessment of Trade Liberalisation Agreements” (paper presented at Workshop on *Methodologies for Environmental Assessment of Trade Liberalisation Agreements*, Paris: OECD, October 1999).

such as the recent identification of combined international sustainability indicators,⁴⁰⁵ and are being formulated using dynamic, developing expertise from many sectors of society. As was pointed out in Part I of this book, however sustainable development is conceptualised (and all conceptions involve significant value judgements) the task remains of translating this concept into operational appraisal criteria and then into law. A broad distinction can be drawn between *target-related indicators* and *process-related indicators*. The former involves expressing sustainable development goals in terms of a set of targets to be achieved at a specified future point in time, and developing a corresponding set of indicators to measure progress (performance-based indicators). Sustainable development process indicators relate to the soundness of the institutional planning and management processes, including mechanisms for the meaningful involvement of the appropriate stakeholders, thereby strengthening institutional capacity and decision-making along sustainable development lines (management or systems based indicators).⁴⁰⁶ This concern with process is one that is increasingly being taken on board. Access to information and public participation are considered essential and efforts are made to involve civil society organisations in all aspects of the SIA process.⁴⁰⁷

While there are still few existing concrete international legal obligations with regard to SIAs, leading international efforts have been undertaken to formulate sustainability assessment procedures, indicators and appraisal criteria. One of the best examples is the Sustainability Impact Assessment Study of the proposed *Millennium Round* negotiations in the World Trade Organisation (WTO), which was commissioned by the European Commission. The first phase of the SIA included a review of literature on trade-related assessments (covering economic, social and environmental impacts relevant to sustainable development), an examination of relevant cases where these assessment methodologies have been applied with an evaluation of their effectiveness, and a proposal for a fully defined sustainable impact assessment methodology.⁴⁰⁸

The second phase was quite comprehensive, involving an examination of the potential sustainability impact of each measure that might have been covered within the WTO negotiations. Impacts, positive and negative, were assessed for four groups of countries – the European Union, developing countries, least developed countries, and the world as a whole. The findings distinguished those areas where negotiations were likely to have a relatively limited impact and those where the impact might have been greater. Additionally, proposals were formulated for mitigation and enhancing measures. In particular, the study examined ‘core sustainability indicators’ (including economic factors such as average real income, net fixed capital information and employment; social factors such as equity and poverty; health and education, and gender inequalities; and environmental factors such as ecological quality (covering air, water and land), biological diversity; and other natural resource stocks. This was done in the context of ‘significance criteria’ (including the extent of existing economic, social and environmental stress, in affected areas; direction of changes to baseline conditions; nature, order of magnitude, geographic extent and duration of changes; and regulatory and institutional capacity to implement mitigation measures). The SIA then consisted of four main phases:

- *screening*: to determine which measures require SIA because they are likely to have significant impacts,
- *scoping*: to establish the appropriate coverage of each SIA,

⁴⁰⁵ B. Moldan & S. Billharz, *Sustainability Indicators: Report of the Project on Indicators of Sustainable Development*, (Chichester: John Wiley, SCOPE 58, 1997).

⁴⁰⁶ D. W. Pearce & G. D. Atkinson, “Capital theory and measurement of sustainable development: an indicator of “weak” sustainability” (1993) 8 *Ecological Economics*, 103-8. See also C. Milner & O. Morrissey “Measuring Trade Liberalisation”, in *M. McGillivray and O. Morrissey*, eds., (New York, 1999).

⁴⁰⁷ OECD Secretariat, “Timing and Public Participation Issues in Undertaking Environmental Assessments of Trade Liberalisation agreements”, (paper presented at Workshop on *Methodologies for Environmental Assessment of Trade Liberalisation Agreements*, Paris: OECD, October 1999).

⁴⁰⁸ C. Kirkpatrick, N. Lee & O. Morrissey, *WTO New Round: Sustainability Impact Assessment Study (Phase One Report)*, online: Manchester University <<http://fs2.idpm.man.ac.uk/sia/Phase1/phase1.html>>.

- *preliminary sustainability assessment*: to identify potentially significant effects, positive and negative, on sustainable development, and
- *mitigation and enhancement analysis*: to suggest types of improvements that may enhance the overall impact on sustainable development of New Round Agenda measures.

There were also extensive procedures for public participation and consultation with civil society organisations. Numerous workshops and consultations were held at each phase of reports, and a website was designated with reports, timely publications and informal mechanisms for involvement during the process.⁴⁰⁹ Though political factors resulted in the delay or cancellation of the proposed trade liberalisation negotiations,⁴¹⁰ this innovative attempt to undertake a comprehensive international SIA of the proposed WTO trade liberalisation programme certainly provides an excellent example of the most highly integrated impact assessment instruments in the field of ISDL.

The SIA shows evidence of being a fully integrated instrument, which takes into consideration economic, social and environmental concerns at the level of methodology and indicators. While the original mechanism, EIA, developed out of a rapidly evolving aspect of international environmental law, the more it was used, the more pressure was generated to include social criteria in this instrument designed to evaluate economic development initiatives. This is an example of the ‘fourth degree of integration’ mentioned above, and appears to be a successful way to address sustainable development concerns in a more holistic manner.

Case Study II – Regional Integration Agreements (RIAs)

The nexus between trade, environment and social law is one of the sharpest areas of potential conflict in the evolving tapestry of ISDL.⁴¹¹ On regional and sub-regional levels, pressure is mounting to find innovative new mechanisms which integrate environmental or social considerations into economic integration arrangements; mechanisms which include rather than shut out civil society perspectives, voices and expertise.⁴¹² This case-study surveys RIAs in the Americas, engaging both developed and developing

⁴⁰⁹ C. Kirkpatrick, N. Lee & O. Morrissey, *WTO New Round: Sustainability Impact Assessment Study (Phase Two Report)*, online: Manchester University <<http://fs2.idpm.man.ac.uk/sia/Phase2/EXSUMFINAL.htm>>. The Study examined changes to agreement on agriculture, changes to the General Agreement on Trade in Services [hereinafter GATS], development of a multilateral framework of rules relating to international investment, development of a multilateral framework of rules relating to competition, measures relating to trade facilitation, further measures relating to tariffs on non-agricultural products, clarification of the relationship between WTO rules and trade measures taken pursuant to multilateral environmental agreements and other environmental policy initiatives, changes to the agreement to strengthen the global protection of intellectual property rights [hereinafter TRIPS], measures to improve market access in government procurement policies and practices, measures relating to technical barriers to trade [hereinafter TBT], measures relating to the protection of human health, measures relating to the use of trade defence instruments (anti-dumping, subsidies, agreement on safeguards), horizontal measures to promote development, various trade and core labour standard issues, various other issues relating to treatment of products of least developed countries, transparency, coherence of policies between WTO and other international organisations, the dispute settlement mechanism, and electronic commerce.

⁴¹⁰ For a brief description of debates and events surrounding the proposed 'WTO Millennium Round', see G. Sampson, *Trade, Environment and the WTO: The Post-Seattle Agenda*, Overseas Development Council Policy Essay No. 27 (Washington: ODC, 2001) [hereinafter *Sampson*]. See also P. Grady & K. Macmillan, *Seattle and Beyond: The WTO Millennium Round* (Ottawa: Global Economics Ltd and International Trade Policy Consultants Inc., 1999) and E. Brown Weiss, *supra* note 389.

⁴¹¹ T. Schoenbaum, "International Trade and Protection of the Environment: The Continuing Search for Reconciliation" (1997) 91:2 *American Journal of International Law* 281. See also M. E. Porter, & C. van der Linde "Toward a New Concept of the Environment-Competitiveness Relationship" (1995) 9 *Journal of Economic Perspectives*, 4 at 97-118.

⁴¹² *Sampson*, *supra* note 10; International Institute for Sustainable Development, *Six Easy Pieces: Five Things the WTO Should Do--And One It Should Not* (1999), online: IISD <<http://iisd1.iisd.ca/trade/wto/sep1.htm>>; A. Cosbey, "Environmental Management and International Trade, Environmental Management" (1997) online: IISD <http://iisd1.iisd.ca/trade/envman_trade.htm>; K. von Moltke, *International Environmental Management, Trade Regimes and Sustainability* (Winnipeg: International Institute for Sustainable Development 1996) 49 [hereinafter *Moltke*]; H. Rogelio Torres, "Environmental Rent: Cooperation and Competition in the Multilateral Trading System" (Winnipeg: International Institute for Sustainable Development, 1995) online: IISD <<http://iisd1.iisd.ca/trade/knenvrent.htm>> (date accessed 9 January 2000); N. Shaw & A. Cosbey, "GATT, the WTO and Sustainable Development: Positioning the Work Program on Trade and

countries from diverse political and economic contexts.⁴¹³ The study will focus on key aspects of these legal mechanisms and how they are being integrated into the rapidly evolving Americas regional integration arrangements (RIAs) as part of the larger, evolving field of ISDL. As is seen in the brief survey below, while some sub-regional structures utilise a clear ‘parallel yet interdependent’ strategy of integration (environment and labour accords running as protocols or side agreements to the economic integration agreements), others are under increasing pressure to integrate environment and social considerations into the text of the trade agreement or in institutional structures and mechanisms. This suggests relevant lessons for ISDL in general, for the construction of any new hemispheric regimes in particular.

The Americas: A Region Seeking Models for Integration

A process has been initiated which could significantly re-structure the ‘architecture’ of international economic and environmental cooperation in the Americas over the course of the next decade. At the ‘Santiago Summit of the Americas’ in April 1998, 34 governments launched negotiations for a new Free Trade Area of the Americas (FTAA), which aspires to link almost 800 million people, with a combined GDP of up to \$9 trillion US dollars, by 2005. The 1998 Declaration of Trade Ministers cited the need for mutually supportive environmental and trade policies, improvements in quality of life, and increased participation of civil society. However, relatively little progress has been made on these issues.⁴¹⁴ Recent meetings of the Summit of the Americas process, including the 2001 Buenos Aires meeting of trade ministers, the 2001 Montreal meeting of environment ministers, and the 2001 Quebec City Summit of the Americas, were expected to advance the agenda. Encouraging signals were generated by the trade ministers through the release of the FTAA negotiating text, the institutionalisation of civil society consultation mechanisms, and the commitment for participation of smaller economies in the process. The environment ministers, after their first meeting, committed to “maximise the potential for mutually supportive policies regarding economic integration and environmental protection...” and stated an intention “to work, in particular, to ensure that the process of economic integration supports (their) ability to adopt and maintain environmental policy measures to achieve high levels of environmental protection.”⁴¹⁵ This cooperation will be built on existing environmental law and policies in the Americas.⁴¹⁶ However, after the 2001 Summit of the Americas in Quebec City, trade and sustainability issues still constitute challenges that must be addressed by the summity process and key hemispheric or sub-regional institutions.

According to recent studies, regional accords and mechanisms can be effective in addressing shared environmental challenges in geographically contiguous areas.⁴¹⁷ Experience is also revealing that effective

Environment “(Winnipeg: International Institute for Sustainable Development, 1995), online: IISD <<http://iisd1.iisd.ca/trade/shaw.html>>.

⁴¹³ D. C. Esty & D. Geradin, “Market Access, Competitiveness, and Harmonization: Environmental Protection In Regional Trade Agreements” (1997) 21 Harv. Envtl. L. Rev. 265.

⁴¹⁴ A. R. Rosencranz, R. Campbell, and D. A. O’Neil, “Rio plus five: environmental protection and free trade in Latin America” (1997) *Georgetown International Environmental Law Review* 9.

⁴¹⁵ *Declaration of Ministers of Environment of the Americas*, 28-29 March 2001, Montreal.

⁴¹⁶ See M. C. Cordonier Segger *et al.*, *Ecological Rules and Sustainability in the Americas* (Winnipeg: UNEP/IISD, 2002). This study divides current international environmental regimes in the Americas into four categories. These are: 1) Species-specific accords - those which protect particular migratory or transboundary species and populations, 2) Natural resources accords- those which ensure that the productive capacity of certain natural resources is respected, restored or managed, 3) Ecosystem areas accords - those which encourage conservation of a particular ecosystem, habitat or heritage area, and 4) Ecological cooperation accords - those new comprehensive environmental agreements formed as part of a broader integration package. Many use trade measures for environmental purposes (TMEPs), and in several, TMEPs may be vital to agreement implementation.

⁴¹⁷ See ICTSD, *Regionalism, Trade and Sustainability Symposium paper* (Geneva: ICTSD, 1999) potential mechanisms listed for regional environmental cooperation included: information and consultation measures for civil society participation, environmental reporting, sustainability impact assessment of trade policies, environmental impact assessment of projects and programmes, institution building, environmental information systems, environmental action plans, eco-labelling, eco-audits, technology transfer accords, technical and financial cooperation on environmental issues, cooperation to solve environmental problems and dispute settlement mechanisms. In recent IISD (2000) CSD VIII intervention, it was proposed that investment protocols be considered for environmental accords. Another IISD paper on Regional Integration and Environmental Cooperation in the Americas at the London Royal Institute for International Affairs conference on Trade, Investment and

participation from Latin American and Caribbean governments, as well as from civil society, can lead to greater accountability and long-term support for these accords, as well as better rules.⁴¹⁸ These progressive new sub-regional regimes tend to run parallel to the sub-regional trade agreements or common markets, can be integrated to different degrees into their structures, and were formed to address concerns requiring transboundary policy coordination, in particular shared ecological regions. An eco-region can be defined, at varying scales, as “a geographically distinct assemblage of natural communities that share a large majority of their species, ecological dynamics, and similar environmental conditions...”⁴¹⁹ They have broad mandates, can include institutional or dispute settlement aspects, and exist primarily to promote environment and sustainable development co-operation on many levels between and within the Parties.⁴²⁰ Below, we address two of the best-known examples: the proposed *Framework Agreement on the Environment* for the Mercosur, and the *North American Agreement for Environmental Cooperation*. It is also worth mentioning less publicised but equally interesting models from accords among smaller economies of the region such as the *Central American Alliance for Sustainable Development* or the efforts of the *Andean Consejo de Autoridades Ambientales de la Comunidad Andina*.

The Southern Cone, and the 2001 Mercosur Framework Agreement on the Environment

The Southern Common Market includes Brazil, Argentina, Uruguay and Paraguay, with Bolivia and Chile as associate members. The MERCOSUR is a combined market composed of more than 207 million people with a GDP of about US\$1,163.4 billion. In spite of recent economic challenges, this customs union has become a new model of integration in Latin America, with intraregional exports totalling 21.5 % of total at 19,967 million, and a common external tariff, averaging 11.4%, arranged in 11 tiers from 0 to 20 %.⁴²¹ The market aims to become a community, committed to democratic principles and the stabilization of their economies.⁴²² The Mercosur structure, though still developing, displays various innovative environment and trade mechanisms, which began as integrated components in the structure of the Mercosur, and are now described as a quasi-independent framework regime for environmental cooperation.

Several resolutions of the ‘Grupo Mercado Común’ and decisions of the ‘Consejo de Mercado Común’ touched upon environmental protection issues, including rules to regulate the levels of pesticide residues acceptable in food products, the levels of certain contaminants in food packaging, eco-labelling and regional transportation of dangerous goods.⁴²³ Linkages between trade and the environment were recognised early in the process, and the 1992 *Canela Declaration* created an informal working group, the *Reunion Especializada en Medio Ambiente* (REMA), to study environmental laws, standards and practices in the four countries. This forum evolved into the creation of a ‘Sub-Grupo No.6’ on the environment, one of the recognised technical working bodies of the *Mercosur*. This group examines issues such as environment and competitiveness, non-tariff barriers to trade, and common systems of environmental information. It has negotiated the 2001 *Mercosur Framework Agreement on the Environment*, which, upon ratification by member States, is added as a

Sustainability, adds eco-regional awareness raising and local action programmes, often carried out by environmental NGOs in support of regional objectives.

⁴¹⁸ In the North-South Institute *Engaging with Civil Society* (2000) study, lessons from the OAS, FTAA and Summits of the Americas are surveyed. A single cross-organisation strategy for public consultation is recommended, and it is suggested that Canada should show leadership and commitment to CSO participation early in the development of negotiating text, and that an open and inclusive process will be key to success in the 2001 Summit.

⁴¹⁹ E. Dinerstein et al., *A conservation assessment of the terrestrial ecoregions of Latin America and the Caribbean*. (Washington D. C.: WWF & World Bank, 1995) at 4.

⁴²⁰ M. Cordonier Segger et al, *Trade Rules and Sustainability in the Americas* (Winnipeg: IISD, 2000). See also S. Charnovitz, “Regional trade agreements and the environment” (1995) 37:5 *Environment*, 95 and D. Tussie & P. I. Vasquez, “The FTAA, MERCOSUR and the environment” (1997) 9:3 *International Environmental Affairs: A Journal for Research and Policy*.

⁴²¹ In January 1995, MERCOSUR members agreed on a list of more than 8,700 products to be exempted from import duties.

⁴²² T. A. O’Keefe, “An analysis of the Mercosur economic integration project from a legal perspective,” (1994) 28:2 *The International Lawyer* 28, 439 – 448.

⁴²³ Inter American Development Bank, *Integration and trade in the Americas* (Washington: IDB, 1996).

decision of the Common Market Council (*Consejo del Mercado Común*), to the *Treaty of Asunción* of the Mercosur.⁴²⁴

A comprehensive stand-alone treaty, the 2001 *Mercosur Framework Agreement on the Environment*, at Chapter 2, Article 4, establishes a shared objective of “sustainable development and environmental protection through the development of economic, social and environmental dimensions, contributing to a better quality of environment and life for the people.”⁴²⁵ This objective establishes the integrative tendencies of this accord. The text of the agreement provides for upwards harmonisation of environmental management systems and increased co-operation on shared ecosystems, in addition to mechanisms for social participation and for the protection of health. At Chapter 3, it commits States to cooperation on the development of instruments for environmental management including quality standards, environmental impact assessment methods, environmental monitoring and costs, environmental information systems and certification processes. At Chapter 4, art. 8 to 11, there are provisions for the settlement of any disputes (by reference to the existing Mercosur dispute settlement process) and other general mechanisms for implementation of the Framework Agreement.⁴²⁶ The Annex provides a framework for the future development of protocols in three areas: sustainable management of natural resources (such as protected areas, biological diversity, biosafety, wildlife management, forests, and hydrological resources); quality of life and environmental management (such as hazardous waste management, urban planning, renewable energy, and improvement of soil and atmosphere/air quality); and environmental policy (such as environmental impact assessment, economic instruments, environmental information exchange, environmental awareness programs).

Though the regime has much work to do to ensure that the promise of the 2001 *Framework Agreement on the Environment* is realised, the elements are there, and key civil society actors have expressed cautious optimism in this linkage at a sub-regional level.⁴²⁷ It is interesting to note that the 2001 *Framework Agreement on the Environment* was generated by the consideration of environmental issues from within the structures of the customs union. In this instance, it appears that the international economic negotiations took environmental priorities into account, then created a place for environmental cooperation as part of the general sub-regional economic integration process for convenience and to ensure continued political will.

The Andean Community and the Consejo de Autoridades Ambientales of the ANCOM

The Andean Community (CAN) consists of Bolivia, Colombia, Ecuador, Peru and Venezuela. The CAN dates from 1969, has a total population of 106 million and a GDP of about 226 billion dollars. Chile was a founding member, but withdrew with differing investment strategies in 1976.⁴²⁸ The intra-regional trade expanded by an average of 29 percent a year between 1990 and 1995, in 1996 accounting for 16 percent of total non-oil exports, and reached 5,403 million by 1997. Common external tariffs range from 5 to 35 percent in five tiers. The Andean Group is a customs union. Once doubtful in its efficacy,⁴²⁹ it has recently gained strength as an integration strategy.⁴³⁰

⁴²⁴ *Acuerdo Marco sobre Medio Ambiente del MERCOSUR*, Approved Text from the XX Reunión del Consejo Mercado Común, 22 June 2001, Asunción, MERCOSUR/CMC/DEC.Nº 2/01. To be annexed, upon ratification by member States, to *El Tratado de Asunción, el Tratado de Ouro Preto*, la Resolución Nº 38/95 del Grupo Mercado Común y la Recomendación Nº 01/01 del SGT Nº 6 "Medio Ambiente".

⁴²⁵ See *Acuerdo Marco sobre Medio Ambiente del MERCOSUR*, Approved Text from the XX Reunión del Consejo Mercado Común, 22 de junio de 2001 en Asunción MERCOSUR/CMC/DEC.Nº 2/01. at Art. 4 where it the objective is stated to be “desarrollo sustentable y la protección del medio ambiente, mediante la articulación de las dimensiones económicas, sociales y ambientales, contribuyendo a una mejor calidad del ambiente y de la vida de la población.”

⁴²⁶ *Protocolo Adicional Al Tratado De Asunción Sobre Medio Ambiente*, Draft, Capítulo XXVI, Montevideo, Uruguay.

⁴²⁷ M. Leichner, “The Mercosur Framework Agreement on the Environment”, (2001) ICTSD Bridges, Fall Edition.

⁴²⁸ M. Thornton., “Since the breakup: developments and divergences in ANCOM’s and Chile’s foreign investment codes.” (1983) 1 *Hastings International and Comparative Law Review* 7.

⁴²⁹ S. Horton, “Peru and ANCOM: A study in the disintegration of a common market.” (1982) 1 *Texas International Law Journal* 17.

⁴³⁰ M. Rodríguez-Mendoza, “The Andean group’s integration strategy.” In *Integrating the Hemisphere – Perspectives from Latin America and the Caribbean*, (Bogota: Inter-American Dialogue, 1997), 10.

Scant information is available about embryonic environmental cooperation in the Andean Zone, but it can be noted that a new *Comite Andino de Autoridades Ambientales* (CAAAM) has been developed and is creating a biodiversity strategy for the ANCOM.⁴³¹ The Andean Pact of 1996 also empowers the national authority and indigenous Afro-American and local communities in each country as the custodians of traditional knowledge and resources, to grant prior informed consent to potential users in exchange for equitable returns.⁴³² The biodiversity strategy integrates a joint Andean Declaration on phytosanitary measures, which includes provisions on biosafety. This implies that environmental cooperation measures are being developed as a central part of the Andean integration processes.

Central or Mesoamerica, and the Central American Alliance for Sustainable Development

The Central American Common Market (CACM) consists of Guatemala, El Salvador, Nicaragua, Costa Rica and Honduras. CACM is a customs union of about 42 million people and a GDP of about 54 billion dollars. Inter-CACM trade accounts for roughly 20 percent of total exports, an increase of 4 percent from 1990. In mid 1993, Guatemala, Honduras, El Salvador and Nicaragua formed the customs union, joined by Costa Rica and Panama in 1995. Common external tariffs average 15 percent (tiered from 5 – 20 percent). Mexico and Belize are now engaged in negotiating a single treaty covering the whole of the region, to be concluded by the year 2002.⁴³³

The CACM clearly adopted a parallel course in the development of sub-regional environmental laws. Their sub-regional institutions are not linked to the regional common market agenda, and appear more functional this way as well as more interesting to foreign donors. Although environmental progress by individual countries has been uneven, harmonization and coordination of national activities on sustainable development is increasing. The environment became a significant issue in 1989, following the signature of the 1989 *Central American Convention for the Protection of the Environment* (CPC), and the subsequent creation of the *Central American Commission for the Environment and Development* (CCAD). The signature of the Alliance for Sustainable Development (ALIDES) in 1994 was even more significant, in that it generated a conceptual and operational framework for sub-regional and national goals and strategies. The ALIDES is a comprehensive sub-regional initiative that addresses political, moral, economic, social, and environmental issues that might otherwise have fallen to trade negotiators to resolve. National Councils on Sustainable Development were established, and act as instruments for implementation. ALIDES was seen as a potential foundation from which to strengthen environmental protection and other development priorities. It was a starting point for the 1994 CONCAUSA (CONvenio CentroAmérica - USA), a partnership for sustainable development which provided funding to the region for a list of concrete commitments including environmental measures such as conservation of biodiversity, development of renewable energy, environmental legislation standards and eco-friendly industrial processes.

Two tangible achievements from this linkage can be noted. First, in 1992, the CCAD coordinated the development of a joint position ("Agenda 2000") for the region at UNCED. After UNCED, CCAD supported the creation of the Central American Inter-Parliamentary Commission on the Environment. Central America has experienced high levels of deforestation and forest degradation over the last decade. Costa Rica's annual deforestation rate was 2.6 percent between 1980 and 1990; the deforestation rates in El Salvador and Honduras (2.1 and 1.9 percent per year) also increased over the same period. This

⁴³¹ See ICTSD "Comercio y medio ambiente en los acuerdos regionales" (1999) 2:1 *Puentes Entre el Comercio y el Desarrollo Sostenible* (Geneva: International Centre for Trade and Sustainable Development, 1999).

⁴³² See S. Prakash, "Towards a synergy between intellectual property rights and biodiversity" (1999) *Journal of World Intellectual Property*. According to the 1992 *Convention on Biological Diversity* (CBD), access to resources is subject to the prior informed consent (PIC) of the provider of such resources. This means that any company or individual seeking access to genetic resources must first seek and receive the consent of the custodian of these resources, before procuring any genetic resources from the provider's jurisdiction. Therefore, access must be granted on mutually agreed terms, as defined by the seeker and provider.

⁴³³ E. V. Iglesias, *El nuevo rostro de la integración regional en América Latina y el Caribe* (Washington: Inter-American Development Bank, 1997), *Acuerdos de comercio e integración en las Américas – Un compendio analítico*. (Washington: OAS, 1997).

commission, consisting of members of parliament from the seven Central American countries, was instrumental in getting these countries to sign a regional Forests Convention that is now being implemented by the regional Central American Forest Council created exclusively for this purpose. Following the high-level call to address deforestation, CCAD created a regional forestry unit to work on a Tropical Forestry Action Program for the region during the period 1990-91. One result of the TFAP process was the adoption of common guidelines for forestry concessions, largely in response to poor concession management in Guatemala, Honduras, and Nicaragua.⁴³⁴ CCAD's success stems partly from its transparent and participatory decision-making process: civil society organisations, representatives of indigenous peoples, and businesses all participate in CCAD's quarterly meetings and other sponsored events. Another key element is its regional rather than global approach. Because only a small number of member countries with clear common interests are involved, progress on sensitive issues is possible.

Second, a Mesoamerican Biological Corridor (MBC) has been proposed as a Central American network of protected areas, to serve as an effective biological link between North and South America. Any mechanisms and institutions whereby the Central American Integration System could conceivably establish an effective MBC are of worldwide interest, given that few models of multilateral cooperation in natural resource management presently exist on the scale required to achieve such a corridor. The MBC concept was supported in the 1992 *Central American Convention for the Conservation of Biodiversity and the Protection of Priority Natural Areas*, which States, at article 21, the six countries' intention "to create, associated to the Central American Commission for Environment and Development, CCAD, the Central American Council for Protected Areas, with personnel and institutions related to the World Commission on Protected Areas, CNPPA, and financed by the Regional Fund for Environment and Development, as the main entity charged with coordinating regional efforts towards harmonizing policies related to and for the development of the Regional Protected Area System as an effective MBC." The World Bank fully endorses a MBC, supporting 75 major projects and studies out of the approximately 450 development activities related to the concept. At their Regular Meeting during the 19th Central American Summit (1997), the region's presidents approved the Central American Council on Protected Areas' (CCAP) proposal for implementation of an MBC.

It appears that the CACM will, for the present, continue to develop environmental protection as a separate agenda to the trade integration process. As the Central American trade liberalisation process appears less likely to bring major changes to the sub-region – and indeed, developments in policy seem to focus more towards Mexico and the North – the political need for a trade and environment agenda is embryonic and perhaps more connected to foreign donor interests than to a proper agenda for the sub-region.

NAFTA and the North American Agreement for Environmental Cooperation

NAFTA is one of the more developed models of a free trade zone in the Hemisphere, with a population of 393 million people and an estimated GDP of 8,495.9 million dollars. It is a free trade area, and became effective in 1994. In 1996, intra-block exports reached almost 50 percent as a proportion of total exports, expanding nine percent per year. There is no common external tariff. The NAFTA is the classic example of the parallel yet politically interdependent degree on integration in international sustainable development law. Labour and environment side agreements exist between the three countries, and these are clearly designated as separate, non-trade agreements. The *North American Agreement for Environmental Cooperation* (NAAEC) is by far the most extensive trade-related environmental agreement of the hemisphere. It creates an institutional framework for continental environmental cooperation and civil society participation through the creation of the *North American Commission for Environmental Cooperation* (NACEC). The NACEC is governed by a Council composed of the three countries' environment ministers and has a secretariat established in Montreal, Canada. After seven years in existence, the NAAEC has developed an extensive

⁴³⁴ Guidelines include commitments to establishing a forestry policy based on zoning of permanent forestry, the adoption of a contractual system for the long-term use of forests, and the even-handed application of laws regulating forestry activities to national and foreign concessionaires.

environmental cooperation programme and considerable expertise in the fields of trade and environment, biodiversity, environmental law, the sound management of chemicals, and others.

The CEC has also allowed civil society to be constructively involved in a trade and sustainability dialogue through the involvement of NGOs in the development and implementation of its projects, and through the work of its Joint Public Advisory Committee (JPAC) that provides the commission with advice on various issues related to its mandate. Public outreach has been at the centre of the CEC's mission from its inception. This has fostered the development of a small but active continental environmental community in North America.

The NAAEC focuses on effective enforcement of environmental standards in the three countries. Enforcement provisions are the only part of the agreement, which is itself subject to a dispute resolution process. The most innovative part of the agreement, however, is a procedure by which civil society groups can file in a complaint to the NACEC alleging that a country is failing to effectively enforce its environmental laws and regulations. This process can lead to the elaboration of a factual record, which is a summary of the facts that serves to highlight a pattern of non-compliance. At the end of the process, however, the NACEC cannot force a country to comply with its environmental law. However, the complaints procedure can certainly be a source of embarrassment for countries. In addition, it has been of capital importance in maintaining support for the work of the NACEC in civil society.

As in the Mercosur, the trade community of NAFTA itself also grappled with certain environmental aspects of their work – in this case, within the text of the NAFTA accord itself and its working groups. Sustainable development is recognized in the preamble as a goal of the agreement and the right of each country to establish its own level of environmental protection is recognised. Perhaps one of the most interesting innovations in the NAFTA is the explicit reference to environmental agreements. NAFTA Article 104 lists seven such accords, and agrees that they will trump the NAFTA in the case of disagreement. The seven include the *Montreal Protocol*, the *Basel Convention*, the *Convention on International Trade in Endangered Species of Flora and Fauna*, and four bilateral environmental treaties. On investment, in NAFTA (Chapter 11), the Parties promise not to try to attract investment by relaxing or ignoring domestic health, safety or environmental regulations. Other parts of Chapter 11 strive to ensure that foreign NAFTA investors will be safe from harassment by host governments, ideally creating a secure and predictable framework for the unencumbered flow of North American investment. The regime disallows expropriation without due process, for example, and in general holds host governments to the same standards for foreign investors as for domestic ones. Recent research has shown that these provisions have been defined in unintended ways, where investors have filed a number of spurious suits against the three governments alleging that their investment interests are damaged by new environmental regulations or community decisions.⁴³⁵ Governments are only just beginning to respond to these suits. As a result of these challenges, the governments have announced an intention to negotiate an interpretative statement, and its objection to the incorporation of such an investor-state dispute resolution procedure in the FTAA.

NAFTA and the NAAEC emphasize national autonomy. However, their environmental provisions create a North American environmental framework with mild harmonization effects. This harmonization does not come from mandate NAFTA standards but from requirements imposed on the three countries: health and safety regulations based on sound science and risk assessment; recognition of standard-setting bodies and equivalency of standards; enforcement of environmental laws; and acceptance of a tri-State dispute settlement mechanism for enforcement matters. Between Canada and the US, convergence in environmental policy is apparent. This results from parallel domestic pressures, international environmental agreements, increased economic integration, and emulation. The US is the largest trading partner of Canada and Mexico and in most cases has higher environmental standards than those of NAFTA partners. The NAFTA, by increasing economic integration, allows greater interaction between

⁴³⁵ H. Mann & K. von Moltke, *NAFTA's Chapter 11 and the Environment - Addressing the Impacts of the Investor-State Process on the Environment* (Winnipeg: International Institute for Sustainable Development, 1999).

policymakers and NGOs, magnifying the pressure for convergence. It is clear that without the environment and labour side agreements, the NAFTA would not have been approved in the political processes of the United States, and might even have faced more ferocious opposition in Canada. It remains to be seen how these parallel yet interdependent aspects of social, economic and environmental law develop cooperative links and work together. Perhaps the most interesting (and least explored) linkages in this arrangement to date will be the issues where the mandates of the social and environmental accords overlap.⁴³⁶

Bi-lateral Environmental Accords and Other Groupings

Countless bi-lateral environmental accords also exist in the Americas. A 1998 estimation counted over 106 bilateral agreements in force or being negotiated in the Americas.⁴³⁷ Some are simple tariff elimination agreements, or selective strategic objectives, and others seem geared toward bilateral common markets. This is rapid proliferation – in 1994, there were only 26 bilateral or trilateral free trade agreements or customs unions in the hemisphere. Agreements have continued to develop, including on bilateral investment treaties.⁴³⁸

In terms of the environment/trade linkage, two bilateral trade agreements use innovative mechanisms which integrate economic and environmental priorities to some degree. The 1998 *Chile-Canada Environmental Side Agreement* bears special mention in this respect. As a new accord, created in order to ensure compatibility with the provisions of NAFTA for Chile in the event of its accession, the agreement includes several innovative mechanisms that address earlier policy concerns. One example is the provisions which propose (within the mandate of the Council, in Article 10, Section 2) that governments “consider and develop recommendations regarding: [...] the environmental implications of goods throughout their life cycles.”⁴³⁹ Another example under the NAFTA framework is a technical assistance program that has been established between Mexican authorities and the US Environmental Protection Agency to provide an *Integrated Border Environmental Plan* and an action agenda of collaborative projects with strong social and environmental components to improve health, working conditions and polluted areas on the border with the *maquiladora* factories.⁴⁴⁰ A new accord is also being negotiated between Canada and Costa Rica, and is rumoured to focus on access to environmental information, and capacity building for environmental policy or lawmakers. These new bi-lateral agreements, as they are more flexible, have room for innovation in integrated social, environmental and economic legal instruments that they employ. They bear observation for models that could be useful for much larger processes.

As in the first case study, this brief survey of RIA processes in the Americas, and the manner in which they have (somewhat clumsily) integrated environmental and in some cases social provisions raises a number of questions, and illustrates certain key characteristics of the RIA as a potential instrument for ISDL. In terms of ‘degrees of integration’ in these sub-regional trade agreements, we observed that none of the five agreements presently in operation in the Americas have reached the full level of supra-national integration present in a highly developed regional organisation like the European Union. Some, such as NAFTA, with its parallel environment and labour side agreements, are examples of the ‘second degree’ of integration, but do not truly begin to integrate environmental, economic and social considerations through the principles of sustainable development. Others, such as the Mercosur, which grants a right of access to the overall

⁴³⁶ Stenzel, *supra* note 63.

⁴³⁷ C. S. Morton, *Progress toward free trade in the western hemisphere since 1994*, (La Jolla: Institute of the Americas, 1998) Appendix E.

⁴³⁸ In 2000, discussions were progressing between Chile and CARICOM, Chile and CACM, CACM and MERCOSUR, the Andean Community and MERCOSUR, Venezuela and MERCOSUR, Mexico and MERCOSUR, Mexico and the northern triangle countries in Central American, Mexico and Nicaragua, Mexico and CACM as a whole, Mexico and Peru, Mexico and Ecuador. Trinidad and Tobago expressed interest in joining the NAFTA, and Chile and Mexico explored the potential for a NAFTA-plus agreement.

⁴³⁹ *Agreement on Environmental Cooperation Between the Government of Canada and the Government of the Republic of Chile*, Articles 2, and 10, Sections 1 and 2, online: http://www.sice.oas.org/trade/chican_e/env1e.stm#art1.

⁴⁴⁰ *Esty*, *supra* note 392 at 376-378.

dispute settlement mechanism in the 2001 *Framework Agreement on the Environment* for environmental and social concerns and provides space for environmental debates in the general institutional structure through *Sub-Grupo No. 6*, are in the process of becoming more integrated (the ‘second degree’). It remains to be seen whether these issues will continue to be added as an ‘afterthought’ or if they can become part of the agenda-setting process (though usually on unequal footing in domestic legal and political debates).

While at present, several RIAs seem to give low priority to environmental or social legal cooperation (preferring to leave these issues for domestic instruments), if the accords lead to deeper integration between the economies of these nations, it is possible that political expediency may force at least parallel, if not integrated and institutionalized structures in the future – even if this cooperation is simply mutual recognition of health and environmental standards for the purposes of a more level playing field in trade decision-making. On a broad conceptual level, the RIAs surveyed are based on an unspoken assumption that trade is an essential part of economic development which, parallel to appropriate social development and environmental protection, will lead toward the goal of sustainable development. Another view would be that RIAs can have inter-linked economic growth, social justice and environmental protection objectives as a sustainable development accord, and just as environmental cooperation may use economic instruments, so may there be social and environmental provisions in the essentially economic cooperation processes. For the hemispheric cooperation process as a whole, and the progressive goals set by the 1994 Miami Summit of the Americas, the 1996 Santa Cruz de la Sierra Summit of the Americas, the 1998 Santiago Summit of the Americas, and the 2001 Quebec City Summit of the Americas, it remains to be seen whether this second framework is adopted. It will be a challenge for the hemispheric trade agreement and its counterparts to choose between five very diverse models, each using a distinct degree of integration and each showing its own agenda or priorities for the trade / environment / social interface. The intricate nature of a new arrangement with 34 countries on very different levels of development promises interesting policy debates if the FTAA follows the dominant trend, and recognises sustainable development as one of its goals.

Case Study III – Compliance-building in ISDL

The integration of economic, environmental and social objectives is evident not only in rules and principles of ISDL regimes, but also in their implementation, monitoring and enforcement. This integrated approach to compliance is a distinctive feature of ISDL and is key to its effectiveness. In this case study, we will track the genesis, operation and distinctive features of the ISDL approach to compliance through close analysis of several highly integrated treaty-based regimes. We will analyse the theoretical basis and practical effects of the *self-reinforcing dynamic* of highly integrated ISDL regimes and conclude by identifying four key trends in ISDL approaches to compliance.

Throughout this discussion, two recurring themes – creative tensions – are apparent. The first is a broad tension between respect for national sovereignty and the protection of the common interests.⁴⁴¹ This tension animates the field of ISDL generally, as well as approaches to compliance, especially in shaping the appropriate role for external, expert bodies in implementation, monitoring and enforcement. ISDL attempts to resolve this tension principally by suggesting that States fully and freely delegate national sovereignty to international, independent, expert institutions where necessary to advance the protection of common interests.⁴⁴²

⁴⁴¹ This includes the concept of *common heritage of mankind*, which recognizes an essentially fiduciary responsibility over areas incapable of national appropriation such as the seabed and cultural heritage sites; as well as *common concern of humanity*, a more general concept that identifies spheres of action in which all nations share a common interest, such as preservation of fish stocks, conservation of migratory wild animals and, more recently, the conservation of biodiversity generally. See *Kiss & Shelton*, *supra* note 13 at 251-52.

⁴⁴² Recognition of this tension in relation to the growing reliance on “epistemic communities” is at least implicit in J. Brunnée & S. J. Toope, “Environmental Security and Freshwater Resources: Ecosystem Regime Building” (1997) *Am. J. Int’l. Law* 26 at 40-44 [hereinafter Brunnée & Toope, *Ecosystems*]. But see E. Benvenisti, “Domestic Politics and International Resources” in M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (New York: Oxford UP,

The second tension, dispersal versus centralisation of compliance-coordination, is a manifestation of this first tension, and is apparent in the ISDL approach to compliance in particular. What is the most appropriate level for ISDL implementation, compliance monitoring and enforcement measures? It might seem that regional agreements – implemented, monitored and enforced regionally – are less prone to polarisation along geo-political lines. By limiting the number of States Parties, regional agreements tend to give greater voice to developing country concerns and favour collaborative solutions that better respond to regional – though not always ecosystemic – needs.⁴⁴³ In this context, compliance can be quite effective. However, centralised, international compliance-coordination affords greater coherence to systematic efforts in fields where “artificial” national or regional boundaries impede effective action. ISDL addresses this tension through the principle of subsidiarity, that is, “governance at the appropriate scale”, at the level most consistent with effectiveness.⁴⁴⁴ The ISDL approach to compliance networks international, regional, national and sub-national governance mechanisms, both horizontally and vertically.⁴⁴⁵

As such, in ISDL, compliance is both a *process* and an *attitude* that emerges when a treaty or customary rule is *implemented, monitored and enforced* effectively. Both the compliance-coordinating role of international bodies and the linkage mechanisms that network implementation, monitoring and enforcement efforts are important for effective compliance. These linkages include public participation, education, openness, capacity-building, unification of scientific methodologies, sharing raw data, sharing knowledge analysis, sharing technology, and sharing financing. The linkages allow the regime to adapt quickly to address non-compliance, generating a self-reinforcing dynamic that is of both theoretical and practical relevance. That is, weaknesses within a particular mechanism of a highly-integrated ISDL regime are corrected not by excising that mechanism from the whole, but through appropriate adjustments to the entire regime.

Genesis of Integrated ISDL Compliance Mechanisms

As independent fields, classical international environmental law, economic law and social law tended to prefer different compliance mechanisms and processes, appropriate to the aims and interests – and political interests – operative within each field. For example, the regulation of international trade from 1948 onwards was focused on the reduction of tariff barriers and, more recently, non-tariff barriers.⁴⁴⁶ Throughout this graduated transition, but especially during the 1970s, the unbalancing effects of trade distortions were a major cause for concern within the regulatory regime. Accordingly, anti-dumping and

2000) at 109 [hereinafter *Benevenisti*], highlighting the key role of domestic politics – rather than delegation of sovereignty – in the protection of international resources; and A.-M. Slaughter, *Governing Through Government Networks* in M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (New York: Oxford UP, 2000) at 177 [hereinafter *Slaughter*], emphasizing that transgovernmental regulation is a manifestation of *disaggregation of the State* and the rise of *government networks* rather than delegation of sovereignty to international bodies.

⁴⁴³ The best examples of promising regional agreements would be the proposed *Environmental Protocol* to the Mercosur and the *North American Agreement for Environmental Cooperation*; see Part IV, case study 2.

⁴⁴⁴ M. C. Segger *et al.*, *Ecological Rules and Sustainability in the Americas* (Winnipeg: International Institute for Sustainable Development, 2001) at 64. This principle developed in the context of environmental protection measures in the European Union (see *Single European Act*, 17 February 1986, 25 I.L.M. 503 (entered into force 1 July 1987), art. 130r(4)) and was expanded to apply to all Community action in the *Maastricht Treaty*, *supra* note 276 art. 3(b). See *Sands*, *supra* note 98 at 546, 549. The challenge for ISDL will be to incorporate the principle of subsidiarity in integrated environmental, economic and social law regimes.

⁴⁴⁵ The consequences and theoretical implications of this integrated approach to compliance are both wide-ranging and exciting, and will be highlighted throughout this paper. In particular, this model may be an illustration of transnationalism in international law, and particularly the “transmission belt” whereby “norms created by international society infiltrate into domestic society”; see H. H. Koh, “Why do Nations Obey International Law?” (1997) 106 Yale L.J. 2599 at 2651 [hereinafter *Koh*]. If this ISDL approach successfully builds compliance, it may also reflect Brunnée and Toope’s interactional theory of international law, insofar as this approach evolves norms through “processes of mutual construction by a wide variety of participants in a legal system” and relies on the deployment of reasoned argument within a predefined institutional framework to effect regime change. See Brunnée & Toope, *Interactional Theory*, *supra* note 7.

⁴⁴⁶ J.G. Castel, A.L.C. de Mestral & W.C. Graham, *The Canadian Law and Practice of International Trade* (Toronto: Montgomery, 1991) at 21.

countervailing duties⁴⁴⁷ arose as remedies that would re-establish equilibrium in trade flows.⁴⁴⁸ That is, situations of non-compliance were addressed through proportional, targeted, “restorative” non-compliance. In comparison, post-war approaches to compliance in the field of social rights (including human rights) tended to favour judicial and quasi-judicial, “rights-based” approaches. So, among many examples, the 1947 *Genocide Convention* allows questions for state responsibility for genocide to be submitted to the International Court of Justice.⁴⁴⁹ The Inter-American Commission on Human Rights, established in 1959, is competent to hear individual petitions and inter-state disputes, as well as to conduct investigations *in situ* with state consent.⁴⁵⁰ In contrast, compliance-building in early environmental law regimes relied principally on “soft law”, knowledge sharing, collaborative mechanisms, and the marshalling of rhetoric; for example, the non-binding *World Charter for Nature* imposes broad duties of implementation on Member States, but provides no concrete mechanisms for monitoring.⁴⁵¹ Rather, the text stresses public education, dissemination of scientific knowledge, ongoing research, cooperation among various international actors, public disclosure of planning and environmental assessment, information and public consultation and participation therein.⁴⁵² Early approaches to compliance in partially-integrated regimes also began to weave together judicial and quasi-judicial dispute settlement, trade measures, promotion of scientific research, sharing of information and technology, public education and public participation.

Key features of a distinctive, ISDL approach to compliance, and potential challenges for such an approach, emerge more fully from the 1992 *Rio Declaration on Environment and Development*⁴⁵³ and *Agenda 21*. Neither document establishes a comprehensive framework for compliance within ISDL. However, the *Rio Declaration* contributes terminology and a sense of aspiration, and *Agenda 21* proposes a broad range of mechanisms and processes that can contribute to building compliance, if structured effectively. It also lays the groundwork for an integrated approach to compliance.

The focus of the *Rio Declaration* is essentially on *cooperation between nations* in the following areas: protecting ecosystems,⁴⁵⁴ strengthening capacity-building,⁴⁵⁵ exchanging scientific knowledge and technology,⁴⁵⁶ promoting a “supportive and open international economic system”,⁴⁵⁷ discouraging transfer or relocation of environmental degradation,⁴⁵⁸ providing assistance in cases of environmental disasters,⁴⁵⁹ and developing international law in the field of sustainable development.⁴⁶⁰ The text also identifies several principles whose implementation will pose challenges for an approach to compliance that integrates economic, environmental and social concerns. For example, the principle of common but differentiated

⁴⁴⁷ That is, duties levied in response to dumping of imports that “causes or threatens material injury” to domestic industry, or duties “levied to offset government subsidies to production”; see *ibid.* at 30-31. The re-balancing effect of these duties is apparent in that they could not exceed the initial margin of dumping or amount of subsidy.

⁴⁴⁸ *Ibid.* at 30-33. See *General Agreement on Tariffs & Trade*, 30 October 1947, 55 UNTS 194, (1948) CTS No. 31, (provisionally entered into force 1 January 1948), arts. VI-VII.

⁴⁴⁹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, (entered into force 12 January 1951). See A.L. Jernow, “*Ad Hoc* and Extra-conventional Means for Human Rights Monitoring” in P.C. Szasz, ed., *Administrative and Expert Monitoring of International Treaties* (New York: Transnational, 1999) at 21.

⁴⁵⁰ The IACHR was established by the Organization of American States; see OAS Res. VIII, OEA/Ser. F/111.5 (1959); see R.A. Painter, “Human Rights Monitoring: Universal and Regional Treaty Bodies” in P.C. Szasz, ed., *Administrative and Expert Monitoring of International Treaties* (New York: Transnational, 1999) at 58-59.

⁴⁵¹ The *World Charter*, as a General Assembly Declaration, not strictly binding in international law; however, it contains expressions of customary international law and strongly normative language. See E. Brown Weiss, P.C. Szasz & D.B. Magraw, *International Environmental Law: Basic Instruments & Reference* (New York, Transnational, 1992) [hereinafter *Basic Instruments*].

⁴⁵² See *Sands*, *supra* note 98 at 42-43.

⁴⁵³ *Rio Declaration*, *supra* note 48.

⁴⁵⁴ *Ibid.*, Principle 7.

⁴⁵⁵ *Ibid.*, Principle 9.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*, Principle 12.

⁴⁵⁸ *Ibid.*, Principle 14.

⁴⁵⁹ *Ibid.*, Principle 18.

⁴⁶⁰ *Ibid.*, Principle 27.

responsibilities⁴⁶¹ militates in favour of added developed country responsibility for environmental protection given the pressures imposed on the environment by those countries and the resources at their disposal.⁴⁶² However, the principle of common but differentiated responsibility might apply very differently to a situation where labour rights violations in a developing country have prompted mass migration to a more developed neighbour, placing fiscal burdens on that country's internal social welfare scheme.

As mentioned above, according to Sands, Chapter 39 of *Agenda 21* – while “short on substance” – represents the closest we have to “a blueprint for the development of international law of sustainable development.”⁴⁶³ Kiss & Shelton are also unequivocal about the significant implications of Chapter 39 for the development of international law. Since Rio, they note, almost every multilateral agreement includes environmental protection as a goal.⁴⁶⁴ Every paragraph of Chapter 39 on International Legal Instruments and Materials is relevant to the question of compliance. The document provides for more specific compliance-building mechanisms: building expertise in international sustainable development law, environmental protection measures based on consensus, setting global, regional and sub-regional priorities, data and information exchange, elaboration of international standards, technical and financial assistance for developing countries, differential obligations where appropriate, balanced, transparent and open regime governance, trade measures to reinforce environmental policies, notification of potential disputes, consultation in dispute settlement, peaceful settlement of disputes including recourse to the International Court of Justice, timely reporting, review, assessment and, vitally, ongoing revision and adjustment of regimes.⁴⁶⁵

However, Chapter 39 is also lacking in several key areas. While emphasizing treaty-based regimes, little reference is made to the principle of “sustainable development” in customary norms.⁴⁶⁶ Sands refers to the “limited progress” on issues of dispute settlement at Rio, and finds that the emphasis on further study of “the range of techniques available at present”⁴⁶⁷ is disappointing, especially as recourse to judicial dispute settlement in the area has been rare at best.⁴⁶⁸ In sum, while both the *Rio Declaration* and *Agenda 21* offer insights into potential compliance-building mechanisms, they do not provide a comprehensive framework for combining and deploying those mechanisms, or coordinating their interaction.

International sustainable development law offers a distinctive approach to compliance and coordination. The Rio documents emphasise the importance of effectiveness in every aspect.⁴⁶⁹ This approach weaves together mechanisms and processes drawn from economic, environmental and social law to offer a range of options for building compliance and addressing non-compliance. These options can be innovative and versatile, and are often tailored to have general or highly specific impact. The ISDL approach to compliance is strengthened by its reliance on webs of internal networks, and benefits from a particular *self-reinforcing dynamic* that will be explored in depth.

The notion of compliance itself is elusive and, as Kingsbury suggests, cannot be defined without recourse to underlying theories of law and international relations.⁴⁷⁰ “Correspondence of behaviour with legal rules”

⁴⁶¹ *Ibid.*, Principle 7.

⁴⁶² See Sands, *supra* note 98 at 217 *ff.*

⁴⁶³ Sands, *supra* note 98 at 57.

⁴⁶⁴ Kiss & Shelton, *supra* note 13 at 72-74.

⁴⁶⁵ *Agenda 21*, *supra* note 48, paras. 39.1-39.10.

⁴⁶⁶ There is reference to the “progressive development and codification of international law on sustainable development”, especially regarding the work of the International Law Commission; see *ibid.*, para. 39(1)(e).

⁴⁶⁷ *Agenda 21*, *supra* note *ibid.* at para. 39.10.

⁴⁶⁸ See Kiss & Shelton, *supra* note 13 at 603. Although the International Court of Justice established a seven-member Chamber for Environmental Matters in July 1993, it has been underutilized.

⁴⁶⁹ *Rio Declaration*, *supra* note 48, Principles 10, 11, 14; *Agenda 21*, *supra* note 48, esp. para. 39.2, see also paras. 39.3, 39.5, 39.9, 39.10.

⁴⁷⁰ B. Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law” (1998) 19 Mich. J. Int'l Law 345 [hereinafter *Kingsbury*].

fails to capture the totality of experience in international law for realists, rationalists, liberals and constructivists alike. However, it is possible to trace the contours of compliance from perspectives both *external* (objective) and *internal* (subjective) to the actors in ISDL regimes.

Relying on the regulatory “enforcement pyramid” model of Ayres & Braithwaite,⁴⁷¹ Kingsbury singles out the compliance-building mechanisms of the *Montreal Protocol on Substances that Deplete the Ozone Layer* and its *Non-compliance Procedure*⁴⁷² as a complex, regulatory regime that exemplifies “the intricate interactions of different types of norms and institutional structures”.⁴⁷³ He emphasizes the significant scientific authority and effectiveness of the Protocol’s Implementation Committee, concluding that in practice, within the *Montreal Protocol* regime, “even the narrow “legal” concepts of “compliance” and “non-compliance” are more completely described in terms of a *process* involving relevant international institutions, the regulated States and other States.”⁴⁷⁴ The *Montreal Protocol* has attracted attention for its “positive and creative stance on the issue of compliance...encourag[ing] and facilitat[ing] compliance.”⁴⁷⁵ It is apt that the concept of “compliance” takes on a procedural quality within the framework of the *Montreal Protocol*, as this regime exemplifies an emerging international sustainable development law regime. Initially a creature of international environmental law, it is in the process of integrating economic concerns, particularly through the use of trade measures. Further analysis of highly-integrated ISDL regimes, below, tends to support this conception of *compliance as process* within ISDL.

The idea of compliance as a process within ISDL, rather than a static label, is conceptually and rhetorically appealing. Conceptually, it serves to distance ISDL from a vain hope of enforcement of abstract norms,⁴⁷⁶ recognizing that violation of norms cannot be the “beginning, middle, and end of the compliance story.”⁴⁷⁷ The emphasis on State cooperation and interdependency that pervades throughout the Rio documents, alone, is inconsistent with a dogged expectation that compliance is necessarily and immediately extinguished by the fact of violation.⁴⁷⁸ Rhetorically, and rather poetically, compliance as process supports a “sustainable” ISDL (as a system of law), enabling the compliance framework to reinforce itself by adapting to address non-compliance, rather than self-destruct in the face of breach.

The procedural nature of compliance is an *external view*; external, that is, to the actors within the regime. We must also consider the *internal view* of compliance, from within the regime; that is, from the perspective of actors enmeshed therein. In this regard, as suggested by Jacobson & Brown Weiss, compliance is, beyond mere implementation of treaty obligations, adherence to the “spirit of the treaty”.⁴⁷⁹ Similarly, as argued by Guruswamy & Hendricks, rules of international law “should first possess an internal force or

⁴⁷¹ I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford UP, 1992).

⁴⁷² *Montreal Protocol & Non-compliance Procedure*, *supra* note 119.

⁴⁷³ *Kingsbury*, *supra* note 470 at 367-68.

⁴⁷⁴ *Ibid.* at 367 [emphasis added].

⁴⁷⁵ S. J. Toope, “Emerging Patterns of Governance” in M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (New York: Oxford UP, 2000) 91 at 106 [hereinafter *Toope*]. From a divergent, even opposite perspective, Koskenniemi agrees that the *Non-compliance Protocol* is “unprecedented”, and notes that the regime’s collective approach to addressing “breaches”, a procedure that Parties “buy into”; his concerns with the Implementation Committee seem to rest on early fears of bureaucratic inefficiency, partiality and overbroad discretion which, according to Kingsbury, have not arisen in practice; see M. Koskenniemi, “Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol” (1992), 3 Y.B. Int’l. Env’tl. L. 123 [hereinafter *Koskenniemi*]; see *Kingsbury*, *supra* note 470 at 365.

⁴⁷⁶ Brunnée & Toope, *Interactional Theory*, *supra* note 7 at 68. See also *Toope*, *supra* note 475 at 107. Both authors argue elsewhere that even the term “compliance” promotes the crystallization of “disputes”, and see the term “implementation” as sufficient to cover development of norms and adherence thereto; see Brunnée & Toope, *Ecosystems*, *supra* note 442 at 44. While this paper adopts the terminology of implementation, monitoring, enforcement, these are employed merely as organizational elements in the analysis of the ISDL compliance-building approach. We further employ the term “compliance” without connotations of “dispute”, but rather as both a *process* and an *attitude*.

⁴⁷⁷ F. Kratochwil & J.G. Ruggie, “International Organization: a State of the Art on an Art of the State” (1986), 40(4) Int’l. Org. 753 at 768.

⁴⁷⁸ On the counterfactual validity of norms, see *ibid.* at 766-79.

⁴⁷⁹ H.K. Jacobson & E. Brown-Weiss, “Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project” (1995) 1 Global Governance 119 at 123-25 [hereinafter *Jacobson & Brown-Weiss*].

dynamic that *makes sense* to the Parties and invokes an *attitude of compliance* rather than non-compliance”.⁴⁸⁰ Taking this common-sense – or even moral – reasoning further, the dual internal/external conception of *compliance as attitude* and *as process* within ISDL is strongly resonant with the interactionalist thesis that “thick acceptance” of norms emerges through processes of “self-binding legitimization”.⁴⁸¹ This dual conception of compliance also relates to the genesis of a self-reinforcing dynamic, which is key to the effectiveness of ISDL regimes.

Compliance analysis within international environmental law tends to emphasize the importance of building compliance through rules and institutions operating on distinct levels or throughout key phases. For Sands, three issues arise when considering the question of compliance with treaty-based or customary regimes. First, there are means of *implementation* of international obligations, which includes enabling municipal legislation, State monitoring of compliance by actors within each State, and international reporting obligations. Second, in cases of non-compliance, there are means of *international enforcement* of international obligations, by other States and international actors. Sands focuses both on the question of standing to enforce these international obligations, and appropriate fora for enforcement. And third, there are means of *international conflict resolution* through diplomatic and legal measures, emphasizing effective access to justice.⁴⁸²

However, this framework seems to place too much emphasis on coercive and contentious approaches to compliance. While that might be most appropriate to international environmental law, ISDL is largely concerned with the prevention, rather than rectification of non-compliance, especially when referring to the protection of collective or human rights. Sands’ framework also underplays the vital importance of what has variously been called “monitoring”, “compliance-control”, “supervision”, “surveillance”,⁴⁸³ “implementation review” and “compliance verification”⁴⁸⁴ as a phase of the compliance-building process. Szasz notes the “extensive development” of monitoring functions since the Second World War, and especially over the past few decades.⁴⁸⁵ Rather than identifying and punishing violators of the law, monitoring is designed to improve and enhance compliance,⁴⁸⁶ typically through several steps:

- the designation of a reporting agency within each national government, raising “domestic bureaucratic conscience”;
- formal and informal dialogue between national reporting agencies and international monitoring agencies, promoting a common understanding of norms within a regime, which can quickly identify difficulties faced by nations in implementing their obligations;⁴⁸⁷
- the publicity, or threat of publicity, of State non-compliance – the “discipline of shame”⁴⁸⁸; and

⁴⁸⁰ L. Guruswamy & B. Hendricks, *International Environmental Law* (St. Paul, Minn.: West, 1997) at 48 [hereinafter *Guruswamy & Hendricks*, emphasis added].

⁴⁸¹ Brunnée & Toope, *Interactional Theory*, *supra* note 7 at 72-73. Many aspects of the interactionalist thesis find expression in the ISDL approach to compliance: a shift away from adjudicative processes in favour of building compliance through ongoing interaction between actors within the regime that, in turn, shapes the regime; a focus on self-government; ensuring “equity”, “openness” and “transparency” in the governance of the regime as a means of building compliance. However, the application of this theory to ISDL customary regimes is challenging, especially in light of the adjudicative context in which disputes over customary law are usually (if rarely) brought. Overall, this theoretical orientation holds great promise for ongoing ISDL research in the field of compliance.

⁴⁸² Sands, *supra* note 98 at 141-178.

⁴⁸³ See Lang, *supra* note 101 at 255.

⁴⁸⁴ See Kiss & Shelton, *supra* note 13 at 588.

⁴⁸⁵ P. Szasz, “Introduction” in P.C. Szasz, ed., *Administrative and Expert Monitoring of International Treaties* (New York: Transnational, 1999) at 1 [hereinafter *Szasz*].

⁴⁸⁶ *Ibid.* at 15.

⁴⁸⁷ On the normative effect of “shared understandings”, see Brunnée & Toope, *Interactional Theory*, *supra* note 7 at 52-53.

- preventative inspections (especially in the context of environmental protection).⁴⁸⁹

Finally, Szasz identifies the importance of monitoring within “soft law” regimes: ongoing monitoring may spur ongoing State compliance with non-binding instruments out of a “sense of quasi-obligation”; this might then form the basis for emerging customary norms.⁴⁹⁰

We believe that an ISDL approach to compliance can best be characterised by three phases: implementation, monitoring and “enforcement”. While the latter term is not ideal, as mentioned earlier, it is used here to encapsulate the range of coercive and cooperative, formal and informal, diplomatic and legal measures that can be deployed by an ISDL regime in response to non-compliance. It conveys a sense of action rather than sanction.

In order to draw out distinctive ISDL approaches to compliance, three treaty-based regimes will be analysed. The first, exemplifying a regime in the process of integration, is the *Montreal Protocol*, including its *Non-compliance Procedure* and provisions governing its Multilateral Fund.⁴⁹¹ The second is a relatively early example of a fully integrated regime, the 1994 *Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*.⁴⁹² The third regime under consideration is perhaps the best example of a highly-integrated ISDL regime to date – the 2000 *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*.⁴⁹³ The use of compliance-coordinating bodies and linkage mechanisms between the implementation, monitoring and enforcement phases will also be considered.

The Implementation Phase

A first key feature of implementation within highly integrated regimes is internationally coordinated implementation on multiple levels. This raises two interrelated subjects: mechanisms for international *coordination* of implementation, and mechanisms for actual regional, sub-regional, national and even local implementation. These will be considered in turn, animated by the creative tension between centralization and dispersal. Other features of implementation within highly-integrated regimes include the use of networks to support implementation, and mechanisms for differentiated implementation that do not thwart the underlying purposes of the regime.

a) Centralization of Coordination

Each of the regimes under analysis establishes intergovernmental bodies that play a coordinating role in implementation. It is interesting that the mandate and operation of these bodies seems to vary with the degree of integration displayed by the regime.⁴⁹⁴ Approaches to implementation within the *Montreal Protocol* display many ISDL compliance-building mechanisms mentioned earlier: *inter alia*, cooperation, financial and technical support for developing countries and “clearing-house” repositories of expertise and assistance. However, the regime does not present a cohesive picture of how these mechanisms will facilitate implementation specifically. Although the initial text of the *Montreal Protocol* creates a “Secretariat”, this body is not designed to coordinate implementation, but to provide administrative

⁴⁸⁸ Such as the “1235 Procedure” and “1503 Procedure” for raising human rights violation within ECOSOC; see D.A. Silien, “Human Rights Monitoring: Procedures and Decision-Making of Standing United Nations Organs” in P.C. Szasz, ed., *Administrative and Expert Monitoring of International Treaties* (New York: Transnational, 1999) 83 at 94 ff. [hereinafter *Silien*].

⁴⁸⁹ See Szasz, *supra* note 485 at 15-17.

⁴⁹⁰ *Ibid.* at 17.

⁴⁹¹ *Terms of Reference for a Multilateral Fund*, Annex IV, UN Doc. UNEP/OzL.Pro.4/15, (1992) YB Int'l L. 824 [hereinafter *Multilateral Fund Terms of Reference*].

⁴⁹² *Desertification Convention*, *supra* note 98.

⁴⁹³ *Cartagena Protocol*, *supra* note 122.

⁴⁹⁴ There leads to the conclusion that a highly-integrated regime is most effectively implemented by an independent, expert compliance-coordinating body with a broad facilitative role in implementation and adequate financial support mechanisms.

support.⁴⁹⁵ The governing body of the Protocol is the Meeting of the Parties, which, while responsible for reviewing the implementation of the Protocol, is not charged with a facilitative role in the initial implementation of the Protocol.⁴⁹⁶ It does retain, however, a broad discretion to “consider and undertake any action” for the achievement of the purposes of the Protocol, which could conceivably target implementation.⁴⁹⁷ Amendments brought to the Protocol in 1990 envisage a role for the Protocol’s Multilateral Fund in financing co-operation, but do not specifically envisage financing to facilitate implementation.⁴⁹⁸ Finally, the mandate of the “Implementation Committee” within the *Non-compliance Procedure*, despite the name, falls within what we have called the enforcement phase of compliance-building.⁴⁹⁹ Overall, the *Montreal Protocol* places primary responsibility for implementation on the Parties themselves; while Parties should “co-operate” in promoting technical assistance for the purposes of implementation,⁵⁰⁰ no institution within the regime is charged with facilitating or targeting technical expertise. Parties themselves “request” technical assistance from the Secretariat, when required for implementation purposes.⁵⁰¹

The role of intergovernmental bodies in implementation within the regime of the *Desertification Convention* is more explicit. First, all Parties and the “international community” are called upon to cooperate to “ensure the promotion of an enabling international environment in the implementation of the Convention.”⁵⁰² Responsibility for “decisions necessary to promote...effective implementation” is explicitly granted to the Conference of the Parties;⁵⁰³ this body is also empowered to establish “such subsidiary bodies as are deemed necessary for the implementation of the Convention”.⁵⁰⁴ The treaty also expressly envisages a general facilitative role for its Permanent Secretariat, especially with regards to developing countries, but not specifically facilitation of implementation.⁵⁰⁵ The principal mechanism for implementation within the Convention is the elaboration of national action programmes, as discussed below, but the Permanent Secretariat acts as a repository of these programmes rather than an active facilitator in their elaboration.⁵⁰⁶ While the Convention does not envisage an integrated, international compliance-coordination body, it is explicit in promoting the use of networks to “support the implementation of the Convention”.⁵⁰⁷

The promising role of intergovernmental bodies in implementation of ISDL regimes emerges most fully in the *Cartagena Protocol*. First, the text goes further than calling for an “enabling environment” for implementation; rather, it immediately makes Parties subject to a general *obligation of implementation* – each party “shall take necessary and appropriate legal, administrative and other measures to implement its obligations under the Protocol”.⁵⁰⁸ The Biosafety Clearing-House – an intergovernmental body conceived as playing a vital role in the implementation phase – is established at art. 20, and is quite distinct from the Conference of the Parties and Secretariat, which are institutions of the *Convention on Biological Diversity*, not the Protocol itself.⁵⁰⁹ The Biosafety Clearing-House is networked to clearing-house mechanisms envisaged throughout the Convention regime as a whole. The *Cartagena Protocol* expressly requires the Clearing-House

⁴⁹⁵ *Montreal Protocol*, *supra* note 119, art. 12.

⁴⁹⁶ *Ibid.*, art. 11(4).

⁴⁹⁷ *Ibid.*, art. 11(4)(j).

⁴⁹⁸ *Montreal Protocol*, *supra* note 119, art. 10.

⁴⁹⁹ The Implementation Committee is to receive submissions on situations of non-compliance, report thereon to the Meeting of the Parties, and secure “amicable solutions” on the basis of “respect for the provisions of the Protocol”; see *Non-compliance Procedure*, *supra* note 119, art. 7. The text of the *Non-compliance Procedure* uses the term “implementation” as Brunnée & Toope do; see Brunnée & Toope, *Ecosystems*, *supra* note 442.

⁵⁰⁰ *Montreal Protocol*, *supra* note 119, art. 10.

⁵⁰¹ *Ibid.*, art. 10(2).

⁵⁰² *Desertification Convention*, *supra* note 98, art. 12.

⁵⁰³ *Ibid.*, art. 22(2).

⁵⁰⁴ *Ibid.*, art. 22(2)(c).

⁵⁰⁵ *Ibid.*, art. 23(1)(c).

⁵⁰⁶ *Ibid.*, arts. 9-13.

⁵⁰⁷ *Ibid.*, art. 25(1).

⁵⁰⁸ *Cartagena Protocol*, *supra* note 122, art. 2 [emphasis added].

⁵⁰⁹ *Ibid.*, arts. 20, 29, 31.

to “assist Parties to implement the Protocol”, and to do so in a manner that integrates the environmental law interests in biosafety and genetic diversity with the economic and developmental needs of least developed nations, small island developing nations, developing nations and economies in transition generally.⁵¹⁰ The Meeting of Technical Experts on the Biosafety Clearing-House, a preparatory body, has already elaborated on specific activities of the Clearing-House with regards to implementation:

- providing improved and integrated access to existing information sources;
- promoting the exchange of information, knowledge, experience and best practices;
- providing a forum for the exchange of views on biosafety between countries, scientists, non-governmental and intergovernmental organizations and the private sector;
- providing access to a roster of government-nominated experts for advisory and other support, and risk assessment upon request.⁵¹¹

Another distinctive feature of the Protocol not found in the two other regimes is that the international Secretariat liaises with multiple national “focal points” to share primary responsibility for administration of the regime.⁵¹² In sum, the highly-integrated *Cartagena Protocol* can be distinguished for explicitly assigning a coordinating role in implementation to an international body that is more highly specialized, adaptable and active than a “Conference of the Parties”, while being distinct from a “Secretariat” by having the authority to advance implementation rather than merely administer the process. This body respects the horizontal ordering of international actors, however, being composed of States Parties who play a facilitative role in the implementation of regimes by their peers.⁵¹³ Furthermore, expanding on the approach to implementation in the *Desertification Convention*, the *Cartagena Protocol* sees networks as mechanisms to support specific *implementing bodies*, rather than means of supporting *implementation* in the abstract. – this is discussed further below. First, however, it is vital to analyze the corollary to centralized coordination within ISDL – the dispersal of implementation.

b) Dispersal of Implementation

In 1988, Caldwell posited the existence of a paradox for international environmental cooperation; in a nutshell, “international cooperation is impossible without national concurrence, but mere concurrence as a formality is insufficient to ensure that effective cooperation will occur.”⁵¹⁴ Caldwell seeks to resolve the paradox by calling for “institutional structures capable of operating with limited autonomy apart from the governments that created them.”⁵¹⁵ However, this is not a complete resolution of the paradox, for the effective implementation of regimes requires not only autonomous coordination to ensure effective cooperation, but enmeshment of domestic decision-making within international legal norms to ensure

⁵¹⁰ *Ibid.*, art. 20(1)(b).

⁵¹¹ “Establishment of the Biosafety Clearing-House” (Note by the Executive Secretary of the Intergovernmental Committee on the Cartagena Protocol), Provisional Agenda Item 3.1, UN Doc. UNEP/CBD/BS/TE-BCH/1/2 (2000), online: Convention on Biological Diversity <<http://www.biodiv.org>> [hereinafter *Establishment Note*].

⁵¹² *Cartagena Protocol*, *supra* note 122, art. 19.

⁵¹³ We must be wary of idealism in this regard. As von Moltke noted in 1988, the proliferation of international environmental institutions should not lead to misconceptions of reality: these institutions are “very closely controlled by the States which have set them up, and they are very small. More often than not, members of the commissions...will tend to be high-level civil servants answerable to their country of origin. This is no revolutionary departure...Nevertheless, these commissions form a vital, and poorly understood, link in the current international system...”; see K. von Moltke, “International Commission and Implementation of Law” in J.E. Carroll, ed., *International Environmental Diplomacy* (Cambridge: Cambridge UP, 1988) at 90. Analysis of implementation from an ISDL perspective starts to show why such commissions play an increasingly vital role in the international management not only of the environment, but development and social rights as well.

⁵¹⁴ L.K. Caldwell, “Beyond Environmental Diplomacy” in J.E. Carroll, ed., *International Environmental Diplomacy* (Cambridge: Cambridge UP, 1988) at 16.

⁵¹⁵ *Ibid.*

something beyond “mere national concurrence”.⁵¹⁶ Hence the need for vertical “dispersal” of implementation across regional, sub-regional, national or local levels as a corollary to centralized coordination of implementation.⁵¹⁷

The *Montreal Protocol* and its companion documents do not contain any such dispersal mechanisms. The *Desertification Convention*, however, offers promising and novel approaches in this regard. First, general principles of cooperation on multiple levels abound within the Convention text.⁵¹⁸ In terms of substantive mechanisms, as mentioned above, the elaboration of *national action programmes* is the principal mechanism for implementation of obligations within this regime.⁵¹⁹ These programmes are the means by which dispersal of implementation is accomplished by the regime. First, they serve to link Parties' international obligations on combating desertification to “the respective roles of government, local communities and land users.”⁵²⁰ They should also provide for cooperation and coordination “between the donor community, government at all levels, local populations and community groups”⁵²¹ and the “effective participation at the local, national and regional levels of non-governmental organizations and local populations” in “policy planning, decision-making and implementation...of national action programmes”.⁵²² Thus, within one international regime, actors as specific as “farmers and pastoralists” become active partners in the fight against desertification on a village level. Building on this dispersal of implementation, the Convention also envisages regional and sub-regional action programmes of a similar character to national programmes.⁵²³ Integrating the beginnings of an ecosystem orientation with sound economic and social reasons for regional implementation mechanisms, the Convention further provides for *regional implementation annexes* “adapted to the socio-economic, geographical and climatic factors” of particular regions and sub-regions.⁵²⁴ Within the highly comprehensive annex for Africa, national action programmes must be tracked via “pertinent, quantifiable and readily verifiable” implementation indicators.⁵²⁵ The concept of *capacity-building* is introduced, with 11 specific means for its promotion, but is not explicitly linked to effective implementation.⁵²⁶ This regional annex also shows how the principle of subsidiarity is operative within the regime – the scope of regional and sub-regional capacity-building, education and public awareness programmes is a function of which specific activities “are better carried out or supported” at that level”.⁵²⁷

The *Cartagena Protocol* is less detailed regarding mechanisms for dispersal of implementation; nevertheless, the concept is certainly operative, and is perhaps better conceptually framed within this regime than within the *Desertification Convention*. By emphasizing *capacity-building* on many levels as a means of effective implementation,⁵²⁸ the Protocol captures both the concept of dispersal of implementation (capacity-

⁵¹⁶ *Koh*, *supra* note 445 at 2654. See esp. *Lowe*, *supra* note 10 at 224 *ff.*, referring to a process of diffusion within international law whereby “the techniques and principles of public international law are being borrowed...and applied...in the internal legal orders of States”.

⁵¹⁷ See generally, for the Americas, J.L. Varela, “Regional Trends in International Law and Domestic Environmental Law: the Inter-American Hemisphere” in S.J. Rubin & D.C. Alexander, eds., *NAFTA and the Environment* (The Hague: Kluwer Law, 1996).

⁵¹⁸ See *Desertification Convention*, *supra* note 98, esp. arts. 3(c), 4(2)(e).

⁵¹⁹ *Ibid.*, art. 9 *ff.* The Convention introduces the concept of national action programmes in the specific context of Parties “carrying out their obligations” under the Convention.

⁵²⁰ *Ibid.*, art. 10(2).

⁵²¹ *Ibid.*, art. 10(2)(e).

⁵²² *Ibid.*, art. 10(2)(f).

⁵²³ *Ibid.*, art. 11.

⁵²⁴ *Ibid.*, art. 15. These annexes are binding insofar as they constitute integral parts of the Convention; see art. 29(1). The Convention includes regional implementation annexes for Africa (Annex I), Asia (Annex II) and Latin America & the Caribbean (Annex III). Each establishes, *inter alia*, highly specific focus areas for national action programmes.

⁵²⁵ *Ibid.*, Annex I, art. 9(d).

⁵²⁶ *Ibid.*, art. 19.

⁵²⁷ *Ibid.*, Annex I, arts. 11(d), 13(b).

⁵²⁸ *Cartagena Protocol*, *supra* note 122 at 22(1).

building *among all actors in the biosafety field*⁵²⁹ and the procedural nature of implementation (*capacity-building*), once again propelling ISDL away from unhelpful, black-or-white reasoning in compliance analysis. Rhetorically, there is also greater force behind an obligation to consider, within funding arrangements, the financial needs of developing countries for capacity-building⁵³⁰ rather than for “activities pursuant to relevant provisions of the Convention”.⁵³¹ Vitaly, capacity-building begins at the implementation phase, with the Protocol specifically identifying “scientific and technical training” in biotechnology management, risk assessment and risk management and enhancement of technological and institutional capacities.⁵³² This training is important to ensure the elaboration of effective national implementing legislation; it has a direct impact on the implementation of the norms of the Protocol.

The preceding analysis points to the combination of *centralized coordination* with *dispersed implementation* as a distinctive feature of implementation with highly-integrated ISDL regimes. Essentially, this is a manifestation of subsidiarity, that is, implementation on the most appropriate scale (flexibly dispersal across multiple levels) consistent with effectiveness (through centralized, expert facilitation of implementation).

c) Implementation Support Networks

If networks are the “optimal form of organization in the information age”,⁵³³ it is apt that they are key to supporting the implementation of ISDL regimes. The supporting role of networks in implementation is implicit in the *Montreal Protocol*, calling for cooperation between Parties and through “competent international bodies” to promote research, development and exchange of information on best technologies for managing controlled substances, alternatives to controlled substances and cost-benefit analysis of control strategies.⁵³⁴ Key “implementing agencies” are identified in the *Multilateral Fund Terms of Reference*, such as UNEP, UNDP and the World Bank, with the goal of facilitating compliance with the Protocol.⁵³⁵ However, the Protocol does not adopt the language of “networking” and does not explicitly identify the scientific community and civil society organizations as key network partners, even though both the scientific community and larger civil society organizations already work through well-developed institutional networks.

The *Desertification Convention*, in comparison, provides for broad participation in “cooperative mechanisms”, with a view to supporting implementation. In particular, organs, funds and programmes of the United Nations system, relevant intergovernmental organizations, academic institutions, the scientific community and “non-governmental organizations in a position to collaborate” are encouraged to participate in the implementation of action programmes under the Convention.⁵³⁶ Local cooperative mechanisms are also envisaged.⁵³⁷ The Convention also explicitly adopts the language of “networking” to “support the implementation of the Convention” and assigns authority to form such a network to a technical experts’

⁵²⁹ The article on capacity-building has an extensive scope: capacity-building should strengthen both human resources and institutional capacities, should consider the needs of least developed countries, small island developing countries, developing countries in general and economies in transition, and should draw on global, regional, subregional, national institutions and organizations, including the private sector.

⁵³⁰ *Cartagena Protocol*, *supra* note 122 at 28(3), 28(4).

⁵³¹ *Desertification Convention*, *supra* note 98 at 21(1)(a).

⁵³² *Cartagena Protocol*, *supra* note 122, art. 22(2). The Intergovernmental Committee on the Cartagena Protocol on Biosafety (ICCP), a preparatory body, has requested Parties, non-governmental, private sector and scientific organizations to submit “suggestions on capacity-building for the implementation of the Protocol” by March 2001; see “Capacity-building”, online: Convention on Biological Diversity <<http://www.biodiv.org>>.

⁵³³ *Slaughter*, *supra* note 442 at 204.

⁵³⁴ *Montreal Protocol*, *supra* note 119, art. 9.

⁵³⁵ *Supra* note 491, arts. 2(a), 4.

⁵³⁶ *Desertification Convention*, *supra* note 98, art. 9(3).

⁵³⁷ *Ibid.*, art. 13(1)(b).

group, the Committee on Science and Technology.⁵³⁸ The Convention conceives of networks as bridging international, regional, sub-regional and national “units” and requires that their operation be facilitated and strengthened by the Conference of the Parties.⁵³⁹ Thus, the Convention begins to nest multiple networks, on diverse levels, within the coordinating framework of an international regime.⁵⁴⁰

In the *Cartagena Protocol*, and throughout the *CBD*, this nesting of networks is systematized through the *clearing-house mechanism*,⁵⁴¹ of which the Biosafety Clearing-House forms one component.⁵⁴² The clearing-house mechanism is conceived as “a global network of Parties and partners working together to facilitate implementation”.⁵⁴³ The functions of this mechanism include;

- promoting and facilitating scientific and technical cooperation;
- developing a global mechanism for exchanging and integrating biodiversity information;⁵⁴⁴
- network development, through clearing-house mechanism focal points and their partners.⁵⁴⁵

The impetus for the clearing-house mechanism is, once again, the tension between centralization and dispersal; this tension is addressed by:

- centralizing the facilitation role, the dissemination of experience and knowledge, and the identification and targeted networking of international, regional, sub-regional, national centres of expertise, governmental and civil society organizations and the private sector; as well as
- dispersing the “process of gathering and organizing the information that feeds into the clearing house mechanism network” to national focal points “coordinating efforts among themselves”.⁵⁴⁶
- The consequences of this integrated approach to networking stretches across the implementation, monitoring and enforcement phases; simply put, it enables the entire regime to “learn from...shared experience.” As a principal distinctive feature of ISDL approaches to compliance in general, this will be discussed in depth under *Effective Compliance*, below.

d) Differentiated Implementation

The principle of common but differentiated responsibility in international environmental law arises from principles of equity within general international law.⁵⁴⁷ Differentiated responsibility is a means of ensuring substantive, rather than formal equality of obligation, in light of the context of each State – relevant factors

⁵³⁸ *Ibid.*, art. 25. While the Committee on Science and Technology is composed of government representatives “competent in the relevant fields of expertise”, it is envisaged as taking a multidisciplinary approach and receiving “information and advice” from panels of independent experts; see art. 24.

⁵³⁹ *Ibid.*, art. 25(2). The role of networks on multiple levels is especially evident in the regional implementation annexes; see esp. Annex I, art. 10(1)(a) on subregional focal points for information exchange, art. 13(e) on regional networks for “systematic observation and assessment” that are integrated into “world-wide networks”.

⁵⁴⁰ On “nesting networks” and certain challenges posed by networking, see *Slaughter*, *supra* note 442 esp. at 204-05.

⁵⁴¹ *Biodiversity Convention*, *supra* note 98, art. 18(3).

⁵⁴² *Cartagena Protocol*, *supra* note 122, art. 20(1).

⁵⁴³ *Establishment Note*, *supra* note 511 at para. 8.

⁵⁴⁴ The Parties have already begun to implement a pilot phase of the Biosafety Clearing-House on the Internet. See “Operation of the Biosafety Clearing-House” (Note by the Executive Secretary of the Intergovernmental Committee on the Cartagena Protocol), Provisional agenda item 3.2, UN Doc. UNEP/CBD/BS/TE-BCH/1/3 (2000), online: Convention on Biological Diversity <<http://www.biodiv.org>>. The pilot phase can be accessed online at www.biodov.org.

⁵⁴⁵ *Establishment Note*, *supra* note 511 at para. 9.

⁵⁴⁶ *Ibid.* at para. 11.

⁵⁴⁷ *Sands*, *supra* note 98 at 217.

include needs and circumstances, level of economic development, financial capacity and past acts causing harm.⁵⁴⁸

Differentiated responsibility within the implementation phase of the *Montreal Protocol* takes the form of delayed implementation for certain developing countries – “grace periods”, in Sands’ terminology⁵⁴⁹ – exempting them from compliance with control measures for ozone-depleting substances for 10 years.⁵⁵⁰ The regime attempts to balance achievement of its ends with equitable obligations in several ways: first, developing countries must not exceed a certain threshold of consumption of controlled substances in order to initially invoke and continue to benefit from delayed implementation;⁵⁵¹ second, any State becoming a Party to the protocol must immediately and continually provide extensive statistical data to the Secretariat, so delayed implementation of control measures does not entail a “holiday” from the regime;⁵⁵² and third, channels exist for those developing countries invoking delayed control measures to receive adequate financial and technical support in furthering the fulfillment of their obligations.⁵⁵³ Within the *Montreal Protocol*, then, differentiated implementation is not framed in terms of the obligations of Parties; rather, it is apparent in the specific case of control measures.

The approach of the *Desertification Convention* is to more explicitly introduce the concept of differentiated responsibility, immediately following the statement of general obligations of Parties. Arts. 5 and 6, respectively, provide for specific “Obligations of affected country Parties” and “Obligations of developed country Parties” within the regime. Recognizing the prevalence of desertification and drought in poorer nations, the text notes the “central importance of financing to the achievement of the objective of the Convention”.⁵⁵⁴ Hence, differentiated responsibility operates to place increased financial responsibility on developed nations, especially through innovative mechanisms such as debt swaps, facilitating the fight against desertification while relieving economic burdens on developing countries.⁵⁵⁵ This is an example of how differentiated responsibility within ISDL regimes is a useful tool to address both environmental and economic aspects of a problem in an integrated manner. The promotion of economic development and respect for social rights can also be integrated through differentiated responsibility. A good example is the specific obligations of affected country Parties within the Convention. For example, affected country Parties specifically undertake to “address the underlying causes of desertification and pay special attention to the *socio-economic factors* contributing to desertification processes;”⁵⁵⁶ and “promote awareness and facilitate the *participation* of local populations, especially *women and youth*...in efforts to combat desertification and mitigate the effects of drought.”⁵⁵⁷

The *Desertification Convention* does not emphasize differentiated *implementation* in light of the specific context of each Party; rather, it principally differentiates between “affected” and “developing” countries, in terms of overall obligations, and emphasizes the use of financial mechanisms. This may be well suited for the fight against desertification and drought specifically, but a more flexible, integrated ISDL approach to implementation is apparent in the *Cartagena Protocol*.

⁵⁴⁸ *Ibid.* at 219. Sands’ statement that “in practical terms, differentiated responsibility results in different legal obligations”, while strictly true, is unhelpful as it downplays the processual nature of implementation within ISDL. Highly-integrated regimes strike a careful balance between achievement of the objectives of the regime and implementation mechanisms to ensure that differentiated implementation will act as a *means* to ensure the fuller attainment of the objectives of the regime. In this sense, differentiated responsibility does not imply less responsibility. The principle of common but differentiated responsibility is discussed in detail in Part III, section 4, above.

⁵⁴⁹ *Ibid.* at 220.

⁵⁵⁰ *Montreal Protocol*, *supra* note 119, art. 5.

⁵⁵¹ *Ibid.*, arts. 5(1)-(2).

⁵⁵² *Ibid.*, art. 7.

⁵⁵³ *Ibid.*, arts. 5(4)-(9).

⁵⁵⁴ *Desertification Convention*, *supra* note 98, art. 20(1).

⁵⁵⁵ See *ibid.*, arts. 6, 20(d).

⁵⁵⁶ *Ibid.*, art. 5(c) [emphasis added].

⁵⁵⁷ *Ibid.*, art. 5(d) [emphasis added].

The appeal and distinctiveness of the *Cartagena Protocol* is based on the flexibility of its differentiated implementation mechanisms. First, it provides strong financial mechanisms where specifically required to address important contextual variables, such as the extent of economic development of States Parties. For example, the allocation of financial resources, “for the purposes of implementation”, to developing countries in general, and least developed and small island developing States in particular, is a key aspect of the Protocol’s financial mechanism.⁵⁵⁸ This financial mechanism for implementation operates on an *international* level, guided by the Conference of the Parties.

Second, the Protocol recognizes that each Party’s *national* implementing legislation may consider the socio-economic impact of import of living modified organisms (LMOs) on conservation and the sustainable use of biodiversity (especially its value to indigenous and local populations).⁵⁵⁹ So, implementation can be tailored in a manner that is sensitive to the socio-economic, environmental and even cultural context of each Party. However, implementation is not made discretionary through this sensitivity, as only enumerated and relevant considerations can be used in tailoring national implementing legislation.

Third, the Protocol anticipates situations of deficient national implementation through the creation of a “backup” regulatory framework, a redundant system engaged in the absence of domestic regulatory frameworks within developing countries and economies in transition. Using this backup framework, developing countries and economies in transition may begin importing LMOs “for direct use as food or feed, or for processing” – meeting urgent economic development or even humanitarian needs – without frustrating the objectives of the Protocol.⁵⁶⁰ This differentiated implementation mechanism is thus able to effectively integrate environmental, economic development and humanitarian objectives. The Parties concerned interact with the Biosafety Clearing-House in this regard, as opposed to the Conference of the Parties. As a repository of expertise on implementation, and charged with a general facilitative role therein, the Clearing-House is presumably well-placed to coordinate this “backup” regulatory framework.⁵⁶¹

In sum, this analysis has shown how highly-integrated ISDL regimes are acutely concerned with preserving their overall legitimacy and effectiveness by using differentiated implementation (and differentiated responsibility in general) to reinforce the attainment of their objectives. These regimes are flexible enough to differentiate implementation of obligations according to contextual variables. Finally, coordination of implementation – especially through the clearing-house concept – ensures that differentiation is managed on international scale by an appropriate body.

The monitoring phase

The past 50 years have witnessed the entrenchment of intergovernmental organizations as monitors of compliance within international regimes. As Szasz notes, “the monitoring of State compliance with normative multilateral treaties has become almost exclusively the province of IGOs...”⁵⁶² The promise of monitoring is not the prospect of sanctioning treaty “violators”, but rather the ability of monitoring, as an interactional element within international regimes, to “improve and enhance compliance with treaty obligations”.⁵⁶³ An analysis of monitoring processes within the *Montreal Protocol*, *Desertification Convention* and *Cartagena Protocol* confirms that monitoring within ISDL regimes is conceived as a “plastic and growing enterprise” by which those regimes are “almost invariably broadened and strengthened”.⁵⁶⁴ In this way, the

⁵⁵⁸ *Cartagena Protocol*, *supra* note 122 at art. 28.

⁵⁵⁹ *Ibid.*, art. 26.

⁵⁶⁰ Such import is subject to the minimum of a risk assessment under the Protocol and a predictable timeframe for decision-making. See *ibid.*, art. 11(6).

⁵⁶¹ See *ibid.*, art. 20(1)(b).

⁵⁶² Szasz, *supra* note 485 at 12.

⁵⁶³ *Ibid.* at 15.

⁵⁶⁴ *Ibid.* at 17.

monitoring phase contributes to the self-reinforcing dynamic of ISDL regimes, the key to their effectiveness.

Two key features of ISDL regimes emerge within the monitoring phase: the *broad scope* of reporting obligations and the emphasis on *horizontal and vertical monitoring*.

a) Broad scope of reporting

As the role of networks in implementation shows, ISDL regimes are highly dependent on the flow of information horizontally (between States) and vertically (through all levels of implementation). Thus, highly-integrated regimes broaden reporting obligations with a view to supplying clearing-house mechanisms with sufficient information to ensure that the aims of the regime are being met, and to quickly identify areas that require further compliance-building.

Within the *Montreal Protocol*, reporting obligations are regular and ongoing, from the moment of ratification or accession onwards. Given the focus of the regime on reduction of ozone-depleting substances, it is no surprising that initial reporting obligations – within three months of ratification or accession – encompass statistical data on production, destruction, import and export, as well as specific data on trade in controlled substances with Parties and Non-Parties.⁵⁶⁵ The London amendments to the Protocol require reporting of further statistical data on the use of both controlled and transitional substances, including use for feedstock, on an annual basis.⁵⁶⁶ Parties are also required to submit “summaries of activities” on other enumerated aspects of implementation every two years – specifically, activities relating to exchange of information on best technologies, alternatives and cost-benefit analyses of control strategies as well as public-awareness projects.⁵⁶⁷ However, the Protocol does not impose a general reporting obligation covering all aspects of implementation, and actual compliance with reporting obligations has been “problematic”.⁵⁶⁸

The *Desertification Convention*, in comparison, does impose a general obligation on Parties to report to the Conference of the Parties according to a timetable set by that body, although this is framed within an article on “Communication of Information”.⁵⁶⁹ The scope of reporting is broadened in three ways. First, reporting extends to all measures taken for the implementation of the Convention.⁵⁷⁰ Consistent with the Convention’s bifurcated approach to differentiated implementation, both “affected country Parties” and “developed country Parties” must report on the implementation of their specific obligations.⁵⁷¹ Second, the scope of reporting is broadened through reporting on multiple levels. While Parties report to an international body on their national action programmes, regional and sub-regional coordinating bodies report to Parties within that region under the provisions of regional implementation annexes.⁵⁷² Once again, a balancing of centralization and dispersal is evident.

The obligation to report within the *Cartagena Protocol* is unequivocal. Art. 33, “Monitoring and Reporting”, provides that “Each Party shall monitor the implementation of its obligations under the Protocol, and shall...report...on measures that it has taken to implement the Protocol”.⁵⁷³ While this report is directed

⁵⁶⁵ *Montreal Protocol* (original text), *supra* note 119, art. 7.

⁵⁶⁶ *Montreal Protocol* (as amended), *ibid.* art. 7(2)-(3).

⁵⁶⁷ *Ibid.*, art. 9(3). All reports and summaries are submitted to the Secretariat.

⁵⁶⁸ See S. Thomas-Nuruddin, “Protection of the Ozone Layer: the Vienna Convention and the Montreal Protocol”, in P.C. Szasz, ed., *Administrative and Expert Monitoring of International Treaties* (New York: Transnational, 1999) 113 at 120-21 [hereinafter *Nuruddin*]. The author notes that by October 1990, only 29 of the 65 Parties had submitted complete reports. See *contra Sands*, *supra* note 98 at 148, noting the Protocol’s “strong record”, as the 29 Parties submitting complete reports represented 85% of world consumption of controlled substances.

⁵⁶⁹ *Desertification Convention*, *supra* note 98, art. 26(1).

⁵⁷⁰ *Ibid.*, art. 26(2).

⁵⁷¹ For affected country Parties, *ibid.*, art. 26(2)-(3); for developed country Parties, *ibid.*, art. 26(5).

⁵⁷² See e.g. *ibid.*, Annex I, art. 18(5)(b).

⁵⁷³ *Cartagena Protocol*, *supra* note 122, art. 33.

to the Meeting of the Parties, the report must be provided to the Biosafety Clearing-House as well – this reinforces the key role of the Clearing-House as a repository and network focal point for information.⁵⁷⁴ Two distinctive aspects of the scope of reporting within the Protocol attract attention. First, beyond reporting on implementation, Parties must provide the Clearing-House with any non-confidential “laws, regulations and guidelines” for the implementation of the Protocol, as well as those applicable to the import of LMOs for direct use as food or feed, or processing.⁵⁷⁵ Thus, the Clearing-House can review country reports in parallel with concrete legislative efforts, identify strengths and weaknesses of particular modes of implementation, and better fulfil its capacity-building role by transmitting its analysis to other Parties and across the Biosafety network. Second, Parties have an ongoing obligation to report to the Clearing-House any information on cases of illegal transboundary movement of LMOs pertaining to it – presumably because such illegal movement is detrimental to the integrity and aims of the regime.⁵⁷⁶ This may signal a shift in the focus of reporting obligations in highly-integrated regimes from a State focus to a regime-focus; rather than encompassing the content of international obligations of Parties, the scope of reporting may eventually come to include any information *relevant to the effectiveness of the regime*.

b) Horizontal and vertical monitoring

The three regimes under analysis all show awareness of a multiplicity of monitoring actors and, in more highly-integrated regimes, promise to integrate these actors into both horizontal and vertical monitoring mechanisms.

The *Non-compliance Procedure* of the *Montreal Protocol* seems to suggest that three actors within the regime have an interest in (although not a responsibility for) monitoring, insofar as these actors can trigger the non-compliance procedure of the regime. First, the Secretariat, presumably upon reviewing country reports, can seek further information and refer unresolved situations of possible non-compliance to the Meeting of the Parties.⁵⁷⁷ There is also a role for Parties in monitoring each others’ compliance, by referring their “reservations regarding another Party’s implementation of its obligations” to the Secretariat with corroborating information, for eventual referral to a non-compliance body.⁵⁷⁸ Finally, there is express recognition of the responsibility of Parties for self-monitoring.⁵⁷⁹ Where a Party has failed to comply fully with its obligations despite *bona fide* efforts, it may invoke the non-compliance mechanism by communicating with the Secretariat.⁵⁸⁰ Overall, then, monitoring actors are dispersed *horizontally* within the regime: non-complying Parties, other Parties, and intergovernmental bodies are involved. However, there is little suggestion of how the monitoring phase should be coordinated within the *Montreal Protocol* itself, except generally regarding the role of the Secretariat as recipient of national reports and summaries of activities. The focus is the detection and addressing of non-compliance – in a cooperative manner – rather than conceiving of the monitoring phase *itself* as a capacity-building exercise that reinforces compliance.

⁵⁷⁴ *Ibid.*, art. 20(3)(e).

⁵⁷⁵ *Ibid.*, arts. 20(3)(a), 11.

⁵⁷⁶ *Ibid.*, art. 25(3).

⁵⁷⁷ *Non-compliance Procedure*, *supra* note 119, art. 3.

⁵⁷⁸ *Ibid.*, arts. 1-2.

⁵⁷⁹ *Ibid.*, art. 4.

⁵⁸⁰ Incentives for self-monitoring and reporting are clearly present in the *Non-compliance Procedure*. Parties are assured that the Implementation Committee will first seek an “amicable solution” and that Parties involved in the non-compliance mechanism will be able to participate in the consideration of the situation by the Implementation Committee. Finally, the list of measures that may be taken by the Meeting of the Parties in respect of non-compliance includes the rendering of “appropriate assistance”, including technical and financial assistance. In practice, the use of financial assistance to address non-compliance is by far the most common measure applied by the Meeting of the Parties. See “Development of compliance procedures and mechanisms under the Cartagena Protocol on Biosafety” (Note by the Executive Secretary of the Intergovernmental Committee on the Cartagena Protocol), Provisional agenda item 4.5, UN Doc. UNEP/CBD/ICCP/1/7 (2000), online: Convention on Biological Diversity <<http://www.biodiv.org>> at para. 19 [hereinafter *Compliance Note*].

The dispersal of implementation in the *Desertification Convention*, through regional and sub-regional coordinating bodies, is paralleled by dispersal of monitoring on these levels.⁵⁸¹ Monitoring actors are thus dispersed *vertically* within this regime. The Convention is also relevant here in addressing the need for external facilitation of reporting, as a means of enhancing the effectiveness of monitoring. Coordinating responsibility is given to the Conference of the Parties to provide technical and financial assistance to affected country Parties in meeting their reporting obligations.⁵⁸² It is, however, questionable whether assigning a facilitative role to the same political body responsible for addressing non-compliance is conducive to capacity-building.

The *Cartagena Protocol* identifies Parties as the principal monitors of their own compliance.⁵⁸³ The non-compliance procedure of the *Cartagena Protocol* is still under development, so it is not clear whether other Parties and actors within the regime will be able to invoke the non-compliance procedure. Hence, it is difficult to determine whether these actors will have an interest in monitoring compliance, based on currently-available documents.⁵⁸⁴ However, it is likely that the Biosafety Clearing-House will act as the focal point for monitoring, through the extensive rules on information-exchange within the regime.⁵⁸⁵ Parties are required to provide some twenty types of information to the Clearing-House, regarding their actions, the operation of the Protocol, the “advanced informed agreement” procedure for import of LMOs, and means of facilitating the exchange of information for the purposes of capacity-building.⁵⁸⁶ The Clearing-House is thus vital to the monitoring phase, but the Protocol gives little guidance on the mechanisms by which information gathered in monitoring is to be distilled and addressed within the regime.

The emphasis of the *Cartagena Protocol* on the language of “information exchange” in describing the role of the Biosafety Clearing-House may assuage the ongoing discomfort of governments with third-party scrutiny of their international obligations. The designation of national central authorities and focal points⁵⁸⁷ encourages ongoing interaction with the Clearing-House; thus, monitoring will likely be strengthened as institutional relationships – and institutional “dialogue” – continue to develop.⁵⁸⁸ However, Sands rightly notes that “information exchange” and “reporting” are two distinct concepts.⁵⁸⁹ A key challenge will thus be to ensure that both information-exchange and firm reporting obligations are satisfied – the ISDL approach might address this challenge by gradually transforming institutional “dialogue” into a tool for capacity-building.⁵⁹⁰ In essence, compliance-coordinating bodies such as the Clearing-House would seek out every opportunity to strengthen the regime in their interaction with States by, for example, promulgating more effective surveillance, data-gathering and reporting techniques. Eventually, principles of participation and openness could be used to advocate for a role in monitoring for individuals and civil society organizations beyond their current role in implementation networks.⁵⁹¹

⁵⁸¹ *Ibid.*, Annex I, art. 18(5)(b).

⁵⁸² *Desertification Convention*, *supra* note 98, art. 26(7).

⁵⁸³ *Cartagena Protocol*, *supra* note 122, art. 33.

⁵⁸⁴ In a review of compliance mechanisms in several recent MEAs, the Executive Secretary of the Intergovernmental Committee for the Cartagena Protocol notes the reticence of government delegates to allow civil society and individuals to trigger the non-compliance mechanism of the *Montreal Protocol*. However, draft UNEP guidelines on the implementation of, and compliance with, multilateral environmental agreements prepared in December 1999 do envisage a role for civil society, the private sector and individuals in assist the monitoring of compliance. See *Compliance Note*, *supra* note 580 at paras. 27, 44.

⁵⁸⁵ *Cartagena Protocol*, *supra* note 122, art. 20. It is unlikely, however, that the Clearing-House will be responsible for administering the non-compliance mechanism. This possibility is not even considered in the *Compliance Note*, *ibid.*

⁵⁸⁶ See *Establishment Note*, *supra* note 511 at paras. 19-33.

⁵⁸⁷ *Cartagena Protocol*, *supra* note 122, art. 19.

⁵⁸⁸ See *Szász*, *supra* note 485 at 15.

⁵⁸⁹ *Sands*, *supra* note 98 at 598.

⁵⁹⁰ Further research is required on the issue of how consistently-implemented compliance-building mechanisms can gradually build towards the emergence of binding norms within ISDL. For discussion this dynamic type of dynamic structure, as exemplified in freshwater resources regimes, see *Toope*, *supra* note 475 at 105 and Brunnée & Toope, *Ecosystems*, *supra* note 442.

⁵⁹¹ Such arrangements exist under both the NAFTA Environmental Side Agreement and the Canada-Chile Environmental Side Agreement. On the importance and effectiveness of civil society participation in international environmental treaty regimes, see generally *Kiss & Shelton*, *supra* note 13 at 590.

The traditional understanding of enforcement in international law is strictly a question of which international actors can enforce the obligations of a State internationally, when that State has “failed to implement an international environmental obligation.”⁵⁹² However, enforcement of international environmental obligations *after the fact* of harm, and especially the attribution of State responsibility, may well be “irrelevant” once the breach of obligation, and subsequent harm, have come about.⁵⁹³ In this regard, Koskenniemi notes that damage to the environment is often irreparable and allocation of responsibility is not likely to encourage prevention. Also, the “quantification” of the environment through liability for harm fails to capture “the value of nature as a spiritual amenity, its value to future generations and even *less nature* as a value in itself”, regardless of instrumental use to humans.⁵⁹⁴ It seems, therefore, that the complex rules on State responsibility are likely an incomplete means of addressing situations of non-compliance within ISDL regimes.⁵⁹⁵ The focus of “enforcement” within ISDL shifts from reaction (punitive measures) to proaction (protective measures), and from the specific relief to individual actors – as embodied in obligations of cessation, restitution and compensation – to systematic relief that enhances the effectiveness of the entire regime. As we have already suggested, “enforcement” within ISDL regimes conveys a sense of action rather than sanction.

Highly-integrated ISDL regimes are distinctive in establishing a spectrum of enforcement measures to address possible non-compliance – cooperative and coercive, formal and informal, preventative and remedial, diplomatic and legal measures. This spectrum affords a certain *flexibility* to these regimes to address varied cases of non-compliance in light of the particular context of nonconforming Parties. Furthermore, ISDL regimes facilitate the *rapid and preventive deployment* of enforcement options. Finally, procedural values of *transparency* and *participation* are especially apparent. The three regimes under discussion display very similar characteristics in the enforcement phase – this is largely due to the innovative *Non-compliance Procedure* of the *Montreal Protocol*, a model that has been copied and adapted by the other highly-integrated regimes.⁵⁹⁶ Various enforcement measures in the *Montreal Protocol* and possibilities for the *Cartegena Protocol* are surveyed here.

a) A spectrum of enforcement measures

The *Non-compliance Procedure* of the *Montreal Protocol* is “an intra-regime, non-judicial, non-adversarial enforcement mechanism”.⁵⁹⁷ As such, it aims not to “establish guilt, but to identify solutions.”⁵⁹⁸ The

⁵⁹² *Sands, supra* note 98 at 148.

⁵⁹³ *Koskenniemi, supra* note 475 at 126.

⁵⁹⁴ *Ibid* [emphasis added]. He also points out that causal links are often difficult to establish in the context of transboundary environmental harms, and the rarity of actual judicial remedies.

⁵⁹⁵ On the potential for conflict between rules of state responsibility and general international law with the *Non-compliance Procedure* of the *Montreal Protocol*, see *ibid*. Regarding the utility of state responsibility, we must note certain recent, remarkable developments in the work of the International Law Commission’s *Articles on State Responsibility*, especially in the definition of an “injured State”, that could have wide-ranging consequences for enforcement of ISDL. The 1996 Report of the International Law Commission contains draft language that allows any Party to a multilateral treaty to gain standing as an injured State if a right infringed is stipulated as being “in the collective interest” of the Parties (art. 40). In the final version of the Articles, the Commission notes that the great difficulties in drafting a comprehensive meaning for “injured State”, owing to the technical and legal complexity of the subject matter, not based solely on customary law. Therefore, the Commission recommends a general, inclusive definition rather than the extensive, enumerated definition found in previous drafts. The new art. 43, seems to exclude a requirement of “injury”. To summarize roughly, where an obligation is owed to a group of States or to the “international community as a whole”, any State in that group or community “specifically affected” by a breach has standing. Where the breach of an obligation affects the “enjoyment of rights or performance of obligations” of that group of States or the “international community as a whole” any State in the group or community has standing. See *Cramford, supra* note 92. This requires further research from an ISDL perspective; see Part V, Crosscutting Issues, below.

⁵⁹⁶ See *Compliance Note, supra* note 580 at para. 14 *ff*.

⁵⁹⁷ *Nuruddin, supra* note 568 at 124.

⁵⁹⁸ *Ibid.* at 125.

enforcement measures available upon a finding of non-compliance by the Meeting of the Parties are established in an indicative list of measures. The first, and by far the most common in practice, is the rendering of “appropriate assistance”, including:

- Assistance for collection and reporting of data
- Technical assistance
- Technology transfer
- Information transfer & training
- Financial assistance

Financing of these cooperative measures falls within the mandate of the *Multilateral Fund*.⁵⁹⁹ Addressing a shortcoming in the original text, the *London Amendments* to the *Montreal Protocol* require that transfer of technology to developing countries occur under “fair and most favourable conditions”.⁶⁰⁰ This shows an awareness of the situational monopoly that exists when economically developed countries transfer technology to developing countries. From an ISDL perspective, these cooperative measures are all manifestations of capacity-building, and provide a framework to *enhance* compliance from the very existence of non-compliance, rather than simply terminate the non-compliance.

The introduction of an Implementation Committee within the *Montreal Protocol* regime is a novel approach: one body (made up of State representatives) to receive, consider and report on cases of non-compliance and mediate “an amicable solution” where possible, before referring cases to the full Meeting of the Parties for disposition.⁶⁰¹ This model is now widely applied.⁶⁰²

Other measures specifically listed include issuing cautions and suspension of specific rights and privileges under the Protocol; for example, those associated with industrial rationalization, consumption, trade, and use of the financial mechanism.⁶⁰³ There is also the possibility of action under article 4 of the *Montreal Protocol* to bar trade in controlled substances with non-Parties. However, these drastic measures have not been applied the typical case faced by the Implementation Committee – those of economies in transition failing to meet phase-out targets for controlled substances.⁶⁰⁴ However, the rhetorical value of coercive sanctions should not be underestimated. In recent decisions of the Meeting of the Parties on cases of non-compliance, the threat of coercive sanctions has been expressly invoked should Parties not attempt to comply in good faith.⁶⁰⁵ To conceive this as an “empty threat” that reflects the inability of international law to enforce norms is to misjudge the strength of rhetoric as a tool for shaping the behaviour of States.⁶⁰⁶

The *Cartagena Protocol* does not yet have a non-compliance mechanism; the Intergovernmental Committee is currently studying various options.⁶⁰⁷ Enabling provisions in the text do envisage “cooperative procedures and institutional mechanisms.”⁶⁰⁸ The broadest spectrum of enforcement options being studied is found in the *Draft Guidelines* of the UNEP Working Group of Experts on Enforcement and Implementation of Environmental Conventions.⁶⁰⁹ These harmonize well with the ISDL approach to compliance, and should be given further attention. Drawing on these proposals, enforcement options could include:

⁵⁹⁹ *Montreal Protocol*, *supra* note 119, art. 10.

⁶⁰⁰ *Ibid.*, art. 10A.

⁶⁰¹ *Non-compliance Procedure*, *supra* note 119, arts. 5, 7, 8.

⁶⁰² See e.g. the Multilateral Consultative Process of the *Climate Change Convention*, the UN-ECE *Convention on Long-Range Transboundary Air Pollution* and its various protocols, as well as the emerging approach of the *Basel Convention* and the *Kyoto Protocol*.

⁶⁰³ *Non-compliance Procedure*, Annex V, *supra* note 119 at para. A.

⁶⁰⁴ *Compliance Note*, *supra* note 580 at para. 19.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ See Brunée & Toope, *Interactional Theory*, *supra* note 7 at 64 *ff.*

⁶⁰⁷ See *ibid.*

⁶⁰⁸ *Cartagena Protocol*, *supra* note 122, art. 34.

⁶⁰⁹ See *Compliance Note*, *supra* note 580 at para. 27.

- Standard protocols for the reporting of data; as discussed below, this should be expanded to standardized methodologies throughout the regime, including scientific assessments
- Targeted investigations *in situ*; allowing for a fuller appreciation of country context and particular needs
- Technical and financial assistance and supply of equipment
- Economic incentives to encourage and reward ongoing compliance
- A “suite of sanctions” including exclusion from benefits of the regime,
- Formal and informal fora for accountability to peer nations, using diplomacy and rhetoric; and
- Inclusion of Implementation Committees in treaties, with provisions for specific non-compliance procedures

b) Rapid & Preventative Deployment

The experience of the *Non-compliance Procedure* of the *Montreal Protocol*, has shown that in practice, the use of cautions and suspensions is avoided in cases of *bona fide* attempts at compliance.⁶¹⁰ This is especially the case when the *Non-compliance Procedure* has been invoked by the non-complying Party itself, thus creating incentives for self-monitoring and rapid reporting. The Secretariat is required to report cases of “possible” non-compliance – this low threshold also shows the preventative focus of the *Non-compliance Procedure*.⁶¹¹ The procedure also sets strict timelines to address bureaucratic inefficiency in addressing non-compliance.⁶¹²

The *Cartagena Protocol* envisages certain subtle enforcement measures that are well-integrated in the overall regime and designed for preventative deployment. The first is the promotion of standardized methodologies in scientific assessment and reporting. The requirement of standard methodologies is another example of capacity-building. So, for example, risk assessment must be carried out “in a scientifically sound manner...taking into account recognized risk assessment techniques [and] available scientific evidence”.⁶¹³ Annexes detail the principles, methodologies and issues to consider in risk assessments, as well as listing specific information required for notifications of transboundary movement of LMOs.⁶¹⁴ These requirements reflect the requisite degree of precaution required to prevent lasting and devastating harm through uninformed transboundary movement. Parties are thus able to evaluate whether their internal regulatory framework is able to satisfy the requirements of standardized methodologies, and draw on centralized facilitation and assistance to improve that framework. This is a good example of a creative but unobtrusive means of *preventing* non-compliance that is both rigorous and supportive of the aims of the regime.

Another example of a preventative and rapid mechanism to address possible non-compliance is the introduction of the default, “backup” regulatory framework for countries lacking domestic regulation, as highlighted earlier.⁶¹⁵ This establishes a minimum standard of regulation as a *component* of the international regime agreed to by the Parties, ensuring that the means are in place to prevent non-compliance from the moment of ratification, even in the absence of full implementation. Thus, the linearity of implementation, monitoring and enforcement phases breaks down – these processes are largely contemporaneous.

⁶¹⁰ Nuruddin, *supra* note 568 at 126.

⁶¹¹ The threshold could also exist to avoid the discomfort of an unrepresentative entity prejudging the existence of non-compliance on the part of a State. Conclusive findings of non-compliance are almost exclusively the domain of political *fora* – in this case, the Meeting of the Parties.

⁶¹² For example, the Secretariat must convey submissions from other Parties regarding a Party’s non-compliance to that Party within two weeks, and the Implementation Committee must make its report within six weeks; *Non-compliance Procedure, supra* note 119, arts. 2, 9.

⁶¹³ *Cartagena Protocol, supra* note 122, art. 15.

⁶¹⁴ *Ibid.*, Annexes I, II, III.

⁶¹⁵ *Ibid.*, art. 11(6).

c) Transparency & Participation

Values of transparency and participation are especially vital in enforcement, to avoid creating mistrust or impressions of partiality that can de-legitimize the regime. This is manifest in the conciliatory approach of the Implementation Committee within the *Non-compliance Procedure* and the allocation of the decision-making function to the fully representative Meeting of the Parties.⁶¹⁶ These values are also operative in the express right of Parties involved in the procedure to make submissions and representations to the Implementation Committee,⁶¹⁷ and the subsequent bar on the participation of involved Parties in the elaboration of recommendations in the report on their case.⁶¹⁸ The report of the Implementation Committee is public, except any confidential information therein.⁶¹⁹ The Protocol does, therefore, promote a good degree of transparency; however, participation from an ISDL perspective extends to non-State stakeholders, and as such, would allocate a participatory role for civil society, the private sector and individuals within the *Non-compliance Procedure*.

The Executive Secretary of the ICCP has emphasized that “principles of timeliness, fairness, predictability, transparency and due process are deemed as essential underpinnings to...non-compliance regimes.”⁶²⁰ In elaborating a transparent and participatory non-compliance mechanism for the *Cartagena Protocol*, it may be appropriate to place an Implementation Committee as an independent section of the clearing-house mechanism of the Protocol. As the repository of implementation and monitoring information, focal point of the global biosafety network, and source of expertise on biosafety, the Biosafety Clearing House would be well-suited to include an effective and rapidly deployable non-compliance mechanism.

The phenomenon of Implementation Committees manifests a trend towards non-judicial, non-adversarial, cooperative enforcement mechanisms, drawing on measures aimed principally at capacity-building and, thus, well suited to enhance compliance with the regime.⁶²¹ These non-compliance mechanisms are exclusively intra-regime bodies, tailoring them to the particular types of non-compliance and means for addressing non-compliance that suit the regime. Two challenges for ISDL emerge to this approach to enforcement:

- structuring the interaction between specialized non-compliance mechanisms, dispute settlement mechanisms in more general framework convention, and principles of State responsibility and reparation for harm in general international law;⁶²² and
- delineating a clearer role for the International Court of Justice in the enforcement of ISDL, in light of a trend away from judicial dispute settlement, especially given the recent openness of the Court to the concept of sustainable development as an interstitial norm.⁶²³

Effective compliance within ISDL

Jacobson and Brown-Weiss propose a model that focuses on effectiveness of international regimes by analysing whether they (a) address *stated objectives*; and (b) address the *problems that led to the treaty* (to

⁶¹⁶ *Non-compliance Procedure*, *supra* note 119, art. 14, Annex V.

⁶¹⁷ *Ibid.*, art. 10.

⁶¹⁸ *Ibid.*, art. 11.

⁶¹⁹ *Ibid.*, art. 16.

⁶²⁰ *Compliance Note*, *supra* note 580 at para. 38.

⁶²¹ See *Kiss & Shelton*, *supra* note 13 at 588-89; *Compliance Note*, *ibid.* at para. 37.

⁶²² See *Koskenniemi*, *supra* note 475

⁶²³ The *Gabčíkovo-Nagymaros* case is a recent example of the key role of the ICJ in elaborating guiding concepts and principles that inspire ISDL, such as the principle of sustainable development, rights of future generations, and, in a concurring opinion, the precautionary principle and ongoing obligation of environmental impact assessments. On the transformational power of interstitial norms as applied in the *Gabčíkovo-Nagymaros* case, see *Lowe*, *supra* note 10.

generalize, the *problems that led to the regime*).⁶²⁴ The ISDL approach to compliance discussed above manifests a third element of effectiveness, namely a capacity within the regime to address *changing situations* by (a) developing new substantive norms within the regime, and (b) adapting its compliance framework as appropriate. Thus, the key benchmark of effective compliance in ISDL is the operation of a *self-reinforcing dynamic* within ISDL regimes.

ISDL regimes reinforce themselves through integrated approaches to compliance-building. Some principal mechanisms include:

- *Parallel implementation, monitoring and enforcement mechanisms* – implementation obligations are matched by associated monitoring and enforcement mechanisms. So, for example, the bifurcated obligations of implementation in the *Desertification Convention* for “affected country Parties” and “developed country Parties” are paralleled in specialized reporting obligations for each of those groups of actors. Specific cooperative enforcement mechanisms such as financial and technical assistance are also tailored to the capacities of the various Parties. By ensuring that implementation, monitoring and enforcement mechanisms parallel one another, the regime sends a consistent and persistent message that reinforces the fact that affected country Parties and developed country Parties are subject to specialized norms. This reinforces the regime in that compliance with these specialized norms will eventually reduce imbalances in available technology and resources between affected country and developed country Parties without advocating the unidirectional flow of aid.
- *Capacity-building* – the normative influence of capacity-building is also key to the self-reinforcing dynamic in ISDL regimes. Within the *Cartagena Protocol*, capacity-building is promoted across the implementation, monitoring and enforcement stages. When the risk of non-compliance and actual non-compliance are addressed through capacity-building mechanisms, highly integrated regimes are not restoring a *status quo ante* (as in obligations of restitution), but rather strengthening themselves through non-compliance. From an ISDL perspective, this is not at all paradoxical, but indicative of a self-reinforcing dynamic. The implications of this seeming paradox pose challenging questions about the meaning of normativity within ISDL. It exemplifies an “organic constructivism” that animates regime-building within ISDL.
- *Comprehensive regime review* – the *Cartagena Protocol* expressly requires that the Meeting of the Parties undertakes “an evaluation of the effectiveness of the Protocol, including an assessment of its procedures and annexes” every five years.⁶²⁵ Contrasted with the piecemeal development of elements of the *Montreal Protocol* regime, the *Cartagena Protocol* anticipates changes within the original framework of the regime. Another example would be the use of annexes for particularly dynamic requirements such as notifications and risk assessment procedures – “annexing for change” is a phenomenon that emerged in CITES and has contributed extensively to the adaptability of that regime. This space for comprehensive regime review underscores the organic nature of ISDL regimes – as Toope suggests, interaction within a regime, building shared experience and understandings may lead to the elaboration of more binding norms.⁶²⁶ The *Cartagena Protocol* builds in a mechanism for that process to take place, and exemplifies the operation of a self-reinforcing dynamic.

Drawing on the examples and case studies analysed above, several more general trends in ISDL approaches to compliance will be noted. These trends show the truly creative force of the fundamental tensions that animate ISDL.

⁶²⁴ Jacobson & Brown Weiss, *supra* note 479.

⁶²⁵ *Cartagena Protocol*, *supra* note 122, art. 35.

⁶²⁶ Brunée & Toope, *Interactional Theory*, *supra* note 7.

- *From “balanced governance” to self-governance:* *Agenda 21* calls for the “balanced governance” of instruments and agreements to reflect the “concerns & interests” of developing countries.⁶²⁷ Progressing from this “place at the table” for a category of “developing countries” in 1992, highly-integrated ISDL regimes have now recognized individual country contexts as a key variable to be addressed through flexible regimes. So, the *Cartagena Protocol* distinguishes between developing, less developed, small island developing countries and economies in transition where such distinctions are important to the effectiveness of the regime, however, awareness of country context beyond developmental status is also manifest. The *Desertification Convention* encourages regions, sub-regions, nations and local communities to identify and implement an integrated sustainable development agenda on multiple levels, while reinforcing international coordination. This is a key example of application of the subsidiarity principle to resolve the centralization/dispersal tension noted in the Introduction.
- *From treaty-monitoring bodies to compliance-coordinating bodies:* Regimes in the process of integration such as the *Montreal Protocol* mark a shift towards a role for IGOs in the coordination of compliance rather than the passive monitoring of treaty obligations. We can now speak of *compliance-coordinating bodies*; independent, intergovernmental institutions drawing on a level of moral authority and rhetorical power grounded in growing de-politicization of enforcement and overall legitimacy. In this process, sovereignty of States is freely delegated to intergovernmental bodies in the context of regimes firmly grounded in principles of precaution and prevention. This manifests the sovereignty/protection tension, and its resolution through the principle of delegation of sovereignty.
- *From individualized relief to systematic relief:* A further trend can be observed from limited, claim-dependent and claim-specific measures (generally coercive and by definition remedial in nature) to flexible, systematized and generally cooperative measures that consistently approach non-compliance by reinforcing the regime as a whole.
- *From reaction to proaction:* *Ex post facto* enforcement of obligations of cessation, restitution and compensation have been recognized as inadequate to address non-compliance in ISDL regimes. Distinctive ISDL approaches to compliance shift the paradigm from correction of harm through remedial sanctions to prevention of harm through information-exchange and cooperative measures. Further research is required on the divergence between the de-judicialisation of compliance-building within treaty-based regimes and the seemingly increasing role of judicial dispute settlement in customary regimes.

Case Study IV – Rights-based approaches in ISDL

This section will address the application of rights-based approaches to sustainable development, which gives effect to various ISDL principles, and will illustrate the intersection of human rights law with international economic and environmental law. In particular, this section focuses on the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, which is in the process of becoming a ‘highly integrated’ ISDL instrument, primarily due to its increasingly broad interpretation by its supervising treaty body,⁶²⁸ as well as efforts by a variety of States and non-state actors to invoke its provisions in environmental and economic contexts.

⁶²⁷ *Agenda 21*, *supra* note 48 at para. 39.1(c).

For example, the Committee on Economic, Social and Cultural Rights recently sent a public message to the organising committee of the World Summit for Sustainable Development indicating that the *ICESCR* was a critical instrument relating to the issues for discussion at the Summit, and should therefore not be ignored. See *Statement of the United Nations Committee on Economic, Social and Cultural Rights to the Commission on Sustainable Development acting as the Preparatory Committee for the World Summit for Sustainable Development*, 24 May 2002. The CESCR made a similar statement to the WTO Ministerial Round in Seattle: *Statement of*

International human rights law is increasingly being brought into play in sustainable development debates. In the context of treaty bodies, civil society actors have begun raising issues of environmental degradation and impoverishment, as such dynamics have affected vulnerable communities, with the result that such treaty bodies have produced concluding observations and general comments that address issues relating to the environmental and economic pillars of sustainable development. Similarly, institutions such as the Office of the High Commissioner for Human Rights have begun dialogues with economic and environmental organisations. In January 2002, a group of experts were jointly convened by the OHCHR and UNEP to set out principles to guide the integration of human rights and environment, in the context of sustainable development.⁶²⁹ Similarly, the OHCHR has begun work with the World Bank in clarifying the application of international human rights law in the context of country poverty reduction strategies.

This case study indicates that international human rights law has distinct implications for international sustainable development law (ISDL), through its intersection with international economic and environmental law. Human rights laws constitute pre-existing imperatives upon states, and have been invoked with the following effects:

- to provide further support for and generate further compliance with certain economic and environmental agreements;⁶³⁰
- to fill gaps in these treaties;
- to indicate ‘core’ and other obligations that require immediate implementation;
- to provide mechanisms to monitor sustainable development obligations, including the international human rights system, judiciaries⁶³¹ and human rights commissions;
- to spur the development of environmental and economic law and policy.

Human rights law provides the substantive legal basis for key principles of sustainable development. The International Law Association’s *Declaration on Principles of International Law related to Sustainable Development* states, “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.⁶³² Similarly, the conclusions of the OHCHR-UNEP experts session on human rights and environment, in the context of sustainable states “Poverty is at the center of a number of human rights violations and is at the same time a major obstacle to achieving sustainable development and environmental protection. A rights-based approach can enhance the impacts of policies and programmes at the national and international levels on this matter.”⁶³³

the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organisation (Seattle, 30 November to 3 December, 1999). UN. Doc. E.C.12/1999/9.

⁶²⁹ UN High Commissioner for Human Rights and the United Nations Environmental Programme, *Meeting of Experts on Human Rights and the Environment, 14-15 January, 2002: Conclusions*, online: OHCHR www.unhchr.ch/environment/conclusions [hereinafter OHCHR, *Conclusions*].

⁶³⁰ The rights focus carries connotations of unacceptability and necessarily requires the casting of responsibility. According to Boyle and Anderson, where a human right is put forward, it connotes a claim to an absolute entitlement that is “theoretically immune to the lobbying and trade-offs which characterize bureaucratic decision-making. Its power lies in its ability to trump individual greed and short-term thinking”; M. Anderson, “Human Rights Approaches to Environmental Protection: An Overview” in A. Boyle & M. Anderson, eds. *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon, 1996) at 21.

⁶³¹ As seen in particular in India and South Africa. See most recently, the *Treatment Action Campaign* case, Constitutional Court of South Africa, 8/02, decided 5 July 2002, upholding a lower court judgement requiring the provision of anti-retroviral drugs to pregnant HIV-positive women.

⁶³² *Supra* note 105 and accompanying text, Preamble.

⁶³³ OHCHR, *Conclusions*, *supra* note 629 at para. 18.1.

Human rights law related to the right to participation, provides support to the ISDL principle of public participation, and by extension to the principle of eradication of poverty. The right to participation is notably enshrined in the *International Covenant on Civil and Political Rights*. The rights in the *ICESCR* provide direct legal support particularly for the principle of equity and the eradication of poverty. Economic, social and cultural rights, in general, have been historically neglected by states, inter-governmental organisations and civil society organisations.⁶³⁴ However, towards the end of the 1990's, there was significant growth in the level of international attention given to economic, social and cultural rights, in particular by organisations such as the Office of the High Commissioner for Human Rights,⁶³⁵ the World Health Organisation, the World Bank, and the United Nations Development Programme⁶³⁶ A key institution that has provided much of the new thinking around such rights is the ECOSOC Committee on Economic, Social and Cultural Rights, an expert body that monitors the implementation of the *ICESCR*. At the domestic level, most constitutions enacted in the 1990s in developing countries include such rights.⁶³⁷

The *ICESCR* recognises a number of key rights that address the 'social' dimension of sustainable development, in particular poverty eradication. It recognises, *inter alia*, the following rights:

- The right to an adequate standard of living for every person, including adequate food, clothing and housing, and to the continuous improvement of living conditions.⁶³⁸ Under Article 11.2, the Covenant recognises the fundamental right of freedom from hunger. The latter obligation requires that States “individually and through international co-operation carry out measures to improve methods of production, conservation and distribution of food, [...] by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; and to ensure an equitable distribution of world food supplies in relation to need.”⁶³⁹
- The right to everyone to the enjoyment of the highest attainable standard of physical and mental health.⁶⁴⁰ The *ICESCR* specifies a number of steps to be taken by States to achieve this right, including, for example, the improvement of all aspects of environmental and industrial hygiene.⁶⁴¹ The right to health is also recognised in a number of related conventions.⁶⁴²
- The right to education.⁶⁴³

Obligations under the *ICESCR* exist in three forms:

⁶³⁴ Philip Alston, “The Fortieth Anniversary of the Universal Declaration” in John Berting et al, eds. *Human Rights in a Pluralist World, Individuals and Collectivities* (1990) at 12.

⁶³⁵ See, for example, *Statement by Mary Robinson, High Commissioner for Human Rights*, Preparatory Committee for the International Conference on Financing for Development, Third Session, 16 October, 2001. The Human Rights Commissioner’s role is to be the UN’s principal spokesperson on human rights, to act as the “world’s moral conscience,” and to link and strengthen the various UN human rights mechanisms.

⁶³⁶ United Nations Development Programme, *Human Development Report - 2000* (New York: Oxford, 2000) at 73 ff.

⁶³⁷ See for example, the Constitutions of South Africa, Namibia, Ethiopia, Ghana and the draft constitution of Sri Lanka.

⁶³⁸ *ICESCR*, *supra* note 20, art. 11. The right to an adequate standard of living is also recognised in the *UDHR*, *supra* note 21, art. 25.1.

⁶³⁹ *ICESCR*, *ibid.*, art. 11 (2) (b).

⁶⁴⁰ *ICESCR*, *ibid.*, art 12.1.

⁶⁴¹ *Ibid.*, art. 12.2.

⁶⁴² *UDHR*, *supra* note 21, art. 25.1, *ICCPR*, *supra* note 19, art. 6(1) (The right to life). In addition, as noted above, the right to life, as part of the *ICCPR*, requires positive measures, which, according to the Human Rights Committee, should include measures to eliminate epidemics, Human Rights Committee, *General Comment No. 6*, UN GAOR, 1982, Supp. No. 40, UN Doc. A/37/40 at para. 5.

⁶⁴³ *ICESCR*, *supra* note 20, art 13, see also the *UDHR*, *supra* note 21, art. 26.

- 1) States have an obligation to *respect* the rights, by not taking any action to prevent individuals access their rights;
- 2) They must *protect* this right by taking measures to ensure that enterprises or individuals do not deprive individuals of their rights; and
- 3) States have an obligation to *fulfil* these rights, by pro-actively taking steps to strengthen peoples' access to resources and means to secure their livelihood, and by providing such resources directly where an individual or group, for reasons beyond their control, cannot enjoy their rights.⁶⁴⁴

It should be noted that the obligations of States are extensive. For example, effective implementation of the right to food requires full compliance with principles, *inter alia*, of people's participation, decentralization, transparency, independence of the judiciary, etc.⁶⁴⁵ Since these processes are not related to resource constraints, they are to be implemented immediately.

The *ICESCR* requires that State Parties "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures, economic, social and cultural rights be realised progressively, to the maximum of available resources."⁶⁴⁶ Such 'progressive obligations' nevertheless consist of certain immediate requirements: that there not be discrimination in implementation of the rights, and that policies be implemented immediately with a view to progressively realise the rights contained in the *ICESCR*.

In addition, the content of 'progressive obligations' has been clarified and developed by international organisations, in particular the Committee on Economic, Social and Cultural Rights (CESCR), the United Nations ECOSOC body of independent experts that monitors the Covenant. A key concept is that of 'minimum core obligations,' set out by the *CESCR*:

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary care, of basic shelter and housing or of the most basic forms of education is *prima facie* failing to discharge its obligations under the *ICESCR*... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁶⁴⁷

⁶⁴⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Food* at para. 15 [hereinafter CESCR, *General Comment 12*].

⁶⁴⁵ *Ibid.*, para. 23.

⁶⁴⁶ *ICESCR*, *supra* note 20, art. 2.1. A similar limitation on economic, social and cultural rights, albeit broader, exists in the Universal Declaration on Human Rights, which states in Article 22; "Persons are entitled to realization of their economic and social rights "through national effort and international co-operation and in accordance with the organization and resources of each State."

⁶⁴⁷ Committee on Economic, Social and Cultural Rights, *General Comment No.3*, UN ESCOR, 1990, UN Doc. E /1991/23 at para. 10 [hereinafter CESCR, *General Comment 3*]. See also the list of obligations in 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. 43-44 [hereinafter CESCR, *General Comment 14*]. In this comment, at para. 47, the CESCR has stated that such core obligations are 'non-derogable' and that a state party cannot, under any circumstances whatsoever, justify its non-compliance with core obligations. The General Comments and statements of the CESCR serve as mainly persuasive authority as to the interpretation of the *ICESCR*. Nevertheless, given the reporting aspect of the *ICESCR*, the views of the Committee will determine the direction of the *ICESCR*'s development.

A key point that should be noted is that economic, social and cultural rights apply in conjunction with other rights related to civil and political rights, and the right to development. Poverty must be addressed at its roots by overcoming the constraints that give rise to it rather than merely treating the symptoms of poverty through welfare transfers.⁶⁴⁸ On this point, the CESCR has indicated that non-discrimination and the broad range of human rights, including the right to meaningful participation, are critical to the successful realisation of any anti-poverty programme.⁶⁴⁹

The Covenant therefore consists of principles that have extremely significant, and broad ranging implications for State Parties, as they relate to ‘social’ law on poverty eradication.⁶⁵⁰ The broad range of economic, social and cultural rights lend themselves to application outside the realm of social law, where environmental or economic issues intersect with basic economic, social and cultural rights.

The ICESCR and International Economic Law

Human rights obligations ratified by States apply domestically as well as internationally. According to article 28 of the *Universal Declaration of Human Rights*; “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.” Similarly, under the *ICESCR*, state obligations are joint since states commit to take steps “individually and through international assistance and co-operation.”⁶⁵¹ In particular, the *ICESCR* requires states to “ensure an equitable distribution of world supplies in relation to need.”⁶⁵²

According to the CESCR, “international cooperation for development and thus for the realisation of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States that are in a position to assist others in this regard.”⁶⁵³ However, while the existence of some legal obligation in relation to international cooperation is therefore clear, the particular content of this obligation has been the object of much controversy and requires further analysis.⁶⁵⁴

International obligations, although different from domestic obligations, may similarly be classified as obligations *to respect*, *to protect* and *to fulfil* economic, social and cultural rights. The latter, the obligation ‘to fulfil’, is particularly controversial. It is difficult to show that these clauses create a legally binding obligation upon any particular State to provide any particular form of assistance to another.⁶⁵⁵ Nevertheless, in certain circumstances, it may be possible to identify obligations to cooperate

⁶⁴⁸ N. Singh and R. Strickland, “Sustainable Development, Poverty Eradication and Macro/Micro Policy Adjustments: An Overview” in N. Singh & R. Strickland, eds. *From Legacy to Vision: Sustainability, Poverty and Policy Adjustment* (Winnipeg: International Institute for Sustainable Development, 1996) at 33.

⁶⁴⁹ *CESCR Poverty Statement*, supra note 203, paras 10-13.

⁶⁵⁰ In addition, the rights it upholds are referred to in other treaties, such as the *Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention on the Elimination of Discrimination Against Women* and the *Convention on the Rights of the Child*, as well as in General Assembly Declarations, in particular the *UDHR*.

⁶⁵¹ *ICESCR*, supra note 20, art. 2 (1).

⁶⁵² *Ibid.*, art. 11 (2) (b).

⁶⁵³ CESCR, *General Comment 3*, supra note 647 at para. 14. This commitment exists in arts. 2(1), 11, 15, 22 & 23 of the *ICESCR*.

⁶⁵⁴ M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon, 1995) at 147 & 149 [hereinafter *Craven*].

⁶⁵⁵ See *ibid* at 149, and P. Alston & G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 156 at 186-191. The countries that negotiated the *Covenant* stated that developing countries could not claim aid as a legal right, which is relevant as a supplementary means of interpreting the terms of the *Covenant*. However, other factors are relevant. Under the Vienna Convention on the Law of Treaties, the *ICESCR* should be interpreted in good faith with regard to its ordinary meaning, the object and purpose, the preparatory work and the relevant practice. See *Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights*, (1987), U.N. Doc. E/CN.4/1987/17, para. 4 [hereinafter *Limburg Principles*]. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980) [hereinafter *VCLT*]. The *VCLT*, at articles 31-33, also permits account to be taken of any relevant rules of international law applicable in relations between the Parties (such rules could include the *UN Charter* and the *UDHR*), and any subsequent practise in its application that establishes the agreement of the Parties regarding its interpretation.

internationally that would appear to be mandatory.⁶⁵⁶ For example, it has been suggested that a State could be viewed as not complying with its *ICESCR* obligations if the amount of aid it provided to other countries declined over a number of years.⁶⁵⁷ Finally, the text of the *ICESCR* clearly mandates international cooperation to ensure an equitable distribution of world food supplies in relation to need.⁶⁵⁸

The CESCR's statement on poverty and the *ICESCR* itself elaborate on this notion by adding the concept of an 'international minimum threshold':

When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect. In accordance with General Comment No. 14, it is particularly incumbent on all those who can assist, to help developing countries respect this international minimum threshold. If a national or international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State party.⁶⁵⁹

This suggests a process to delineate the extent of international obligations relative to domestic obligations. If international anti-poverty strategies must 'enable' developing countries to meet their core obligations under the *ICESCR*, the international community would be responsible for raising the resources that developing countries – in particular the lesser developing countries – clearly require, in addition to their available domestic resources, in order to meet such core obligations. The *ICESCR* does not impose any particular obligation on any one country to provide aid to another, nor does it require any specific policy choices. However, it does require that the State Parties individually and collectively take necessary actions consistent with the Covenant to ensure, as stated in the *UDHR*, that international co-operation and assistance be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the *ICESCR* can be fully realised.⁶⁶⁰

An inter-related obligation is the requirement that – in the same manner as domestic resources – international assistance (aid and/or debt relief) corresponding to *ICESCR* obligations be targeted towards the most vulnerable populations.⁶⁶¹ This obligation is of significant concern since it has been estimated that historically, and presently, international assistance is not focused on the most needy states, or on the most needy populations within them.⁶⁶² The obligation upon developed countries is particularly clear since failures to target aid may not be excused by claiming a 'lack of available resources.'

⁶⁵⁶ P. Alston & G. Quinn, *ibid* at 191.

⁶⁵⁷ Craven also suggest that standards could be set by the CESCR with reference to the resources required to meet the challenge of global poverty, *supra* note 654 at 150.

⁶⁵⁸ Article 11.2 requires that states "individually and through international co-operation, [undertake] the measures, including specific programmes, which are needed ... to ensure an equitable distribution of world food supplies in relation to need."

⁶⁵⁹ *CESCR Poverty Statement*, *supra* note 203 at para. 20. Minimum core obligations in the domestic context were explained as necessary since: "If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*." (see CESCR, *General Comment 3*, *supra* note 647 at para. 10). An analogical argument may apply at the international level. Unless international obligations do not exist to compensate for the inability of a domestic party to meet its core obligations, references to international cooperation in the *ICESCR* would be of little relevance in light of the *ICESCR*'s purpose, which is to ensure the realisation of economic, social and cultural rights for all in accordance with the commitments in the *UN Charter* and the *UDHR*. Preambulatory paragraph 3 of the *ICESCR* states, "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."

⁶⁶⁰ As stated in the *Limburg Principles*, *supra* note 655 at para. 30.

⁶⁶¹ The CESCR has stressed, for example in the context of the right to housing, that international assistance should be focused on the most disadvantaged groups. *General Comment No. 4: The Right to Adequate Shelter*, E/1992/23-E/C.12/1991/4.annex III at para. 19. The *Limburg Principles*, *supra* note 655, state; "international cooperation must be directed towards the establishment of a social and economic order in which the rights and freedoms in the Covenant can be fully realized (cf. Art. 28, *UDHR*)."

⁶⁶² In 1995, it was estimated that twice as much overseas development assistance (ODA) per capita went to countries including the wealthiest 40% of people in the developing world as opposed to the poorest 40%. Less than 7% of bilateral ODA was directed to human development concerns - primary health care, basic education, safe drinking water, etc. M. Ul-Haq, *Reflections on Human Development*, (New York: Oxford, 1995) at 35.

In contrast to obligations to fulfil economic, social and cultural rights, duties to respect and protect the rights of persons in other countries are probably the most easily justified aspects of international obligations. International lending institutions are required to respect the economic, social and cultural rights in the context of their imposition of structural adjustment programmes.⁶⁶³ Similarly, it has been suggested that states have a duty to ensure that all bodies subject to their control respect the enjoyment of rights in other countries. This would apply to the voting of states in international organisations and the regulation of multinational companies based in their countries.⁶⁶⁴

In addition, the obligations under the *ICESCR* require that measures be urgently taken to remove global structural obstacles, such as unsustainable foreign debt.⁶⁶⁵ For example, the right to food requires that international lending agencies pay attention to the right to food in their lending and credit agreements, and in international measures to address the debt crisis.⁶⁶⁶

The *ICESCR*, along with other human rights conventions, declarations and customary law, thus represent a significant body of law that exist in uneasy contradiction with international financial and trade law and practise. The decade of the 1990s has seen some sporadic attempts by inter-governmental bodies, and non-governmental organisations to begin addressing the relationship between human rights and international economic law. Growing receptiveness of some international financial institutions to such legal resources may give way to greater development of the intersections between these two domains.

The ICESCR and International Environment Law

The *ICESCR* has broad applications to environmental issues. According to the *ICESCR*, the notion of sustainability is intrinsically linked to the right to food, or food security, implying that food must be accessible for both future and present generations.⁶⁶⁷ The drafting history and wording of these two articles acknowledge that the right to health includes a wide range of socio-economic conditions that promote conditions in which people can lead a healthy life, and also extends to the underlying determinants of health, including a healthy environment.⁶⁶⁸ In particular, Article 12.2 (b) which refers to “the improvement of all aspects of environmental and industrial hygiene” is understood by the Committee to require the reduction of all detrimental environmental conditions that directly or indirectly impact upon human health.⁶⁶⁹ The Human Rights Committee has taken a similar approach in relation to the *ICCPR*.⁶⁷⁰ Certain forms of environmental degradation and environmental policies will violate the right to non-discrimination.

In relation to health, the *ICESCR* has identified a number of acts that may constitute violations including: “the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.”⁶⁷¹ It should be noted that the right to health also includes international

⁶⁶³ Committee on Economic, Social and Cultural Rights, *General Comment No.2*, UN ESCOR, 1990, UN Doc. E/1990/23, at para. 9 [hereinafter *ICESCR, General Comment 2*].

⁶⁶⁴ Craven, *supra* note 654 at 148. In relation to membership in international organisations, see *General Comment No. 2, ibid.*

⁶⁶⁵ *ICESCR Poverty Statement*, *supra* note 203 at para. 21. In addition, *ICESCR General Comment No.2, supra* note 663, refers to the possible need for debt relief initiatives. Debt repayments have at times amounted to between 69% to 200% of their combined health, education and social expenditure, as has been the case of Zambia, as stated in Commission on Human Rights, *Joint Report by the Independent Expert on Structural Adjustment Programmes and the Special Rapporteur on Foreign Debt*, UN ESCOR, 2000, UN Doc. E/CN.4/2000/51 at para 17.

⁶⁶⁶ *ICESCR, General Comment 12, supra* note 644 at para. 41.

⁶⁶⁷ *Ibid.* at para. 7.

⁶⁶⁸ *Ibid.* at para. 4.

⁶⁶⁹ *Ibid.*, para. 14.

⁶⁷⁰ The Committee has consistently sought information on specific measures in the field of public health, including environmental matter such as the registration and transportation of nuclear waste. However, there remain doubts as to whether such rights are to be realised immediately or progressively, R. Churchill, “Environmental Rights in Existing Human Rights Treaties” in A. Boyle & M. Anderson, eds. *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon, 1996) at 90.

⁶⁷¹ *ICESCR, General Comment No.14, supra* note 647 at para. para. 51. The *ICESCR* states (at para. 39) that states are must prevent third Parties from violating the right to health in other countries, if they are able to influence these third Parties by way of legal

obligations. State Parties have to respect the right to health in other countries and the obligation to prevent third Parties from violating the right to health in other countries, if they have legal or political influence over such Parties. State Parties also have the obligation to ensure that the right to health is given due attention in international instruments.⁶⁷²

One may argue that the *ICESCR* constitutes the juridical basis for the right to a healthy environment. Alston suggests that there is little to support the claim that the right to a healthy environment, as currently formulated, goes beyond rights that are protected under existing treaties. Indeed, many scholars go further to note that the right to a healthy environment *could not* significantly move beyond existing rights.⁶⁷³ Without delving into this controversial issue too deeply, this indicates that the *ICESCR* constitutes at the least a key resource in addressing environmental issues. Its application to climate change and to desertification, discussed below, indicates its concrete effects.

Applications of the ICESCR to Climate Change

This sub-section indicates the effects of climate change in exacerbating poverty and in causing further impoverishment. As such, human rights instruments provide a mechanism to support and monitor the mitigation of climate change. However, such instruments also indicate approaches to support the growing awareness of the need to address vulnerable communities that are most likely to be affected by climate change. Furthermore, human rights instruments require that measures to combat climate change take full account of the needs of the poor.

Climate change will result in a general reduction in crop yields for most projected increases in temperature, in most tropical and sub-tropical regions.⁶⁷⁴ It will also lead to an increase in food prices. Furthermore, there is evidence (which still requires further research) that climate change will lower the incomes of vulnerable populations and increase the absolute number of people at risk of hunger. It has been established, though incompletely, that climate change will worsen food security in Africa.⁶⁷⁵

Some of the processes that would affect agriculture include soil erosion, increased flooding, landslides, avalanches and mudslide damage as a result of more intense precipitation, heat waves,⁶⁷⁶ and decreased water availability in many water-scarce regions, particularly in the sub-tropics.⁶⁷⁷ Climatic variations are expected to exacerbate desertification caused by human activities.⁶⁷⁸

In addition, one of the likely consequences of climate change is an increase in the number of people exposed to vector borne diseases such as malaria and water-borne diseases, such as cholera.⁶⁷⁹ In general, the impacts of climate extremes are expected to fall disproportionately on the poor. This is because tropical regions, and primarily Africa will be the most affected by climate change, and further because poorer peoples and states are less able to adapt to climate change.⁶⁸⁰ Flooding over the next 80 years could

or political means. However, it further states (at para. 51) that a state violates its obligations when it fails to take all necessary measures to safeguard *persons within their jurisdiction* from infringements of the right to health.

⁶⁷² *Ibid.*, para. 39.

⁶⁷³ P. Alston, "Peoples' Rights: Their Rise and Fall" in P. Alston, ed. *Peoples' Rights* (Oxford: Oxford University, 2001) at 282-283. See also on this point, D. Shelton, "Environmental Rights" in P. Alston, ed. *Peoples' Rights* (Oxford: Oxford University, 2001) at 233-236.

⁶⁷⁴ Intergovernmental Panel on Climate Change, Third Assessment Report, Working Group II, *Climate Change 2001: Impacts, Adaptation and Vulnerability*, 13-16 February 2001, online: <http://www.ipcc.ch> at 5. The IPCC's formulations include projections for the upper and lower estimated ranges of possible temperature increases [hereinafter IPCC, *Impacts*].

⁶⁷⁵ *Ibid.*, at 11.

⁶⁷⁶ *Ibid.*, at 7.

⁶⁷⁷ *Ibid.*, at 5.

⁶⁷⁸ United Nations Environmental Programme, Report of the Executive Director, *Status of Desertification and Implementation of the United Nations Plan of Action to Combat Desertification*, UNEP/GCSS.III/3. at 3 [hereinafter UNEP, *Desertification*].

⁶⁷⁹ IPCC, *Impacts*, *supra* note 674 at 5.

⁶⁸⁰ *Ibid.*, at 6-8.

displace between 75 million to 200 million people, in most cases destroying their shelter and means of livelihood.⁶⁸¹

Climate change therefore clearly impacts on key human rights, such as the rights to health, food and an adequate standard of living. International law on climate change has been relatively conservative in protecting such rights. The *United Nations Framework Convention on Climate Change (UNFCCC)* envisages a reduction in carbon emissions that would prevent dangerous anthropogenic interference with the atmosphere as an ultimate objective.⁶⁸² However, both the *Climate Change Convention* and *Kyoto Protocol* clearly do not come close to this target.⁶⁸³ The *Kyoto Protocol's* key commitment is to achieve stabilisation for developed states at 5 % below 1990 levels between 2008 and 2012,⁶⁸⁴ a goal later reduced to 2-3% reductions for State Parties. However, according to the Intergovernmental Panel on Climate Change (IPCC), stabilisation would require a very significant reduction in world carbon emissions levels from 1990 levels.

If considered in the context of climate change, the *ICESCR* would impose obligations upon States to be responsible for the damage they cause to the rights of persons in other States (i.e. they will have violated their obligation to *protect* the rights of persons in other States from the actions of persons within their jurisdiction). In relation to both of the above decisions, the greater resources of more economically advanced states will place much of the burden on them.⁶⁸⁵ The result is similar to that which would have been achieved by the principle of common but differentiated responsibilities.⁶⁸⁶

Human rights imperatives related to poverty eradication will require that some care be taken in the design of laws relating to climate change. Some reduction in emissions may negatively affect the right to an adequate standard of living, for the poor. For example, the State Parties to the *Kyoto Protocol* commit to the “progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments.”⁶⁸⁷ The reduction of energy subsidies could be very significant for lower income groups, especially in relation to transport and heating costs. This effect can be prevented or minimised by structuring emissions reductions programmes so that they do not unduly impact upon the standard of living of the poor⁶⁸⁸ and by instituting employment programmes for displaced workers and other such affected persons, at least to the extent permitted by the availability of resources. Such an approach requires a move away from subsidies that apply to the general population, and limitation of such benefits to the poor, quite consistent with the ‘priority to the poor’ focus of sustainable development.

The Protocol does not refer to poor-friendly strategies; which would have been useful. However, the *Protocol* does not take away from the ability of countries to provide appropriate exemptions for vulnerable groups – and instead to shift the costs elsewhere. This exclusion may become more problematic in the future when developing countries commit to emissions reduction targets. A growing contributor to

⁶⁸¹ *Ibid.*, at 13.

⁶⁸² *Climate Change Convention*, *supra* note 98, art. 2.

⁶⁸³ Third Assessment Report, Working Group III, *Climate Change 2001: Mitigation*, online: <http://www.ipcc.ch> at 5 [hereinafter IPCC, *Mitigation*].

⁶⁸⁴ *Kyoto Protocol*, *supra* note 111, art. 3.1.

⁶⁸⁵ It is estimated that the costs of meeting the proposed Kyoto commitments for Annex B states would be between 0.1% and 1.1% of GDP. IPCC, *Mitigation* *supra* note 683 at 8. Even with a doubling of such costs, the funds could be raised through a modest increase in taxes on wealthier groups.

⁶⁸⁶ See for more information on this principle as an element of ISDL, see Part III, section 3. The principle is reflected in Article 3.1 of the *Climate Change Convention*, *supra* note 98, which requires states to protect the atmosphere on the basis of “equity and in accordance with their common but differentiated responsibilities and respective capabilities.”

⁶⁸⁷ *Ibid.* art. 2(v).

⁶⁸⁸ An example would be to use the proceeds from carbon taxes to compensate negatively affected low-income groups. IPCC, *Mitigation*, *supra* note 683 at 9.

greenhouse gases is methane produced by animal husbandry and rice cultivation.⁶⁸⁹ Developing countries can argue that they may not be in a position to compensate for methane emissions with reductions in other parts of their economies, and would therefore have to limit the ‘survival emissions’ of rural producers – which would impoverish rural communities, undermining food security.

The second poverty eradication element to be considered in climate change is to support vulnerable communities adapt to climate change and to mitigate the effects of climate change upon them. Prevention of extensive climate change could be considered *prima facie* to constitute a minimum core obligation under the *ICESCR*, given that the poorer sectors of society are likely to be the first affected by climate change and will also be affected to the greatest extent. However, it is clear that adaptation and mitigation strategies are an element of a state’s core obligations under the *ICESCR*, particularly given that climate change has already begun to cause damage and cannot be reversed, at least in the short term. To make this statement does not imply a simple endorsement of adaptive measures as an alternative to prevention of climate change. From a pragmatic point of view, the need to adaptive and mitigating measures will be of growing importance given that greenhouse gas emissions are rising and will continue to rise in most States in the near future. It is therefore important to focus on adaptation as a means to protect human rights in the context of climate change.

The need for a focus on adaptation is reflected in the *Climate Change Convention*, which requires developed countries to assist developing countries that are particularly vulnerable to the adverse effects of climate change to meet the cost of adaptation to these adverse effects.⁶⁹⁰ This assistance is not based on set amounts. However, a good faith interpretation of the *Climate Change Convention* would require that some substantial assistance be given.⁶⁹¹ The application of human rights law to this issue would bolster and even extend the obligations of States in relation to climate change. Internationally, the *ICESCR* places a general responsibility on developed states to assist developing states in times of emergency.⁶⁹² In addition, under the *ICESCR*, the more developed states – who have disproportionately contributed to climate change – could be held to have violated the economic and social rights of individuals and groups in poorer countries who are affected by climate change. The logical step is to insist that each of these States would be required, under Article 2.1 of the *ICESCR* to take action to repair the damage that it had caused.

The human rights approach would also require remedial actions to be taken domestically. Climate change impacts particularly affect the poorer States and the most economically vulnerable within each State. Under the *ICESCR*, it is precisely such groups who must be prioritised by States in situations where such conditions occur. The Committee on Economic, Social and Cultural Rights states in relation to the right to food: “even where a State faces severe resource constraints, whether caused by [...] climatic conditions or other factors, measures should be taken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.”⁶⁹³ Such obligations certainly apply to the other rights related to poverty, such as the right to an adequate standard of living and the right to health.

The analysis of the *ICESCR* and climate change is an example of the potential integration of social law, in particular human rights law, with environmental issue.

Applications of the ICESCR to Desertification

⁶⁸⁹ About 75% of the increase in emissions since 1750 have been caused by industrial emissions and the rest by changes in land-use patterns, such as deforestation Intergovernmental Panel on Climate Change, Third Assessment Report, Working Group I, *Climate Change 2001: The Scientific Basis*, online: <http://www.ipcc.ch> at 7.

⁶⁹⁰ *Climate Change Convention*, *supra* note 98, art. 4.4.

⁶⁹¹ Such an obligation may be seen in light of the principle to not cause environmental harm (or disproportionate harm), the violation of which could lead to the invocation of state responsibility, thereby requiring compensation. As recognised by the Permanent Court of International Justice in *Chorzow Factory Case (Indemnity) (Germany v. Poland)* (1928), P.C.I.J. (Ser. A), No. 17 at 29. The obligation to interpret treaties in good faith is contained in the *VCLT*, *supra* note 655, art. 31.

⁶⁹² CESCR, *Gen. Comment 14*, *supra* note 647, para. 40.

⁶⁹³ CESCR, *Gen. Comment 12*, *supra* note 644, para. 28.

As with climate change, desertification is a phenomenon that has a critical impact on the existence of poverty. The United Nations Environment Programme estimates that 70% of the world's dryland is threatened by desertification. These drylands account for one-fifth of the world's population⁶⁹⁴ and generate one-fifth of the world's agricultural output.⁶⁹⁵ Desertification will undermine the access to food of families that depend on farming, either as a source of their food or as a source of core income.

About \$42 billion annually is lost as a result of desertification, primarily in Africa (of which 70% of the land is dryland) and Asia. Most of this loss is borne by people at the lower end of the income spectrum.⁶⁹⁶ It is unfortunate that it is least developed countries that are the most threatened by desertification. Those states with annual per capita incomes of less than \$500 make up 20% of the total land area of developing countries, yet comprise 63% of the drylands of all developing countries.⁶⁹⁷ Desertification forces farmers to give up their property, their housing and social networks and to relocate. It is estimated that 135 million people may get displaced due to desertification in this way, including at least one sixth of the population of Niger and Burkina Faso.⁶⁹⁸

As with climate change, addressing desertification will require sensitivity to the interests of the poor. In contrast, however, the eradication of poverty is probably a prerequisite to addressing desertification. The *Desertification Convention*⁶⁹⁹ can be identified as a good example of an attempt to address questions of marginalisation within the sphere of environmental protection.

The *Desertification Convention* explicitly requires that states pay special attention to the socio-economic factors contributing to the desertification process,⁷⁰⁰ that they integrate strategies for poverty eradication into efforts to combat desertification⁷⁰¹ and that they improve national economic environments with a view to eradicating poverty and ensuring food security.⁷⁰²

The Convention addresses the imperative of ensuring greater participation in decision-making.⁷⁰³ This characteristic reflects the lessons of previous experiences where large government desertification programmes had attempted to organise and educate rather than to cooperate with affected communities.⁷⁰⁴ The Implementation Annex for Africa in the *Desertification Convention* goes further than the Convention itself, as it encourages “a policy of active decentralization, devolving responsibility for management and decision-making to local authorities.”⁷⁰⁵ In the Annex for Africa, States also commit to adjusting regulatory frameworks of natural resources management to provide security of land tenure for local populations.⁷⁰⁶ Furthermore, they commit to putting in place “price and tax policies and commercial practices that promote growth.”⁷⁰⁷

In relation to ensuring adequate financing for desertification programmes, the *Desertification Convention* requires that Parties “taking into account their capabilities, shall make every effort to ensure that adequate

⁶⁹⁴ UNEP, *Desertification supra* note 678 at xiii.

⁶⁹⁵ R. Heathcote, *The Arid Lands: Their Use and Abuse* (Tokyo, United Nations University, 1983) at 296

⁶⁹⁶ H. Dregne et al. “A New Assessment of the World Status of Desertification” (1991) 20 *Desertification Control Bulletin* 6.

⁶⁹⁷ R. Kates & V. Haaman, “Where the Poor Live” (1992) 33 *Environment* 1 at 5,7.

⁶⁹⁸ K. Danish “International Environmental Law and the “Bottom-Up” Approach: A Review of the Desertification Convention” (1995) 3 *Ind. J. Global Leg. Stud.* 133 at 138 [hereinafter *Danish*].

⁶⁹⁹ *Desertification Convention, supra* note 98.

⁷⁰⁰ *Ibid.*, Art. 5 (c).

⁷⁰¹ *Ibid.*, Art. 2 (c).

⁷⁰² *Ibid.*, Art. 10.4.

⁷⁰³ *Ibid.*, Arts. 5 (d), 10 (f).

⁷⁰⁴ *Danish, supra* note 698 at 143-148.

⁷⁰⁵ *Desertification Convention, supra* note 98, Annex 1: Regional Implementation Annex for Africa, [hereinafter *Desertification Convention, Africa Annex*], art. 5.1 (b).

⁷⁰⁶ *Desertification Convention, Africa Annex, ibid.*, art. 8 (c) (iii).

⁷⁰⁷ *Ibid.*, art. 8 (a) (ii).

financial resources are available for programmes to combat desertification and combat the effects of drought.”⁷⁰⁸ Under the terms of the Convention, developed countries undertake to mobilize “substantial financial resources including grants and concessional loans”⁷⁰⁹ and to facilitate the transfer of technology.⁷¹⁰ The first of these, as a matter of treaty interpretation does appear to be a concrete obligation, since the use of the term ‘substantial’ would have to be interpreted in good faith.⁷¹¹ It should be noted, however, that in the Annex related to Africa, developed states undertake to *increase* resources granted to the continent for desertification initiatives, although the exact amount is not stated.⁷¹²

Developed states also undertake “to promote the mobilization of adequate, timely and predictable financial resources, including new and additional financing from the Global Environmental Facility of the agreed incremental costs of those activities concerning desertification that relate to its four focal areas”⁷¹³ (i.e. ozone layer, greenhouse gas emissions, protection of biodiversity and protection of international waters). There is a tangible link between these issues because desertification leads to the loss of indigenous wild plant species. The loss of such species will in turn undermine the survival of other species that rely upon them as habitat or food supply.⁷¹⁴ Consequently, the loss of plant life occasioned by desertification will increase climate change, though at a lesser level than processes such as deforestation.⁷¹⁵

However, desertification programmes will have to compete with other initiatives for a relatively small amount of money. In comparison to the \$10-22 billion estimated by UNEP to be necessary to combat desertification annually,⁷¹⁶ the annual budget of the GEF in 1997 was roughly \$2 billion,⁷¹⁷ and has only recently been replenished to more adequate levels. The *Desertification Convention* establishes a Global Mechanism dedicated to financing. It does not, in itself provide for funding, but rather is intended to promote the mobilization of resources for desertification programmes.⁷¹⁸

In relation to international dynamics, the *Desertification Convention* requires that the State Parties, in pursuing the objectives of the Convention, “give due attention, within the relevant international and regional bodies, to the situation of affected developing country Parties with regard to international trade, marketing arrangements and debt, with a view to establishing an enabling economic environment conducive to the promotion of sustainable development.”⁷¹⁹ While the recognition that international economic systems impact on desertification is welcome, the obligation to give attention is framed in loose terms and transfers actual measures to be taken to unspecified other bodies, thereby making it extremely difficult to hold developed States accountable for this obligation.

From the viewpoint of poverty eradication, the *Desertification Convention* is a useful instrument. However, it can be critiqued on a number of grounds, in which human rights obligations, in particular those of the *ICESCR* can apply to some extent to ‘fill the gap.’ The *ICESCR* is a useful complement to the *Desertification Convention* in four ways:

⁷⁰⁸ *Ibid.*, art. 20.1.

⁷⁰⁹ *Ibid.*, art. 20.2 (a).

⁷¹⁰ *Ibid.* art. 20.2 (c).

⁷¹¹ See *VCLT*, *supra* note 655, art. 31.

⁷¹² *Desertification Convention, Africa Annex*, *supra* note 705, art. 5.1 (b).

⁷¹³ *Desertification Convention*, *supra* note 98, art. 20.2 (b).

⁷¹⁴ *Danish*, *supra* note 698 at 149.

⁷¹⁵ *Ibid.* at 139.

⁷¹⁶ W. Burns, “The International Convention to Combat Desertification: Drawing a Line in the Sand?” 16 *Mich. J. Int’l L.* 831 at 863-864.

⁷¹⁷ *Danish*, *supra* note 698 at 159.

⁷¹⁸ *Desertification Convention*, *supra* note 98, art. 21.4.

⁷¹⁹ *Ibid.*, rt. 2 (b).

- First, it would mandate for all States the actions that are reflected in the African Annex, but left out in the other Annexes – these being decentralisation⁷²⁰ and non-discrimination between rural and urban areas.
- Second, while the *Desertification Convention* requires states to fund these programmes “according to their capabilities,” the language in the *ICESCR* is tighter, requiring action from a state “to the maximum of its available resources ... by all appropriate means.”⁷²¹ Although a state would have competing resource demands relating to other human rights obligation, desertification would receive significant priority as it normally affects the most vulnerable communities.
- Third, the *ICESCR* would emphasize the social justice element of reform measures. It would, for example, require the redressing of discrimination against rural areas rather than the development of ‘appropriate pricing policies’ for agricultural produce. The *Desertification Convention* only refers to providing ‘security of tenure’ for local populations, which is not as extensive as the land reform, coupled with financial and technical assistance required to properly eradicate poverty (as indicated in Part I). The *ICESCR* may be understood to require such action as part of its requirement to address the provision of rights “by all appropriate means” The right to food comprising guarantees of full and equal access to economic resources, particularly for women.⁷²²
- Finally, while the *Desertification Convention’s* approach to international economic dynamics is weak, as mentioned above, the *ICESCR*, particularly through its interpretation by the CESCR, is a little stronger, and could, in the circumstances, indicate the need for debt relief and changes to the international trading system where core economic and social rights were threatened.⁷²³

Conclusion: Prospects for a rights-based approach to ISDL

Human rights law provides significant elements of binding international law corresponding to the ‘social’ pillar of sustainable development. This section has noted that human rights institutions provide significant resources, mechanisms and legal support for actions that implement the ‘priority to the poor’ element of sustainable development. Human rights law, as indicated in the example of the *ICESCR*, has broad intersections with international environmental and economic law, in many cases creating obligations that significantly affect their design, scope and implementation. It is precisely due to the broad scope of human rights law and discourse, its imperative character, and its subversive nature, that there has been resistance to the mainstreaming of human rights in international sustainable development law and policy. Resistance to human rights is of two main varieties. One position, specific to economic, social and cultural rights, is from governments that resist the justiciability of such rights, including at the international level. Another, more common position, is that of many developing countries who argue that human rights language opens to the door to political conditionality. As explained above, these concerns do not negate the utility of a rights-based approach in ISDL, but rather provide impetus for a more open, international debate.⁷²⁴

There are indications of growing international practise that accepts the human rights law as a basis for sustainable development. Human rights law is not necessarily a synonym for the social aspects of sustainable development, such as development, poverty eradication, gender awareness and equity. Nevertheless, it constitutes a significantly developed body of law in the social realm that has been

⁷²⁰ As part of the right to food, see CESCR, *General Comment 12*, *supra* note 644 at para. 23.

⁷²¹ *Desertification Convention*, *supra* note 98, art. 20.3, *ICESCR*, *supra* 20, art. 2.1.

⁷²² CESCR, *General Comment 12*, *supra* note 644 at para. 26.

⁷²³ *Ibid.*, para. 9.

⁷²⁴ This issues is discussed further by in the CISDL Legal Brief, “Human rights obligations and levels of development financing” 22 March 2002, online: www.cisd.org. See also K. Tomasevksi, who argues that sanctions for human rights have often been inconsistent, relying on legal fictions of trickle-up effects, carried out for appearances sake and often benefiting the sanctioning state, in *Responding to Human Rights Violations 1946-1999* (The Hague: Martinus Nijhoff, 2000).

embraced by a growing number of states, IGOs and civil society organisations. It is therefore poised to become a key aspect of ISDL.

PART V: THE PROSPECTS

This section maps out prospects and research agendas in six priority areas of evolving integration between economic, social and environmental law. These are:

- Sustainable International Trade, Investment and Competition Law
- Sustainable International Climate Change and Vulnerability Law
- Sustainable International Human Rights and Poverty Law
- Sustainable International Natural Resources Law
- Sustainable International Biodiversity Law
- Sustainable International Health Law

This section also highlights themes that crosscut these research agendas, and discusses the international institutional architecture of sustainable development governance in the context of the World Summit on Sustainable Development.

Sustainable International Trade, Investment and Competition Law

How can international trade, investment and competition law better support, and not frustrate, sustainable development goals? This section provides particularly interesting examples of international sustainable development law (ISDL).⁷²⁵ Different instruments at global and regional levels show various degrees of integration between the economic, environmental and social legal provisions.

Vibrant debates regarding the linkages between trade and environment, and trade and development are spurring the sustainable development discourse. Both discussions have recently been subject to considerable scholarship and legal analysis.⁷²⁶ In order to combine the two debates into a single, new approach we must look at the areas of integration between the laws. Fundamentally, we must also develop guiding principles for cases in which the areas overlap or even appear to conflict.⁷²⁷ As indicated in the title chosen for this area of research, these debates have extended beyond the straightforward trade liberalisation agenda items. In addition to intellectual property rights and other provisions mentioned below, economic liberalisation and general international governance mechanisms, loosely known as ‘rule-making’, is emerging as a distinct area of law with fairly distinct rules and institutions. These include international investment law, as well as competition law, which is mainly domestic at present. This expansion could lead to greater international cooperation between economies, and also provide safeguards and balancing mechanisms similar to those already found on a domestic level in many OECD countries.

The recent WTO Doha Development Agenda is a first step into the direction of more integration. Trade ministers agreed to initiate negotiations on trade and environment issues and gave high priority – at least in the text – to development. The Declaration explicitly encourages efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-

⁷²⁵ See Part IV, case study 2 on Regional Integration Agreements.

⁷²⁶ On trade and environment see e.g. D. Brack (ed.), *Trade and Environment: Conflict or Compatibility* (1998) and J. Cameron/P. Demaret/D. Geradin (ed.), *Trade & The Environment: The Search For Balance* (1994). On trade and development see for example B. Lal Das, *The WTO Agreements : deficiencies, imbalances and required changes*; J.M.Djossou, *L’Afrique, le GATT et l’OMC : entre territoires douaniers et régions commerciales*, (Sainte-Foy, Québec, 2000).

⁷²⁷ For research on trade and sustainable development, see International Centre for Trade and Sustainable Development, online: www.ictsd.org, the International Institute for Sustainable Development, online: <http://www.iisd.org/trade/default.htm> or the International Institute for Environment and Development, online: www.iied.org.

up to the 2002 World Summit on Sustainable Development in Johannesburg, South Africa.⁷²⁸ This decision is the culmination of a debate that dates over a decade. Just before the 1992 Earth Summit in Rio, academia and the public started to discuss the trade and environment link. Esty, in "Greening the GATT", was the one of the first lawyers to seriously consider the legal implications and call for reforms of the GATT system.⁷²⁹

In 1992 the international community began to recognise the potential for conflicts between the trade and environment regimes, and to reinforce the role that trade could play as an instrument in sustainable development. Chapter 2 in *Agenda 21* suggests ways to promote sustainable development through trade and provides proposals for making trade and environment mutually supportive. It states that "[a]n open, equitable, secure, non-discriminatory and predictable multilateral trading system that is consistent with the goals of sustainable development and leads to the optimal distribution of global production in accordance with comparative advantage is of benefit to all trading partners. Moreover, improved market access for developing countries' exports in conjunction with sound macroeconomic and environmental policies would have a positive environmental impact and therefore make an important contribution towards sustainable development."⁷³⁰ This broad statement did not, of course, solve the debate. Indeed, a decade later, trade and finance aspects were still one of the most highly controversial issues in the WSSD Declaration negotiations.⁷³¹

International trade is one of the oldest areas governed by international law.⁷³² It follows therefore that multiple levels and forms of international trade rules exist. At the global level, not only do the WTO agreements govern trade but many Multilateral Environmental Agreements (MEAs) also contain trade provisions. The International Labour Organization (ILO) Conventions also have an impact on trade relations. Regional examples of trade, investment and competition rules include the European Union (EU),⁷³³ the Asian Pacific Economic Community and the Free Trade Area of the Americas (FTAA), currently under negotiation. The sub-regional accords with relevant treaty law include, for example, the Mercosur where an environmental framework agreement has been signed, the Southern African Development Community (SADC), the Andean Community (ANCOM) with its parallel Committee of Environmental Authorities, the Caribbean Community (CARICOM) with its alternative cooperation arrangements, and the North American Free Trade Agreement (NAFTA) with its parallel labour and environment agreements. There are also numerous bi-lateral treaties. Innovative mechanisms were included in the Chile-Canada accords and side-agreements, the Costa Rica-Canada accords & side-agreements and the USA-Jordan accords and side-agreements, which are still under negotiation. Other mainly inter-regional trade agreements include the Lomé and Bamako Conventions, the increasingly relevant Cotonou Agreement, and the Mercosur-EU agreements, still under negotiation.

Trade, investment and competition are influenced, and increasingly governed, by a growing body of jurisprudence and decisions of international tribunals and courts. On the global level, formal tribunals or court-like institutions in this area of law include the WTO dispute settlement mechanism (especially Appellate Body decisions⁷³⁴ which, while not formally *stare decisis* – binding in subsequent cases – are in fact something similar),⁷³⁵ the International Court of Justice and the International Tribunal of the Law of the

⁷²⁸ See WTO, Ministerial Declaration, Ministerial Conference Fourth Session, Doha, 9 - 14 November 2001, WT/MIN(01)/DEC/W/1, online: WTO <www.wto.org>.

⁷²⁹ See *Esty*, *supra* note 392.

⁷³⁰ *Agenda 21*, *supra* note 48 at para 2.5.

⁷³¹ See Reports of the Preparatory Conferences, online: WSSD <www.johannesburgsummit.org>.

⁷³² K. Ziegler, *Völkerrechtsgeschichte*, (München 1994).

⁷³³ See the informative website of the General Direction Trade of the European Commission, DG Trade online: <http://trade-info.cec.eu.int/europa/index_en.php>.

⁷³⁴ Three of the most significant cases engaging sustainable development issues are *Hormones*, *supra* note 118, *Shrimp Turtle*, *supra* note 99 and *Asbestos*, *supra* note 118.

⁷³⁵ See William J. Davey, "The WTO Dispute Settlement System," *JIEL* 3 (2000); John H. Jackson, *The Jurisprudence of GATT and the WTO*, (2000), at 113ff.; Ernst-Ulrich Petersmann, "From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement," *JIEL* 1 (1998), 175ff.

Seas (ITLOS).⁷³⁶ In investment law, increasingly, the decisions of the International Chamber of Commerce (ICC) dispute settlement procedures, and the awards of the International Centre for Settlement of Investment Disputes (ICSID) are also leading to a body of practice which provides guidance to future arbitrators of investment disputes.

For a future legal research agenda in this area, it is possible to focus specifically on the environment and development issues prominent in the negotiation, implementation and dispute settlement of international trade, investment and competition law, as well as the trade, investment and competition related instruments in international environmental and development law. Issues such as intellectual property rights and health, market access and eco-labelling, the WTO dispute settlement procedures and public participation, are gaining increasing prominence.⁷³⁷ On the new agenda, the following examples illustrate other areas of international economic law where sustainable development concerns could be integrated.

- **Government Procurement** is an important economic force. According to rough estimates, government procurement spending can account for between 10 and 15% of national GDPs, some hundred billion USD worldwide.⁷³⁸ Changes in government procurement policies or rules can have a significant impact upon sustainable development. For example, a decision that all government bureaucracies will use only recycled paper generates immediate economic opportunities for the recycling industries. However, should such a new law target a country as unsuitable for provision of the paper simply to protect domestic producers, this could violate the principle of non-discrimination in international trade law. Social and environmental criteria for governmental procurement are under discussion in several fora. Proponents argue that as tax-payer monies are being spent, more responsibility can be assumed and government procurement policies can be subject to sustainable development rules. Others fear that disguised protectionism, including “sweetheart deals”, could be struck under the guise of social or environmental considerations. In another example, some wish to see countries demonstrate observance of basic human rights in order for their industries to be permitted to compete for procurement related contracts. The recent *Burma case* dealt with such a law in the State of Massachusetts, which banned companies from trading with Myanmar to meet government procurement contracts. The US Supreme Court struck it down as unconstitutional.⁷³⁹ The EC and Japan asked for consultations in the WTO dispute settlement mechanism, and methods of drafting a valid law are still under discussion. In the WTO, government procurement is part of the Singapore issues of the Doha Development Agenda. The potential for new negotiations has generated increased interest in the issues.
- **Trade in agricultural products** has several sustainable development implications. Agricultural production is naturally linked with the environment and for many developing countries, is still a principal source of income. Hence, any change in agricultural trade is very likely to affect sustainable development goals. The legal debate focuses on issues such as the multi-functional nature of agricultural policies, and whether current levels and mechanisms of support by developed countries for their agricultural industries is legitimate, or protectionist. Other important questions arise in connection with genetically modified organisms (GMOs) and the WTO Agreement on Sanitary and Phyto-sanitary measures (SPS). The EC recently notified a new regulation on GMOs, leading to heavy criticism from Canada and the US.⁷⁴⁰ Trade in agricultural products also has strong equity implications. The new EU-APC Agreement attempted to address the issue, but according to

⁷³⁶See for example the Chile-EU swordfish dispute. The ITLOS special Chamber in the “Case concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean” suspended proceedings until 1 January 2004, ITLOS, Case No. 7 – Order 2001/1 of 15th March 2001, Chile / European Communities, para. 6, online: ITLOS < www.un.org/Depts/los/ITLOS/>.

⁷³⁷ See International Centre for Trade and Sustainable Development (ICTSD), online: www.ictsd.org.

⁷³⁸ See WTO, *Annual Report 1997*, at 142.

⁷³⁹ *Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288, U.S.Mass., 2000.

⁷⁴⁰ Bridges Weekly Trade News Digest - Vol. 6, Number 10, 19 March, 2002.

development NGOs, still falls short. The treatment of perverse agricultural subsidies which can overstimulate exploitation of fisheries, forests and other potentially renewable resources is also under discussion in the WTO and in regional trade agreements. For example, the Doha Development Agenda transfers fishery subsidies to the WTO Committee on Trade and Environment, for discussions, but a ban on those harmful subsidies has not yet been won.

- **Services** liberalisation has been called into question in terms of environmental and social services. On the one hand, liberalisation of services in certain sectors can stimulate better provision of services for populations, and lead to greater development and technology transfer. However, in other sectors, such as health and education, these may qualify as genuinely governmental and sensitive to national priorities, causing them to be exempted from the General Agreement on Trade in Services (GATS). This area has generated less controversy, however, as the GATS is formulated as a 'reverse liberalisation' procedure, whereby services must be deliberately listed to be liberalized and distinct categories permit different levels of treatment. Other sustainable development questions related to this agenda include the human rights implications of limits on the movement of natural persons, and of migration, specifically in the services sectors. Service liberalisation is also seen as a means of slowing or addressing the growing digital divide, particularly in terms of incentives to ensure more global provision of telecommunications services. Other issues include the liberalisation of financial and legal services, which, if it led to greater access to credit or justice, provide sustainable development benefits.

As mentioned above, international economic law intersects with other areas of law, both within and outside the agendas of official trade liberalisation negotiations. Seeking solutions and legal principles to guide conflicts or overlaps, within and outside existing international institutions, is an essential aspect of ISDL.

- **Trade and Environment** laws do need to become mutually supportive, and still need legal analysis or new accords to ensure that conflicts of obligations are avoided. The United Nations Environment Programme has done some excellent work in this area, and the WTO Committee on Trade and Environment has held fruitful sessions with representatives from several MEAs to ensure coherence between the way trade measures are implemented, and the overall goals of the international trading system. The potential for conflicts is still possible, however, particularly with regard to MEAs which use trade measures in violation of WTO disciplines.
- **Trade and Human Rights** form an interdependent relationship. Human rights can no longer be ignored in an international trade regime based on the rule of law and respect for existing international obligations. While several voices suggest that trade restrictions are particularly blunt instruments to use to influence domestic respect for human rights, and also fear the effects on their comparative advantage with regard to core labour rights, many others now argue that violations of basic human rights are deeply related to international trade, and that related measures already have serious positive or negative impacts. These proponents, many of whom are lawyers, suggest that international negotiations leading to rules-based approaches would have a positive effect, helping to limit disguised protectionism and forward legitimate concerns. Vibrant discussions are occurring, for example in debates on the enforcement of trade related intellectual property rights (TRIPs) law in developing countries, and health concerns regarding access to medicines.⁷⁴¹ Similarly, the effect of service liberalisation on social services is being viewed from a human rights perspective. Issues of market access for developing countries are increasingly being considered as constituent elements of the right to an adequate standard of living and the right to development.

⁷⁴¹ See in particular, the Sustainable International Health Law agenda, below.

- **International Investment Law** is only developing as an international field, but has significant sustainable development implications. Most international instruments are bilateral, or remain matters of private international law. A recent attempt to conclude a multilateral investment agreement (MAI) in the OECD failed. The legal aspects of sustainable development rights and responsibilities for investors, and the best ways to ensure their observance, is a particularly relevant subject matter as international investment laws continue to be negotiated, and principles continue to be developed through ad hoc tribunals. In addition, formal investment regimes such the WTO Trade Related Investment Measures (TRIMS) agreement, and the rapidly proliferating bi-lateral investment treaties (BITS), urgently require further examination as to their sustainability implications. Some pioneering legal and policy research, undertaken by von Moltke, Mann and others, considers “more sustainable international investment regimes.” These considerations are particularly relevant in light of recent NAFTA Chapter 11 tribunal decisions. Examination of these issues from a sustainable development perspective is still embryonic, and much work remains to be done.
- **International Competition Law** is also becoming very important, as the economic impact of anti-trust and other competition decisions is increasing and the number of countries with competition legislation continues to rise. Legal rules to ensure fair competition for environmental and social goods and services are just starting to evolve. In the recent *ECJ German Small and Medium Renewable Energy Producers* case, a German law favouring small sustainable energy producers was defended against a competition claim from large energy companies.⁷⁴² The WTO is currently consulting as to the potential for negotiations on international anti-trust rules, which would begin after their next Ministerial Conference. Legal research and analysis in this area has barely scratched the surface of the agenda. The sustainable development implications of monopolies, such as the international vitamins cartel, are worthy of increased scrutiny. Intellectual property rights’ regimes can also include certain competition rules. The impact of incomplete competition when IPRs are guaranteed is of particular interest in TRIPS and health policy debates. Sustainable development aspects of bilateral cooperation agreements (and future multilateral agreements) concerning competition policy, in particular the establishment and strengthening of anti-trust authorities, require further examination.

In this section, we do not provide a comprehensive overview of a future legal research agenda for more sustainable international trade, investment and competition law. Rather, we attempt to signal certain key issues, to give a flavour for the debate including the treaties, international institutions and in some cases, regional and even present domestic legal implications. Different legal economic instruments, existing or in the process of negotiation, bear potential to integrate social and environmental considerations to varying degrees, or simply to support and take into account existing legal obligations in the other fields. In the areas of human rights and environment laws, legal economic measures and provisions are being increasingly used as incentives, or as protection against “free riders” and “backsliding”, to the benefit of the regimes. As such, much further investigation is necessary, and we conclude that sustainable trade, investment and competition law is a fascinating new area of legal study, with significant potential as an intervention point to encourage sustainable development.

Sustainable International Climate Change and Vulnerability Law

An ISDL perspective should look to the particular aspects of the climate change issue that have international social, economic and environmental legal significance in an integrated manner. (e.g. economic and social aspects of climate provisions or vulnerability to change). It should also look at certain areas that integrate two of the three (e.g. emission trading, environment, economic). An ISDL perspective focuses on

⁷⁴² ECJ, *Preussen Elektra*, C-379/98 Judgment, 13. March 2001.

how climate change law is developed, with a focus on the needs of smaller economies, especially least-developed countries and new actors, including civil society and corporate citizens.

An ISDL perspective can define and clarify complex regimes, looking at the broader legal system in which measures are taken, with examples drawn from qualitative examination of case studies of legal instruments and their effects and contexts to complement analysis. An ISDL perspective can focus on *lex ferenda* and take new measures and modes of international law into account. While remaining aware of *Agenda 21* and other basic climate change and SD documents, ISDL researchers should also reach beyond into new tools being tested on national or nascent international levels especially in terms of causation issues and responsibility. An ISDL perspective should not ignore the increasing influence of private law. It can trace climate change and economic linkages between public international and private law spheres, as well as the interaction between the two (such as inter-corporate emission trading). A special focus should lie on insurance legislation especially regarding the social aspects of climate change.

Economic Aspects of Climate Change Law

- The three **Kyoto market mechanisms**, emissions trading, clean development mechanism (CDM) and joint implementation, were designed for maximum effectiveness while meeting social and economic needs. CDM is of particular interest to developing countries. The pilot phase has been launched. Clean energy technologies such as wind, solar, hydro and geo-thermal power are already available. Current debates centre on means of promoting these forms of energy, such as tax, energy or competition laws.
- **Phasing out market imperfections** in greenhouse gas emitting sectors is a key element of an ISDL agenda, in particular under the *Kyoto Protocol*, art. 1(a). Cleaner energy sources and the promotion thereof can complete the agenda. In particular, competition rules in the energy market often favour small- and medium-sized units on a local or regional level which tend to produce clean energy (see CISDL Sustainable Trade, Investment and Competition research agenda).
- **Trade and Climate** issues occur as the international climate regime is evolving alongside an international regime promoting trade liberalisation, raising the potential links or conflicts between these two regimes. As climate measures begin to affect energy markets and trade in energy-intensive goods, some countries may move to shield or subsidize vulnerable sectors. Trade measures against non-parties may be used.

Vulnerability and Social Aspects of Climate Change Law

Legal provisions to prevent vulnerability are key to the climate change debate. The Marrakech Accords established three funds: the special climate change fund, the least developed countries fund, and the adaptation fund under the *Kyoto Protocol*, all of which will be managed by the Global Environmental Facility (GEF). Rules, procedures and modalities on these mechanisms have been developed at the seventh meeting of the Conference of the Parties. Research is needed to fully understand the functioning of these market mechanisms and assess their effectiveness.

Recent studies show that climate change will result in mass displacement of populations. State responsibility, as well as individual rights to compensation, refugee law, and humanitarian law, will come into play.

- **State Responsibility** includes the causality determination for climate change, as well as responsibility of the world as a whole through financial institutions such as the World Bank Group. Will the World Bank offer special grants for the prevention of direct climate change consequences,

addressing vulnerability issues such as preparation, mitigation and relief strategies? Does the UN *Refugee Convention* cover all aspects of personal vulnerability?

- **Natural Disaster Preparation and Relief** includes domestic and international control of aid, access to geographical information and data, and relevant technology transfer or investment law to mitigate possible effects of disasters.
- **Human issues** are raised as climate change will cause humanitarian disasters of unfathomable proportions. This raises the issue of the rights of persons affected by climate change. Might these individuals be able to invoke legal rights against States or other actors for failure to undertake climate-saving action when required?
- **The compliance system** is critical in ensuring the credibility of the *Kyoto Protocol*. An ISDL research agenda should focus on a three-step system: reporting, review of reporting conducted by the expert review teams under Article 8 and review of the procedures and mechanisms on compliance, with a view to assessing their roles in the climate change process.

Sustainable International Human Rights and Poverty Law

The right to an adequate standard of living was recognized more than 50 years ago by the international community, but has remained elusive to the majority of the world's community. Twenty years later, State Parties recognized in a binding instrument "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."⁷⁴³ Despite these noble statements, millions of poor people continue to live in poverty without adequate food and water and without adequate housing and sanitation. Many people have become poorer and marginalized, and the reference to the "continuous improvement of living conditions" has become a non-starter as many millions of people in the world today live in squalor and starvation.⁷⁴⁴

There is no doubt that poverty is the biggest violator of human rights. It leads to the deprivation of other rights enshrined in international human rights instruments, particularly the right to health, the right to education, the right to work, and the right to privacy. It also leads to other procedural rights such as the right to participate in the decision-making process, the right to information, etc.⁷⁴⁵ It is also a violation of the principle of equality, a fundamental tenet of international human rights law, and of the principle of intra-generational equity, which is generally considered as forming part of international environmental law and more particularly, a component of the principle of sustainable development.

Poverty is also the biggest polluter. Many people live in dire poverty, which has exacerbated environmental degradation, as poor people resort to unsustainable practices in order to eke out a meagre living. More recently the international community recognized the link between poverty and sustainable development and proclaimed, in the 1992 Rio Declaration on Environment and Development:

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.⁷⁴⁶

⁷⁴³ ICESCR, *supra* note 20, art. 11.

⁷⁴⁴ It is estimated that 1.2 billion people in the world today live on less than US \$ 1.00 a day. See *World Development Report 2000/01* (World Bank) and UN Secretary General's *Millennium Report* (2000) presented to the UN General Assembly's Millennium Summit.

⁷⁴⁵ K. E. Mahoney & P. Mahoney, eds. *Human Rights in the Twenty-First Century: A Global Challenge*, (1993).

⁷⁴⁶ *Rio Declaration*, *supra* note 48, Principle 5.

Poverty is also a developmental issue. It is clear that lack of economic development has led to the present problems associated with poverty. Thus, the UN General Assembly Resolution on the Right to Development⁷⁴⁷ recognized that:

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 freedoms can be fully realized....

Clearly, poverty has the ability to cut across a wide spectrum of issues - social, economic and environmental - and, as a result, requires an integrated approach.⁷⁴⁸ It is here that international sustainable development law - understood as the intersection between economic, social and environmental law - plays a significant role.⁷⁴⁹

While enormous strides have been made with regard to international protection of human rights, in practice a huge gap exists between civil and political rights on the one hand, and economic, social and cultural rights, on the other.⁷⁵⁰ This also reflects the North-South divide on the issue. This has long since contributed to the marginalisation of the poor and the time has come to bridge the gap between these two sets of rights. Despite the official UN position that all rights are indivisible, interdependent and inter-related, in practice, we must actively work to break the divide that still exists between economic and social rights. The progressive realisation of economic, social and cultural rights is imperative, if the present plight of the poor is to be ameliorated. In addition, governance issues have exacerbated the problems faced by the poor, as societies in which governments are corrupt and do not respect the rule of law or fundamental rights of peoples tend to further marginalize the poor.⁷⁵¹

There are many international players involved in what is, by no means, a level playing field. These include the World Bank, the UNDP, UNEP, the Office of the UN High Commissioner for Human Rights and the various UN bodies involved in promoting human rights, the Commission on Sustainable Development, national governments and, of course, the people themselves.

An ISDL research agenda in this area should consider the following issues:

- **Cross-cutting issues** should be assessed with the starting point being international law and principles (including soft law documents), particularly in relation to economic, social and cultural

⁷⁴⁷ UNGA Resolution 41/128 of 4th December 1986. It is unclear if this right now constitutes part of international customary law. In addition, both the notion and use of the right to development has attracted some criticism. According to Rosas, writing in 1995, "That there are some rights and obligations at this level, too, cannot be denied, but what specific impact they can have on the policies of States and international institutions is yet to be determined." A. Rosas, "The Right to Development" in A. Eide, C. Krause & A. Rosas, eds. *Economic, Social and Cultural Rights: A Textbook*, 1st ed., (Dordrecht: Martinus Nijhoff, 1995) at 251. See generally on this point, S. Marks, "Emerging Human Rights: A New Generation for the 1980s?," 33 Rutgers L. Rev. 435 (1980-81); P. Alston, "Conjuring up New Human Rights: A Proposal for Quality Control," 78 AJIL 607 (1984); P. Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?," 29 Neth. I.L. Rev. 307 (1985); P. Alston, "Peoples' Rights: Their Rise and Fall" in P. Alston, ed. *Peoples' Rights* (Oxford: Oxford University, 2001) at 285. Crawford, ed. *Rights of Peoples* (1988). P. Alston, "Making Space for New Human Rights: The Case of the Right to Development," Harvard Human Rights Y.B. 3 (1988); A. Lindroos, "The Right to Development" The Erik Castren Institute of International Law and Human Rights Research Reports 2/1999 (Helsinki, 1999). See, also, U. Baxi, "The Development of the Right to Development" ed. *Human Rights: New Dimensions and Challenges*, 99 (1998); C. Weeramantry, "Right to Development," Indian Journal of International Law 482 (1985); J. Paul, "The United Nations Family: Challenges of Law and Development - The United Nations and the Creation of an International Law of Development," 36 Harv. Int'l L.J. 307 (1995).

⁷⁴⁸ J. Oloka-Onyang'o, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?" 6 Buff. Hum. Rights. L. Rev. 39 (2000).

⁷⁴⁹ See Boyle & Freestone, *supra* note 94.

⁷⁵⁰ See A. Eide, C. Krause & A. Rosas, *Economic, Social and Cultural Rights*, 2nd ed. (2001).

⁷⁵¹ K. Ginther, E. Denters & P. de Waart, eds., *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Publishers 1995).

rights, the right to development, and the right to environment and how these can be reconciled at the international level.⁷⁵²

- The extent to which ISDL principles have been reflected at the **national level** and the gap (if any) that exists between international law and national law, and the reasons for such a gap.
- The role of international sustainable development law in achieving **poverty eradication**, as well as the obstacles impeding such achievement. Areas of concern could include: using human rights tools to empower vulnerable individuals and groups to defend their livelihoods, land tenure, provision of credit and extension services, tax reform, budgetary allocations for social expenditure, operationalising the concept of ‘minimum core obligation’;⁷⁵³ improving compliance with the ICESCR and vulnerability; and mechanisms of distribution.
- The role of **good governance** and participatory rights and identifying the institutional structures at both national and international levels. This should include consideration of institutional development (legal and judicial reform) and anti-corruption approaches, and best practices in the devolution of power. Procedural human rights requirements are also relevant, including, as mentioned in Principle 10 of the *Rio Declaration*, the right to information, access to justice and the right to political participation.
- To reduce the gap between theory and practise, **financing mechanisms for poverty eradication** and the role of development agencies must be considered;⁷⁵⁴ canvassing the application of the *Monterrey Consensus* in the context of sustainable development, and considering the particular roles of domestic sources, debt relief, trade and investment.
- The role of **civil society** in achieving human rights and poverty eradication is key. Further analysis is required on the legal implications of advocacy, dissemination of information and training, especially in the context of the roles to be played by international organizations, states, the media, etc. The impact of the mobilisation of communities in order to realise human rights and poverty eradication is also relevant, particularly in relation to sustainable livelihoods and empowerment.
- **Protection of vulnerable groups** is related to the priority of the poor in sustainable development. A research agenda should include the issue of obligations to groups especially vulnerable to the adverse effects of economic policies, and to environmental degradation (including desertification and climate change). Such an agenda can also assess the question of liability for causing climate change and obligations and approaches for addressing environmental racism. It is important to consider approaches to provide for non-discrimination and mechanisms for improving the participation in decision-making of socially excluded groups including racial, ethnic and religious minorities, poor and less-educated people, women, etc.

⁷⁵² D. McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 Int'l & Comp. LQ, 796 (1996); and A. Boyle & M. Anderson eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon, 1996) P. Sands, “International Law in the field of Sustainable Development,” 65 Br. Yrbk. of I.L. 303 (1994); for a different view, see M. Pallemarts, “The Future of Environmental Regulation: International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process,” 15 Journal of Law and Commerce 623 (1996).

⁷⁵³ An alternative formulation is the concept of ‘reasonability’ in state action, see the decision of the South African Constitutional Court in *Grootboom*.

⁷⁵⁴ D. Bradlow, "Social Justice and Development: Critical Issues Facing the Bretton Woods System: The World Bank, the IMF, and Human Rights," 6 Transnat'l. L. & Contemp. Probs. 47 (1996).

Sustainable International Biodiversity Law

An ISDL approach to International Biodiversity Law should aim to develop and enhance understanding of the links between biodiversity-related policies and law at the national, regional and international levels. Research can be carried out in places where the right balance has been struck between the social, environmental and economic aspects of biodiversity issues. What contribution has been/can be made by the various institutional structures at the national and international levels? For the purposes of this research programme, the term biodiversity shall include the variability among all life forms at the genetic, species and ecosystem levels.

Sustainable International Biodiversity Law in Economic Regimes

The relationship between trade and biodiversity protection has acquired increasing significance since the adoption of the *Convention on Biological Diversity* (CBD), and the *Biosafety Protocol*. This underlines the need for studies that would explore, in an integrated manner, the relationship between the legal regimes for trade, biodiversity protection and biosafety, and their implications for sustainable development.⁷⁵⁵ This research agenda would contribute to this effort. To this end, the research programme would consider issues such as the extent to which the continuing pressure on biodiversity resources is explicable on the basis of the current structure of international trade rules. In addition to endangered species loss, in what ways do WTO rules on tariff escalation, for example, maintain pressure on natural products from developing countries? To what extent do rules on agriculture or phytosanitary and sanitary measures affect trade in GMOs or products thereof? And what is the significance of labelling on the trade of GMOs?

The role of **Intellectual Property Rights** (IPR) in the protection of biodiversity and especially the development of biotechnology, has been the subject of substantial commentary.⁷⁵⁶ There is hardly any doubt that IPRs could make important contributions to the promotion of technology and innovation, transfer of environmentally sound technologies, healthcare and access to essential medicines. The question remains, however, of whether the current corpus of IPRs are sufficient for the realisation of the environmental and social objectives that, together with the predominant economic motive of IPR regimes, underlie sustainable development. For example, what are the effects of the law of patents on the ownership and distribution of biotechnology, as well as the sharing of the benefits thereof? What is the scope and implication of intellectual property exclusions for plants and animals? How should indigenous knowledge systems be protected – multilateral or regional approaches? Should the origin of source material be disclosed in patent applications? What is the effect of conventional IPRs, especially patents, on incentives for biodiversity protection? Innovative approaches to providing incentives for biodiversity conservation could be explored through adjustment of intellectual property systems to reflect the different means of adding value to the biotechnology sector.

Plant Variety Protection issues have implications for sustainable development as well,⁷⁵⁷ as *sui generis* systems different than those related to IPR systems. These include the right to food and health, the role of local and indigenous communities, farmers and breeders' rights, conservation and sustainable use of biodiversity, technology in the public domain to meet sustainable development objectives, and the protection of indigenous knowledge.

Competition and Investment issues also arise in the context of biodiversity. Most of the research and development in biomedical research and the development of biotechnology is paid for by multinational

⁷⁵⁵ See, David R. Downes, *Integrating Implementation of the Convention on Biological Diversity and the Rules of the World Trade Organization*, (IUCN, Cambridge, 1999).

⁷⁵⁶ See G. Dutfield, *Intellectual Property Rights, Trade and Biodiversity*, (London: Earthscan, 2000) and Crucible Group II, *Seedling Solutions, Volume 1. Policy Options for genetic resources, People, Plants, and Patents revisited*, (IDRC and IPGRI, 2000).

⁷⁵⁷ See the different options and their implications in FAO Legal Papers Online, Intellectual property rights in plant varieties: An overview with options for national governments, <http://www.fao.org/Legal/Prs-OL/lpo31.pdf>

corporations, predominantly from Western industrialised countries. In some cases, these MNCs have collaborated with host governments, universities or research institutions in developing countries. International investment and competition law will, therefore, continue to play a role in determining how the use of components of biodiversity will affect sustainable development objectives.

Issues for consideration relating to competition and investment include: consolidation in life science and agro-chemical industries; the effect of broad and long-term patents; anti-competitive or restrictive business practices; chain of control from seed to distribution; incentives for research and development on critical diseases; broad claims in patent applications and the negative effects on research and development, barrier to entry of new competitors, etc. Against the backdrop of the patterns of investment in biotechnology industries, an ISDL agenda could focus on discovering and testing new legal tools that may serve as incentives for technology transfer and research and development.

Sustainable International Biodiversity Law in Environmental Regimes

- **Conservation of biodiversity and the sustainable use of its components** raise a number of issues. To what extent are provisions of the CBD appropriate for the realisation of these two principal objectives? What legal mechanisms could be introduced to facilitate the realisation of these objectives? What are some of the constraints? How does the review of other sectoral regimes e.g. TRIPS and the development of the new *Treaty on Plant Genetic Resources for Food and Agriculture*, affect the realisation of these objectives?
- **Access to Genetic Resources and Benefit Sharing** is raised in relation to the scope of CBD provisions, development of regimes and legislation⁷⁵⁸, sovereignty over natural resources and ownership of genetic resources, benefit sharing from ex-situ collections, etc. Further research is needed on the role of indigenous knowledge and innovations, the extent of biopiracy, the scope of prior informed consent, transparency and participation.
- **Biosafety** concerns arise from genetically modified organisms; agricultural biodiversity in monoculture production; risk assessment and risk management; development and adequacy of regulatory systems, and extension of moratorium on challenges in the trade regime.⁷⁵⁹
- **Environmentally Sound Use of Biodiversity**⁷⁶⁰ can be considered through legal mechanisms for the access and transfer of environmentally sound technology; different uses of genetic resources; incentives and mechanisms to facilitate in situ conservation especially through protected areas systems, biological corridors, etc.

Sustainable International Natural Resources Law

The scope of natural resources law is vast, ranging from issues related to forests, fisheries, and mining to plant genetic resources, soils, water and air. Using a sustainable development lens, this agenda focuses on crosscutting issues and research that emerge in international debate, rather than issues specific to particular natural resources. An ISDL perspective can bring to natural resources law a conscious effort to address, rather than shy away from, the web of social considerations, economic policies, laws, expectations, players and interests that shape public policy and legal and private approaches to natural resource use. Economic and social laws and policies (examples include debt relief, privatisation, corporate responsibility, foreign

⁷⁵⁸ See about the evolution of the different legal regimes, L. Gloyka, *A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources*, Environmental Law and Policy Paper No 34, IUCN, Gland, 1998.

⁷⁵⁹ About the potential interaction between the Biosafety Protocol and the rules of the World Trade Organization, see IUCN and FIELD, *A Guide to the Biosafety Protocol*, Draft, (2002).

⁷⁶⁰ See the study of K. ten Kate and S. Laird, *The Commercial Use of Biodiversity. Access to Genetic Resources and Benefit-sharing*, (London: Earthscan, 2000).

direct investment and development financing) impact the pace of natural resource use and the effectiveness of legal instruments. In addition, international development finance, policy advice from international financial institutions, project and sectoral loans, and debt relief arrangements often involve some form of legal agreement with obligations that influence economic incentives and policy trends relevant to natural resources.

Natural resources often generate great economic value to governments (e.g. as a source of export earnings, national income, tax revenue and employment generation), local communities and private sector interests. Some natural resources are also of high strategic and commercial value (e.g., oil and minerals for industrial manufacturing and energy needs). Given the economic stakes involved, the multiple value systems at play and the variety of possible short and long-term end-uses for natural resources, tensions frequently arise among different stakeholders over the conservation, access to, and use of natural resources. In countries with abundant natural resources, those with control over access occupy positions of great power and influence. More locally, natural resources can be a central source of income, food security and/or livelihoods for local communities, particularly in developing countries. Cultural and ethical norms also come into play. Traditional communities—on whose land significant natural resources reside—often consider themselves stewards of natural resources with spiritual and cultural responsibilities related to their use. The economic objectives of some groups sometimes conflict with the social priorities of different stakeholders, which in turn might complicate the conservation and sustainable goals of others. That said, synergies between various stakeholders and objectives have proven possible. The multi-stakeholder nature of the natural resource policy and law arena signals the need to better consider innovative multi-stakeholder processes, to engage civil society in existing international law-making, implementation and monitoring processes (NGOs, community-based organizations, etc) and to address the needs of smaller economies, especially least-developed countries.

There is no overarching international law on natural resources. Instead, a vast range of sector and resource-specific laws exists. These relate primarily to fisheries, oceans, marine resources and seas, freshwater resources, soil and desertification, forests, mineral and energy resources, wetlands and world heritage, among other topics.⁷⁶¹ Other relevant environmental legal frameworks exist at the global, regional and national level.

In setting out an ISDL approach to natural resources, the following are key general themes:

- the adequacy of state political and financial commitments to the implementation of existing environmental laws,
- technical constraints in the implementation of natural resources law due to inadequate and constantly changing scientific data and knowledge on the complex interactions of ecological, political and social systems that impact natural resources,
- the compatibility of the objectives of economic and environmental legal regimes and the appropriate means for the resolution of natural resource-related disputes,
- the relationship between environmental laws and economic policies, and

⁷⁶¹ Examples include the *UNCLOS*, *supra* note 154, the *Straddling Stocks Agreement*, *supra* note 305; the *Ramsar Convention*, *supra* note 131, the *Desertification Convention*, *supra* note 98, the *World Heritage Convention*, *supra* note 146, *CITES*, *supra* note 224, drafts of Freshwater and Forest Conventions, the *Biodiversity Convention*, *supra* note 98, the *Climate Change Convention*, *supra* note 98, and various international commodity agreements (e.g., the international copper agreement and OPEC). Regional and resource specific environmental agreements include the *Atlantic Tuna Convention*, *supra* note 159, the Commission on the Conservation of Southern Bluefin Tuna (CCSBT), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR); and EU-West Africa fisheries agreements.

- the social and environmental responsibility and accountability of the corporate sector.

Governance, Transparency and Accountability

- **Transparency and accountability in decision-making** related to natural resources management is relevant, including the relationship between both developed and developing country governments, armed groups, private companies and investors. Particular attention must also be paid to the process for negotiating rights of access to natural resources and the regulation of warrants for exploration.
- **Perverse Economic Incentives** in natural resources law should be considered, including the lending agreements and practice of multilateral and regional financial institutions and export credit agencies, and their implications for natural resource management in developing countries. One avenue would be to explore ways to systematize the transparency and accountability evaluation of international financial institutions and export credit agencies (e.g., for their policy advice, loan and project agreements as well as export guarantees). A case study approach might also provide some insights about the way legal obligations embedded in policy and project loans and grants shape national approaches to natural resources and the differential social impacts that can result.
- **Competition and anti-trust law** concerns relate to the manner in which monopolies can influence patterns of natural resource extraction and use, and the extent to which competition and anti-trust law might play a useful role in correcting problems. Particular issues worthy of investigation include: trends in the vertical and horizontal integration of large natural resource companies; the impact of these companies on domestic natural resource policies and legislation; and the capacity of companies to acquire large publicly funded subsidies for activities that influence patterns of natural resource use.

The Private Sector, Investment and Liability

- An ISDL agenda should consider **corporate responsibility and international codes of conduct**, including issues such as:
 - a) the objectives and value of different approaches to corporate codes of conduct,
 - b) the potential to extend the responsibility of corporations to shareholders beyond fiduciary criteria,
 - c) the track record of different approaches to corporate responsibility,
 - d) new legal approaches to individual and institutional investors to promote more sustainable corporate practices in natural resource extraction (e.g., security commission disclosure requirements),
 - e) the extent to which legal principles can be used to guide investment toward projects that promote the sustainable conservation, extraction and use of natural resources (including government procurement).
- **Establishing linkages between foreign direct investment in natural resource sectors and foreign liability** requires a consideration of the effectiveness and feasibility of initiatives to hold companies legally liable, including in their home countries, for foreign direct investment decisions overseas. Research should consider not only the case of Northern corporations operating in the South, but also the legal and political prospects for establishing liability of the Southern-based multinational companies. Impacts on human rights, social and environmental variables, and political decision-making all warrant consideration.

- **National sovereignty, property rights and natural resource management** is a promising area of research. How do different legal regimes balance the principle of national sovereignty with other international principles such as the notion of common natural heritage of humanity and the need for international cooperation? How is the principle of national sovereignty reconciled with calls for the use of private or collective property rights to ensure effective resource management and for the derogation of control to local levels?
- **Investing in the Environment** is an approach that must be considered in ISDL. How can the law be harnessed to help guide capital toward investments that promote sustainability in the use, conservation and extraction of natural resources?

Participation and Openness in International Processes

- **Multi-stakeholder processes** are an important objective of ISDL. What kinds of legal frameworks or processes best draw together the multiple stakeholders to deliberate upon appropriate natural resource management strategies and laws? How can we best evaluate the usefulness of these processes (e.g., the World Commission on Dams) to different groups? In what ways are they replicable?
- **International certification processes** have been enacted by NGOs, government agencies and the private sector with the development of guidelines, principles, initiatives and national laws for certification and labelling of “sustainable” products and harvesting, extraction or production processes. How compatible are certification schemes with international trade rules? What are the appropriate processes for deciding upon the benchmarks for “sustainability” in different sectoral initiatives? What are the costs, benefits and practicalities of making voluntary certification efforts mandatory? What are the ways to mitigate the regulatory burden on developing countries of certification processes? How can opportunities for low-income groups in developing countries be maximized?
- An ISDL research agenda should consider the **role of multinational corporations in international treaty-making processes** with respect to the management and use of natural resources. What are the costs and benefits of their involvement and influence? How can legal principles and guidelines be used to enhance the positive aspects of their participation while mitigating undesirable aspects?
- The role of **local communities in international standard-setting and rule-making processes** is related to the ISDL principle of public participation. What kinds of instruments can be developed to ensure that the voices of local communities, minority groups, and the poor are adequately heard in existing and future efforts to create new ground rules for corporations? Can the human rights, peace, indigenous peoples, labour rights and environmental communities share lessons?

Implementation Issues: Compliance, Financing and Dispute Settlement

- **Non-party compliance with environmental laws** is a critical issue. Legal instruments embodied in regional fisheries arrangements challenge many assumptions about the readiness of states to consider imposing trade measures against non-members of agreements. The politics and implementation of recent, innovative models for promoting the compliance of non-parties warrants greater monitoring and documentation.

- **Using the consumer as an instrument for environmental compliance and reducing over-consumption** is a useful approach to implementing natural resources law. What has been the success rate of the range of supply and demand tools available to limit unsustainable consumption patterns (e.g., ecolabels, advertising rules, boycotts as instruments for public awareness raising)? What are the prospects for production and consumption targets in key areas? Does the Framework Convention on Climate Change set useful precedents in this regard?
- International law- and policy-makers need **capacity building** (e.g., in the form of evidence, best practices case studies, guidelines and policy proposals) regarding options for building capacity to comply with international natural resource regimes at the national level. Studies of best practices and lessons learned could focus on: the transfer of environmental technologies to developing countries; delivery of technical assistance to developing countries; models for financing environmental capacity building; building effective institutions for regulating and managing natural resource use; and private sector involvement in natural resource management (e.g., water).

Precaution, Science and ISDL

- **Availability and Credibility of Scientific Data** raises concerns on the ongoing challenge of operationalising the precautionary principle. Allegations of financial conflicts of interest and lack of scientific impartiality frequently conspire to frustrate efforts to improve both the management of natural resources (fisheries, forests, minerals, Antarctic minerals, deep sea nodules) and their use (e.g., burning of fossil fuels and the climate change debate). What do we do about natural resource extraction when there are fundamental differences of opinion about whether “sound science” judges certain activities to be sustainable or not? Beyond the precautionary principle, can legal principles lend any support to those working to promote scientifically rigorous decision-making?
- **Impact assessment and monitoring techniques** are critical to sustainable development. What legal processes for public participation and transparency have proven most successful in generating widely accepted impact assessments and monitoring, particularly where broad international consensus is often vital to prompt action? What new tools are available to monitor environmental trends and compliance (e.g., life cycle perspectives, production chain analysis)?⁷⁶² Can we draw from other sectors (e.g., labour rights monitoring)?

Sustainable International Health Law*

While health has long been central to the sustainable development agenda, the relevance of international health law (IHL) to sustainable development law (SDL) is a newer concept.

There are a few reasons for this historic disconnect. Until recently, neither the international health nor legal communities saw health law as an “outcome determining” factor when it came to public health progress.

⁷⁶² Life cycle analysis draws attention to analysing the cycle of the production and use of natural resources, including extraction, transportation, marketing, consumption (e.g., carbon emissions from the burning of fossil fuel resources), waste disposal and recycling. It involves considering how social and environmental issues along this chain can affect the state of natural resources (e.g., impacts of pollution on marine ecosystem resources) and their value (e.g., the health of fish products for sale).

* A recommended bibliography for international sustainable health law includes: J. Eckhardt, “Balancing Interests in Free Trade and Health: How the WHO’s Framework Convention on Tobacco Control can withstand WTO Scrutiny”, 12 *Duke J. Comp. & Intl. L.* 197 (2002); D. Fidler, *International Law and Infectious Diseases*, (New York: Oxford University Press, 1999); K.E. Mahoney and P. Mahoney eds., *Human Rights in the Twenty-First Century: A global challenge* (Dordrecht: Martinus Nijhoff, 1993); D. Jamieson, “Global Responsibilities: Ethics, Public Health and Global Environmental Change” (1997) *IJGLS* 99; J.M. Mann and D.J.M. Tarantola eds., *Aids in the World II* (New York: Oxford UP, 1996); WTO, *Understanding the WTO agreement on Sanitary and Phytosanitary Measures*, 15 July 1996, online: <http://www.wto.org/wto/agric/spsund.htm>; World Bank, *World Development Report 1993: Investing in Health* (Washington, D.C.: World Bank, 1993).

Rather, it has been medical, pharmaceutical, engineering and technological breakthroughs which, rightfully, have been given credit for the greatest advances in 20th century health.

Second, the extensive international health law that *has* been developed, has been the purview of public health experts rather than legal ones. Much global public health policy emanates from health organizations, such as the World Health Organization, rather than through judicial decision-making. Moreover, health law tends to be derived from “soft law processes”. Policy implementation and enforcement have historically operated through recommendations and regulations rather than through legally binding rules. Interpretation and dispute settlement of those treaties and recommendations also tend to be governed by informal processes. In the words of one author, this “ethos” is based on the assumption that international health law can be better achieved through cooperation and consensus building rather than a hard legal approach.⁷⁶³ Consequently, international health law has not received extensive interest among lawyers who have not seen it as their domain.

Rationale for the Development of International Sustainable Development Health Law

However, a changing global context means that this existing division between the legalists and the medical experts is no longer viable; international health concerns have been necessarily drawn closer to economic and social law. One under-discussed development is the increasing number of cross-border activities of patients and health care providers; medical personnel shortages due to the freer movement of labour are becoming acute especially in countries where there are few specialists to begin with. A second important development is the growth of transnational consumer protection action as illustrated by numerous grassroots initiatives regarding patients’ rights and genetically modified organisms (GMOs).

But the single most important change, or rather, setback, is the re-emergence of infectious disease epidemics. In the 1970s, experts believed that the fight against infectious diseases was won. But during the last two decades, this opinion has been reversed. The spread of new diseases, such as HIV/AIDS, hepatitis C, dengue haemorrhagic fever, and the resurgence of diseases long considered under control such as malaria, cholera and sleeping sickness has alarmed the medical community. Today, infectious diseases, particularly HIV/AIDS, have reversed hard won gains in life expectancy in Africa and Asia.⁷⁶⁴

Moreover, the re-emergence of these epidemics has coincided with antimicrobial resistance. While resistance occurs with every antimicrobial, medicine and science were, until recently, able to stay ahead of the pathogens through the discovery of ever more potent classes of pharmaceuticals. This success has slowed markedly partly because of the medical community’s misplaced confidence that infectious diseases had been conquered. But other globalising patterns have compounded our naiveté, including urbanization with its associated overcrowding and poor sanitation; pollution; environmental degradation; changing weather patterns, which can affect the incidence, distribution and the habitats of the insects and animals that carry disease; and a growing proportion of people needing hospital-based treatments, which increases population exposure to highly resistant pathogens found in hospitals.⁷⁶⁵

These public health dangers are of a scale that is beyond the capacity of any single national health care system. Their nature is inherently global, with causes related to the world’s growing interconnectedness, and with consequences that must be addressed by international solutions. International legal regimes represent just those solutions and further complications. Liberalising trade regimes, for example, only hastens the transnational flow of goods that serve as vectors for microscopic health threats. On the other hand, human rights laws provide powerful arguments improving access to lifesaving AIDS cocktails that

⁷⁶³ D. Fidler, *International Law and Infectious Diseases* (New York: Oxford UP, 1999) at 112-113.

⁷⁶⁴ Statement by Dr. David L. Heymann, Executive Director for Communicable Diseases, WHO, “Strengthening Global Preparedness for Defense Against Infectious Disease Threats.” Committee on Foreign Relations; WHO Report on Global Surveillance of Epidemic-Prone Infectious Diseases; WHO/CDS/CSR/ISR2000.1.

⁷⁶⁵ *Ibid.*,

are protected by patent laws. From an ISDL perspective, then, it is increasingly important to consider the linkages between ‘international health law’ and the other ‘hard law’ areas related to sustainable development in order to create a coherent body of international sustainable development health law.

Elements of an International Sustainable Development Law Approach

There are three elements of ISDL that have particular resonance for international health issues.

- The first is the **precautionary principle**, which has become intrinsic to international environmental policy. One example of an intersection with emerging health issues is that of GMOs: as yet, the precautionary principle has not been applied in the area of risk assessment vis-à-vis disease modifying biotechnology (i.e. genetically engineered medical treatments) though they will soon emerge as goods on the international market.
- Second, the ISDL principle of **intergenerational equity** has implications for the health agenda related to both environmental pollution and microbial resistance. Environmental pollution not only has health effects on present populations, but, by despoiling resources that contribute to health, it impairs the health of future generations. As we have learned more about the natural environment and its complexities, we have also learned more about the human body’s sensitivity to apparently modest insults and about the problems associated with the migration of pollutants, their transformation and the potential for accumulation over time. The issue of infectious disease containment, in light of our current drug use practices, also calls for an analysis of harm to future generations.
- Finally, ISDL has the potential to help elaborate the content of the **right to health**, which had its first expression in the 1946 World Health Organization Constitution.⁷⁶⁶ Attempts are still being made to endow the right to health with meaning, to move it from beyond an indeterminate norm to one of tangible application. What makes this right difficult to formulate is that it is impossible to isolate: all economic, social and cultural rights are fundamental to ensuring the conditions in which people can be healthy.

Key Issues for an International Health Law Agenda

Though there are numerous potential areas of study, priorities for the Health Law agenda include:

- **Health and the International Trade Law Regime:** Public health and the liberalisation of trade, as concretized by the World Trade Organization (WTO), provide the most potent examples of laudable goals working at cross-purposes. The main dynamic that operates in international trade law with respect to infectious diseases contains two elements. First, international trade law recognizes the sovereign right of States to adopt measures to protect public health from threats posed by products flowing in international commerce. This has been articulated in Article XX(b) of GATT which extends protective measures to human, plant and animal life or health. Second, international trade law regimes impose disciplines on States which constrain their ability to misuse their power to protect public health. This use of science is key to guiding States in balancing these interests.

Questions to be considered include: How can market liberalisation be pursued without undermining genuine national concerns about the transmission of infectious disease? How does the precautionary principle affect what constitutes an adequate risk assessment for a Sanitary and

⁷⁶⁶ “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”

Phytosanitary (SPS) challenge? Since mounting or defending challenges to health and safety measures requires scientific capabilities and resources, how can developing countries achieve parity with major industrial nations? How can the public's concerns about "foreign disease" threats (via the transmission of goods and people) avoid violations of individuals' rights in the name of "safety"?

- **Health and International Tobacco Regulation:** Tobacco is an extraordinary threat both to human health and the environment. There is no greater area of structural conflict between trade liberalisation and public health than that of tobacco control. The benefits of liberalised trade (increased access to improved and cheaper consumer products) apply in reverse to cigarettes. Public health is harmed when cigarettes are made more efficiently and inexpensively, and are more attractive and more available. Article 20 of TRIPS may also have special significance for tobacco control, as it may affect how governments may limit trademarks through advertising restrictions or bans. Already we have seen both China and Taiwan relax controls of imported cigarettes and change the tax structure on tobacco as part of their undertakings to join the WTO.

Questions to be considered include: the future interaction of the WHO Framework Convention on Tobacco (the first time the WHO has used its treaty-making powers) and existing trade obligations under the WTO.

- **Health and Access to Medications:** Since the 1978 Alma-Ata conference, there has been recognition that access to essential drugs is vital for preventing and treating diseases affecting millions of people throughout the world.⁷⁶⁷ However, the TRIPS agreement made such global access extraordinarily difficult. TRIPS requires that all member countries provide exclusive marketing rights to holders of patents on pharmaceutical products for a period of at least 20 years. TRIPS is an exception to the general liberalisation tenets of the trade regime. It imposes a positive duty on countries, requiring US-style intellectual property law be implemented globally. The US also actively intervenes to protect its dominance of world drug markets. The resulting cost of patented drugs is causing considerable alarm as essential medicines remain unattainable in many developing countries.

It was not until the *Doha Declaration* that TRIPS contained both a promise and an obligation to interpret the TRIPS Agreement in a manner supportive of WTO members' rights to protect public health and to promote access to medicines for all. As exciting a development in IP law as Doha was, many questions remain about its implementation.

Questions to be considered include: How can the *Doha Declaration* inform other provisions of the WTO? Can international finance regimes help national strategies finance the supply and increase the affordability of essential drugs in both the public and private sectors? How might developing countries structure IP legislation in a way that respects both producing and consumer country concerns?

- **Health and the International Environment Law Regime:** The environment is a major health determinant. Both "traditional" health hazards (such as lack of access to safe drinking water; inadequate basic sanitation; indoor air pollution from cooking and inadequate solid waste disposal) and "modern" hazards (such as pollution from industry and intensive agriculture; urban air pollution from motor cars, coal power stations and industry and transboundary pollution) contribute to about a quarter of human morbidity and mortality. And environmental changes will

⁷⁶⁷ This resolution was operationalised in 1981, when the WHO Action Programme on Essential Drugs was established; it provides support to countries to develop national drug policies and to work towards the rational use of drugs.

increasingly affect human health. The fact that many people are not able to adapt to such circumstances, while others are forced to do so is the antithesis of sustainable development.

Questions to be considered include: the erosion of health and environmental standards; the shift of public services into private control with little regulation; the uncontrolled movement of capital with effects on labour conditions; the movement of toxic industries to low labour-cost environments and the increase of income inequalities.

- **Health and Genetically Modified Organisms (GMOs):** Biotechnology is behind the paradigm shift in disease management towards preventive medicine based on genetic predisposition, targeted screening, diagnosis, and innovative drug treatments. It is also the engine driving many novel and innovative approaches that aspire to meet the needs of aging populations and developing countries. However, there are numerous serious and legitimate concerns about biotechnology. Concerns include the corruption of the natural gene pool through unintended cross pollination and gene transfer; harm to biodiversity; disruption of the ecosystem balance by excessive population growth and altered competition patterns; unintended toxicity to animals; the evolution of "super-pests" that develop a resistance to the genetically engineered toxicity; and health risks for consumers of GMO products.

Questions to be considered include: Will emerging understandings of the precautionary principle be used to justify the refusal of the transboundary movement of GMOs intended for direct use? How can developing country concerns about clearly defined liability be reconciled with developed countries' reluctance to assume liability for uncertain, foreseeable risk?

Crosscutting Issues

International sustainable development law (ISDL) is characterised by creative, dynamic instruments and institutions with **fresh potential for legal solutions** that integrate environmental, economic and social dimensions of legal problems. In particular, ISDL often employs the most recent scientific methods, including indigenous and traditional knowledge, uses new measures for technology transfer, and provides for corporate responsibility and public-private partnerships.⁷⁶⁸ ISDL seeks more integrated, effective and efficient approaches to environment, social and economic regulation. In *Agenda 21*, States recognise as an objective for international law of sustainable development "[t]o improve the effectiveness of institutions, mechanisms and procedures for the administration of agreements and instruments..."⁷⁶⁹ The 1997 *Programme for Further Implementation of Agenda 21*, and the recent regional preparatory meetings for the 2002 *World Summit for Sustainable Development* call for innovative new approaches and partnerships for sustainable development, based on the most up-to-date scientific and technological information.

These procedural aspects of ISDL regimes are engaged by each of the research agendas discussed above. Understanding the effect of these 'crosscutting issues' on ISDL regimes helps to explain the **integrative potential** of ISDL principles, for these themes serve as vehicles for weaving together environmental, economic and social priorities.

These crosscutting issues include:

⁷⁶⁸ D. Vogel, *Green And Global: A Review Of Trading Up: Consumer And Environmental Regulations In A Global Economy* (Washington: 1995); N. Roht-Arriaza, "Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment" (1995) 22 *Ecology L.Q.* 479. See M. Cappelletti *et al.*, eds., *Integration through Law* (London: 1986); H. Collins, "The Voice of the Community in Private Law Discourse" (1997) 3 *Eur. L.J.* 407.

⁷⁶⁹ *Agenda 21*, *supra* note 48, ch. 39.3(f).

- **Accountability for Environmental and Developmental Damage**, both through the regime of State responsibility premised on wrongful acts, and liability for international environmental and developmental damage in the absence of wrongdoing; legal implications of the polluter pays principle, methods for economic calculation of social and environmental damages, and international insurance regimes.
- **Socially and Environmentally Sound Investment**, such as sustainable multilateral investment regimes, institutions which provide for development loans or promote foreign direct investment, and frameworks which lever or create incentives for corporate social responsibility.
- **Compliance in ISDL**, including dispute settlement processes such as non-adversarial dispute settlement or environmental mediation; and distinctive features of dispute settlement in ISDL treaties, including the meshing of dispute settlement and dispute avoidance, the increased capacity of ISDL dispute settlement processes to address conflicting norms, and the dynamic interaction between dispute settlement processes and substantive rules within ISDL regimes.
- **Science and Precaution in ISDL**, including use of international social, environmental and sustainability impact assessment methodologies, the developing precautionary principle, and the increasing reliance upon academic work, scientific standards and expert evidence in ISDL decision-making.
- **Transparency and Participation in ISDL**, such as processes to ensure openness in treaty drafting, implementation, monitoring and non-compliance procedures, participation in international processes for the evaluation of *Agenda 21* implementation, and standing and intervener rights in ISDL disputes for present and future generations.
- **Financing implementation of ISDL**, including mechanisms to generate new and additional resources, technology transfer agreements; and policy linkages between foreign debt, debt relief and the right to development.

Sustainable Development Governance: International Institutional Architecture

This section outlines international institutional arrangements relating to sustainable development in the United Nations system and beyond. This is not meant to be an exhaustive study of the many organisations with mandates related to sustainable development, but rather a survey of some key institutions and an explanation of their formal mechanisms for cooperation.

The 2002 WSSD sets in place a strengthened institutional architecture for sustainable development, to further implement the 1992 *Agenda 21*, follow up on the outcomes of the 2002 WSSD, and meet emerging sustainable development challenges.⁷⁷⁰ The goals for this framework are provided by the provisions of *Agenda 21*. Implementation is further provided for in the 1997 Programme, in the principles of the *Rio Declaration*, and in other internationally agreed development goals (including those contained in the 2000 United Nations *Millennium Declaration*, taking into account the 2001 Monterrey Consensus on Financing for Development, and relevant outcomes of other major UN conferences and international agreements since

⁷⁷⁰ This process was initiated pursuant to a mandate from the United Nations General Assembly, Ten-year review of progress achieved in the implementation of the outcome of the United Nations Conference on Environment and Development, UNGA Resolution A/RES/55/199 20 Dec 2000. The United Nations World Summit on Sustainable Development, Draft Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/L.1 26 Aug–4 Sept 2002 can be found online: http://www.johannesburgsummit.org/html/documents/summit_docs.html. See also “Sustainable Development Governance,” a paper prepared by the Vice-Chairs, Mr. Ositadinma Anaedu and Mr Lars-Goran Engfeldt, online: www.johannesburgsummit.org/html/documents/prepcom3docs/governance30.3.rev1.doc.

1992).⁷⁷¹ Together, the new institutional framework sets in place a system of sustainable development governance, built by strengthening and linking the work of international bodies and organisations dealing with sustainable development, as well as the efforts of relevant regional, national and local institutions.

The new global framework for sustainable development governance is multi-tiered, a regime built of partnerships on three principal levels; international (including the international community more broadly, United Nations bodies such as the general assembly, the Economic and Social Council, and the Commission for Sustainable Development, as well as other agencies and international financial institutions), regional (including the United Nations Regional Commissions and other regional and sub-regional bodies) and national (which includes local authorities).⁷⁷² In this regard, several specific aspects of the new institutional arrangements can be highlighted, mainly from recent agreements achieved in WSSD negotiations:

The role of the international community in sustainable development governance

On the international level, the WSSD set in place a system of cooperation centred around the role of the broader international community, including three specific international institutions: the United Nations General Assembly (UNGA), the United Nations Economic and Social Council (ECOSOC), and the United Nations Commission for Sustainable Development (UNCSD). The new sustainable development governance system encourages collaboration within and between the UN system, the International Financial Institutions, the Global Environment Facility and the World Trade Organisation (WTO), utilizing the United Nations Chief Executive Board (CEB), the UN Development Group, the Environment Management Group (EMG) and other inter-agency coordinating bodies.⁷⁷³ This does not just mean more meetings- rather, cooperation is meant to be mainly operational, and in partnership with others at all levels.

Economic, social and environmental pillars of sustainable development governance

There is a clear need for further collaboration between the WTO and the International Labour Organisation (ILO), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), UNEP and other relevant agencies. The exact nature of this link, as well as urgings for trade and financing institutions to take sustainable development goals greater into account, were highly controversial points in the WSSD negotiations. Debates centred on the need to further enhance the contribution of trade and finance institutions to sustainable development. Some, particularly developing countries, urged Parties to go beyond the provisions of the Monterrey Consensus⁷⁷⁴ for more concrete commitments on financing for sustainable development.

There is also a need to better integrate the social dimension in sustainable development policies and programs, and ensure that sustainable development objectives are fully integrated in policies and programmes of bodies that have a primary focus on social issues. In particular, the social component of sustainable development can be strengthened by full implementation of the International Labour Organisation (ILO) Conventions on core labour standards.⁷⁷⁵

⁷⁷¹ Further information on the international series of conferences from 2002 can be found at the ECOSOC website, online: <http://www.un.org/esa>.

⁷⁷² Further information on the United Nations Commission on Sustainable Development and its relationship to other international organisations can be found at the UN CSD website, online: <http://www.un.org/esa/sustdev/csd.htm>.

⁷⁷³ Further information on the United Nations system of agencies, and their relationship to other international organisations, can be found at the UN CSD website, online: <http://www.un.org/esa/sustdev/csd.htm>.

⁷⁷⁴ Further information on the International Conference on Financing for Development, held in Monterrey, Mexico from 18 – 22 March, 2002, can be found at the ECOSOC website, online: <http://www.un.org/esa/ffd>.

⁷⁷⁵ Further information on the International Labour Organisation can be found at the ILO website, online: <http://www.ilo.org>.

International environmental governance will be mainly done through the implementation of the outcomes of UNEP's *Governing Council Seventh Special Session, Decision I: International Environment Governance* (IEG). This decision was the result of a ministerial-level intergovernmental process, established by the UNEP governing council, addressing issues and options for strengthening international environmental governance.⁷⁷⁶ The decision includes provisions for five main building blocks, from an innovative IEG process chaired by Minister of Environment David Anderson of Canada. First, UNEP is to be greatly strengthened and second, given adequate, more secured financing. There is also a special role for the Global Environmental Facility (GEF) in terms of financing environmental projects. Third, coordination will be enhanced, including the further development of an Environmental Management Group (EMG) composed of relevant international organisations and treaty secretariats. Fourth, there will be clustering of Multilateral Environmental Agreements (MEAs) along functional and programmatic lines. Fifth, the General Assembly is invited, for its 57th Session, to consider establishing universal membership for the Governing Council/Global Ministerial Environment Forum; a call reinforced by the *WSSD Declaration*.

The role of the UN General Assembly, ECOSOC and the CSD

The Commission on Sustainable Development continues to be the high-level commission on sustainable development within the UN system and serves as a forum for consideration of issues related to integration of the three dimensions of sustainable development. The role, functions and mandate of the Commission was set out in *Agenda 21* and adopted by General Assembly Resolution 47/191.⁷⁷⁷ In the 1992 Earth Summit preparatory process, a follow up mechanism was designed for the United Nations to track progress toward sustainable development. In the end, it was agreed that a new functioning Commission would be set up, under the auspices of the United Nations Economic and Social Council (ECOSOC).⁷⁷⁸ At Chapter 38, *Agenda 21* states that "...to ensure the effective follow-up of the Conference, as well as to enhance international cooperation and rationalization, the intergovernmental decision-making capacity for the integration of environment and development issues and to examine the progress of the implementation of *Agenda 21* at the national, regional and international levels, a high level Commission on Sustainable Development should be established in accordance with Article 68 of the Charter of the UN."⁷⁷⁹ After the Earth Summit in 1992, the UN General Assembly recognised that the ECOSOC would establish the high level Commission as a functional council body, and elect representatives of 53 states to serve for up to three-year terms. The CSD would meet once a year for two or three weeks, as a functional ECOSOC commission with a full-time secretariat based in New York, and it was given a clear identity within the UN system. Relevant intergovernmental organizations and specialized agencies (UNEP, WHO, UNDP and others), including financial institutions, were invited to designate representatives to advise and assist the Commission, serving as focal points between sessions. The 1992 Earth Summit had also seen an unprecedented involvement of stakeholders in the preparatory process and the Summit itself. *Agenda 21* contains nine chapters dealing with the role of 'major groups'.⁷⁸⁰ In ten years of work from 1992 to 2002, the CSD established innovative formal and informal procedures which gave major groups extremely high involvement in their work, and excellent access to deliberations.

According to the WSSD, the General Assembly of the United Nations should adopt sustainable development as a key element of the overarching framework for UN activities, particularly for achieving

⁷⁷⁶ Further information on the United Nations Environment Programme, and the international environmental governance negotiations, can be found at the UNEP website, online: <http://www.unep.org/IEG>. See also M.C. Cordonier Segger, A. Khalfan, M. Gehring, "International Environmental Governance for Sustainable Development", Centre for International Sustainable Development Law (CISDL), online: <http://www.cisd.org>.

⁷⁷⁷ Further information on the United Nations Commission on Sustainable Development can be found at the UN CSD website, online: <http://www.un.org/esa/sustdev/csd.htm>.

⁷⁷⁸ Further information on the United Nations Economic and Social Council can be found at the UN ECOSOC website, online: <http://www.un.org/esa/coordination/ecosoc>.

⁷⁷⁹ *Agenda 21*, *supra* note 48 at Chapter 38. See also the *UN Charter*, *supra* note 204 at art 68.

⁷⁸⁰ The Major Groups in *Agenda 21* are Youth, Women, Farmers, NGOs, Local Government, Business, Academics, Indigenous People, and Trade Unions. See *Agenda 21*, *supra* note 48, at ch. 24 – 32.

the internationally agreed development goals, including those contained in the Millennium Declaration. It is also to give overall political direction to the implementation of *Agenda 21* and its review.

The WSSD also grants a stronger role to ECOSOC in the process. The Charter of the United Nations and *Agenda 21* provisions regarding ECOSOC, and the General Assembly Resolutions 48/162 and 50/227, reaffirmed ECOSOC as the central mechanism for coordination of the UN system and its specialised agencies and supervision of its subsidiary bodies, in particular its functional commissions (such as CSD). ECOSOC can play a special role to promote the implementation of *Agenda 21* by strengthening system-wide coordination. The WSSD decided that ECOSOC should increase its role in overseeing system-wide coordination, and balanced integration of economic, social and environmental aspects of the United Nations policies and programmes aimed at promoting sustainable development. It should also organize periodic consideration of sustainable development themes in regard to the implementation of *Agenda 21*. Recommendations in regard to such themes could be made by the Commission on Sustainable Development (CSD), and ECOSOC will make full use of its high-level coordination, operational activities and the general segments to effectively take into account (but not coordinate) all relevant aspects of the work of the UN on sustainable development. The ECOSOC also encourages active participation of major groups in its high-level segment and the work of its relevant functional commissions, in accordance with various rules of procedure. It will promote greater coordination, complementarity, effectiveness and efficiency of those activities of its functional commissions and its other subsidiary bodies, which are relevant to the implementation of *Agenda 21*. The WSSD terminated the Committee on Energy and Natural Resources for Development, and transferred its work to the CSD. ECOSOC is also asked to ensure that there is a close link between ECOSOC's role in the follow-up of both the WSSD outcomes and the Monterrey Consensus, and encouraged to further develop links with the Bretton Woods institutions and the WTO (an arrangement set forth in the Monterrey Consensus).

The CSD's mandate included to monitor progress on the implementation of *Agenda 21* and activities related to the integration of environmental and developmental goals by governments, NGOs, and other UN bodies; to monitor progress towards the target of 0.7% GNP from developed countries for Overseas Development Aid; to review the adequacy of financing and the transfer of technologies as outlined in *Agenda 21*; to receive and analyse relevant information from competent NGOs in the context of *Agenda 21* implementation; to enhance dialogue with NGOs, the independent sector, and other entities outside the UN system, within the UN framework; and to provide recommendations to the General Assembly through the Economic and Social Council (ECOSOC).⁷⁸¹ The CSD is made up of 53 countries – a third of which are up for election each year. The allocation of seats is 13 from Africa, 11 from Asia, 6 from Eastern Europe, 10 from Latin America and the Caribbean and 13 from Western Europe and North America. The Secretariat is located within the Department for Social and Economic Affairs (DESA). DESA also has secretariats for the Commissions on Population, Status of Women and Social Development, which the WSSD found to offer a good opportunity for collaboration. One of the interesting aspects of elections to the CSD is that they have been actively pursued by countries unlike many other UN Commissions. The CSD is a soft law forum. If an issue requires a stronger legal framework, initial discussions can take place at CSD, but they are then designated to an appropriate body to negotiate legally binding actions.

In the years between 1992 and 2002, several critiques were raised by developing countries and others. They had expected the CSD to provide an effective body to monitor progress towards the target of 0.7% GNP, ensuring adequate financing and the transfer of sustainable-development related technologies, but this was not perceived to have happened. The CSD looked at finance and technology transfer themes in isolation from issues that might have enabled there to be an effective argument for new funds. In addition, while occasionally development, transport, energy or agriculture Ministers would attend if their sector was being discussed, CSD was not seriously attended by Ministers with budgets to deliver additional financing for sustainable development. Other critiques were also raised, including the CSD being described as a “talk-

⁷⁸¹ UNGA Resolution 1993/207

shop” with too many environmental interests, not enough development Ministries, too many northern NGOs, and no machinery for implementation.

The CSD also has a record of certain achievements for international sustainable development policy, as opposed to law. Mainly, the forum provides space for dialogue, coordination and eventual cooperation which leads to international instruments. According to Felix Dodds, these have included recommendations to codify Prior Informed Consent procedures (1994); the establishment of an Inter Governmental Panel on Forests (1995) and an International Forum on Forests (1997); supporting the Washington Global Plan of Action on protecting the marine environment from land-based activities (1996), agreeing to the replenishment of Global Environmental Facility (GEF) (1997); setting a firm date of 2002 for governments to produce their National Sustainable Development Strategies (1997); establishing a new process in the General Assembly to discuss oceans (1999); agreeing that new consumer guidelines would include sustainable development (1999); and developing an International Work Programme on Sustainable Tourism (1999).⁷⁸²

The involvement of major groups at the CSD has increased each year, with formal and informal procedures being developed. These included being let into informal and formal meetings and invited to speak (1993); being given the opportunity to ask their governments questions on their national presentations in front of their peer group (1994); the introduction of the Dialogue Sessions - as a series of 5 half-day Major Group presentations (1997); being invited to speak at the Heads of State meeting of the UN General Assembly Special Session for the first time (1997); and the inclusion of Dialogue Session outcomes as part of the materials for Ministerial discussion and part of official CSD Intersessional documents for governments to draw on by the CSD Chair (1999). The involvement of civil society organisations and Major Groups in the WSSD process has been unprecedented, with concrete steps being taken to ensure participation at each level.

The WSSD recognises that while this progress continues to be relevant, CSD will now focus more on reviewing and monitoring the progress in implementation of *Agenda 21*, and foster coherence of implementation, initiatives and partnerships. This implementation is taking place at all levels, and the CSD can promote and facilitate partnerships involving governments, international organisations and relevant stakeholders for the implementation of *Agenda 21*. The CSD will continue to review and evaluate progress and promote further implementation of *Agenda 21*, but will look to cross-sectoral aspects of specific sectoral issues. It will provide a forum for better integration of policies through the interaction of Ministers dealing with the various dimensions and sectors of sustainable development. It will address new challenges and opportunities related to the implementation of *Agenda 21*, including the identification of constraints and ways these can be overcome. It will review issues related to financial assistance and transfer of technology for sustainable development as well as capacity building while making full use of existing information, such as national reports and regional experience. In this respect, CSD will still develop recommendations, but negotiations in the CSD will be limited to every two years, and the number of themes addressed in each session will also be limited. The emphasis will shift. CSD will serve more as a focal point for discussion of partnerships that promote sustainable development, including sharing lessons learned, progress made and best practices. It will also provide a forum for analysis and exchange of experience on measures that assist sustainable development planning, decision-making, and implementation of sustainable development strategies through national and regional reports. In addition, the CSD has a new mandate to track “significant legal developments in the field of sustainable

⁷⁸² F. Dodds, *Reforming the International Institutions, Earth Summit 2002: A New Deal* (London: EarthScan, 2002) at Ch 5, online: <http://www.earthsummit2002.org/es/issues/Governance/governance.htm#Sustainable%20Governance> For more civil society and expert reviews of the functioning of the United Nations Commission on Sustainable Development, see the International Institute for Environment and Development (IIED) series on the World Summit for Sustainable Development, online: <http://www.iied.org/wssd/index.html>. See also the International Institute for Sustainable Development (IISD), online: <http://www.iisd.org>, and the Centre for International Sustainable Development Law (CISDL), online: <http://www.cisdl.org>.

development, with due regard to the role of relevant intergovernmental bodies in promoting the implementation of *Agenda 21* relating to international legal instruments and mechanisms.⁷⁸³

In regard to the practical modalities and work program of CSD, specific decisions on these issues are taken by the CSD at its sessions, when the Commission's thematic work program will be elaborated. The work program will continue to provide for more direct and substantive involvement of international organisations as well as major groups in its work; give greater consideration to the scientific contributions to sustainable development; further the contribution of educators to sustainable development including, where appropriate, in the activities of the CSD; and promote best practices and lessons learned in sustainable development, as well as use of contemporary methods of data collection and dissemination, including broader use of information technologies.

The role of other international institutions

In terms of the role of international institutions, the new sustainable development governance framework stresses the need for international institutions both within and outside the UN system, including international financial institutions (IFIs), the World Trade Organisation (WTO) and the Global Environment Facility (GEF), to enhance, within their mandates, their cooperative efforts to promote effective and collective support to the implementation of *Agenda 21* at all levels. This is to be done with enhanced collaboration, not only on *Agenda 21* but also for the outcomes of the World Summit on Sustainable Development, relevant sustainable development aspects of the *Millennium Declaration*, the *Monterrey Consensus*; and the outcomes of the Fourth WTO Ministerial Meeting (Doha). The Secretary-General of the United Nations can use the Chief Executives Board for Coordination to further promote system-wide inter-agency cooperation and coordination on sustainable development, and to take appropriate measures to facilitate exchange of information, and to keep ECOSOC and CSD informed of actions being taken to implement *Agenda 21*.

Several other international aspects of sustainable development governance should be highlighted. The UNDP has capacity building programmes for sustainable development. There is a commitment to strengthen cooperation among UNEP and other UN bodies and specialized agencies, the Bretton Woods institutions and the WTO, within their mandates. The UNEP, UN-Habitat, UNDP and UNCTAD are also expected to strengthen their contribution to sustainable development programmes and the implementation of *Agenda 21* at all levels, particularly in the area of promoting capacity building. Governments also agreed to streamline the international sustainable development meeting calendar, reducing the number of meetings, the length of meetings and the amount of time spent on negotiated outcomes in favour of more time spent on practical matters related to implementation. They will encourage partnership initiatives for implementation by all relevant actors, making full use of developments in the field of information and communication technologies, but the modalities of these partnerships are still unclear. Governments suggest that the United Nations Convention to Combat Desertification, like other Rio Conventions, should have a dedicated, specific and permanent financial mechanism, and land degradation, primarily desertification and deforestation, is to become a GEF focal area, though the GEF Second Assembly, to be held October 2002, and the 6th Session of COP/UNCCD must take the necessary measures to this effect.

Sustainable development governance at the regional (and sub-regional) levels

The United Nations Regional Commissions, as well as other regional and sub-regional institutions and bodies, are given a special role in the implementation of *Agenda 21* and the outcomes of the World Summit on Sustainable Development. This includes improved intra-regional coordination and cooperation on sustainable development among the regional commissions, United Nations Funds, Programmes and Agencies, regional development banks, and other regional and sub-regional institutions and bodies. Their

⁷⁸³ See the *Implementation Declaration* of the WSSD, online: www.johannesburgsummit.org.

role, in particular, is to facilitate and promote a balanced integration of the economic, social and environmental dimensions of sustainable development into the work of regional, sub-regional and other bodies. This can be done, for example, by facilitating and strengthening the exchange of experiences, including national experiences, best practices, case studies and partnership experiences related to implementation of *Agenda 21*. They will assist in the mobilization of technical and financial assistance, as well as facilitate the provision of adequate financing for the implementation of regionally and sub-regionally agreed sustainable development programmes and projects, including addressing the objective of poverty eradication. They will also continue to promote multi-stakeholder participation and encourage partnerships to support implementation of *Agenda 21* at the regional and sub-regional levels. Finally, regionally and sub-regionally agreed sustainable development initiatives and programmes (for example, the New Partnership for Africa's Development (NEPAD) and the inter-regional aspects of the globally agreed Barbados Programme of Action for the Sustainable Development of Small Island Developing States) shall be supported.

Sustainable development governance at the national, subnational and local levels.

Sustainable development governance also has a very important national level. The WSSD mandate states that governments should continue 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. As per paragraph 24(a) of the Programme for the Further Implementation of *Agenda 21*, governments will also take further steps for the formulation and elaboration of national strategies for sustainable development, supported through international cooperation. These steps should take into account the special needs of developing countries, in particular the least developed countries. Such strategies, which, where applicable, could be formulated as poverty reduction strategies, that integrate economic, social and environmental aspects of sustainable development, should be pursued in accordance with each country's national priorities.

In the WSSD negotiations, particularly contentious statements were made on the need for good governance at the national level. Several delegations strongly felt that this was essential for sustainable development and urged that all States should strengthen their government institutions by, for example, promoting the rule of law, improving legal structures and enforcing existing laws that support sustainable development. In this regard, they sought recognition that all countries can promote sustainable development by enacting effective laws that support sustainable development, by building and maintaining adequate, transparent, accountable and fair regulatory and judicial institutions and infrastructure to achieve sustainable development, including for protection of human rights, and by fighting corruption. They also argued that all countries should promote access to information, including by promoting laws and regulations that ensure that citizens have access to and utilize information regarding laws, activities and policies. They supported work to foster full public participation in sustainable development policy development and implementation. This included effective participation by women, in governmental regulatory policy and planning processes, including cooperation and coordination with local governments and administrations, indigenous groups, community based organizations and other stakeholders. Finally, they sought recognition of the need for all countries to promote access to justice, to provide transparent, non-discriminatory and fair regulatory, administrative and judicial institutions and procedures, including for enforcement, rights of review, appeal and remedies; to develop and maintain effective legal systems including strong and clear laws related to compliance, monitoring, enforcement, anti-corruption and citizen participation.

Among other aspects of the new national sustainable development governance agenda, several countries also sought to further promote the establishment or enhancement of sustainable development councils and/or coordination structures, at the national level, and at the local level. This is thought to provide a high-level focus on sustainable development policies. They promoted multi-stakeholder participation. They

wanted to support efforts by all countries, particularly developing countries, and countries with economies in transition, to enhance national institutional arrangements for sustainable development, at the local and national level. They argued that this could include promoting cross-sectoral approaches in the formulation of strategies and plans for sustainable development, such as, where applicable, poverty reduction strategies, aid coordination, encouraging participatory approaches and enhancing policy analysis, management capacity, and implementation capacity, including mainstreaming a gender perspective in all these activities.

Governments also agreed to enhance the role and capacity of local authorities and stakeholders in implementing *Agenda 21* and the outcomes of WSSD, and in strengthening the continuing support for Local *Agenda 21* programmes and associated initiatives and partnerships. They agreed to encourage, in particular, partnerships among and between local authorities and other levels of government and stakeholders to advance sustainable development as called for in, *inter alia*, the Habitat Agenda. They agreed to enhance partnerships between governmental and non-governmental actors, including all major groups, as well as volunteer groups, on programmes and activities for the achievement of sustainable development at all levels. Another point of high controversy appeared, whereby several governments and regional groups argued for the development, with participation of civil society, of global multilateral guidelines on public access to information, public participation on decision-making and access to justice drawing on existing experience, including initiatives designed to implement Principle 10 of the *Rio Declaration*. A further point of controversy centred on the need to acknowledge the importance of the inter-relationship between human rights promotion and protection and environmental protection for sustainable development, and invite further consideration of these issues in the relevant fora, including by continued cooperation between UNEP and United Nations High Commission for Human Rights.

Finally, governments sought to promote and support youth participation in programs and activities relating to sustainable development, through, for example, supporting local youth councils or their equivalent and by encouraging their establishment where they do not exist.

PART VI: ONLINE RESOURCES

Recommended print and web-based resources on international sustainable development law will be available on the CISDL website (www.cisd.org/wtr) from October 2002.

BIOGRAPHIES OF THE AUTHORS & CONTRIBUTORS

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Marie-Claire Cordonier Segger is director of the Centre for International Sustainable Development Law (CISDL). She lectures in law for the International Development Law Institute in Rome and other institutions, and writes legal briefs, articles and reports on international trade, environmental protection and sustainable development. She is also project director of the International Institute for Sustainable Development's Americas Portfolio, in cooperation with the United Nations Environment Programme, where she chairs a Hemispheric Working Group on Trade and the Environment, and monitors the 2002 WSSD process. With IISD, she is lead author of *Trade Rules and Sustainability in the Americas*, *Ecological Rules and Sustainability in the Americas*, and *Social Rules and Sustainability in the Americas* (forthcoming), as well as *Beyond the Barricades of Quebec City: A Hemispheric Trade and Sustainability Agenda*

She has twice been appointed visiting scholar at the Lauterpacht Research Centre for International Law in Cambridge University, and spent two years as an associate fellow at the Royal Institute for International Affairs in London. She holds degrees in civil and common law from McGill University in Montreal, where she held the Wainwright Scholarship, and an interdisciplinary BA (highest honours) in international relations, environment, law, and management studies. She is also executive director of Elements International Ltd., a small global consulting firm, and holds a professional certificate in graphic arts. She speaks English, French and Spanish, and basic German and Portuguese.

Ms. Cordonier Segger has served as advisor to the Canadian delegation in the United Nations, as president of the Environmental Law Association of McGill University, and on the Advisory Committee of the Canadian International Development Agency's Environment and Sustainable Development Program. She spent four years working for the Canadian Environmental Network, and six as a director of the Environmental Youth Alliance and other international networks. In these capacities, she participated in the 1992 Earth Summit, and later founded the UNEP Youth Advisory Committee. She has also served on the UN Commission on Sustainable Development V NGO Steering Committee, and the National Steering Committee of the Canadian Environmental Network.

Ashfaq Khalfan

Ashfaq Khalfan is Director of the Centre for International Sustainable Development Law (CISDL). He is a citizen of Kenya and speaks English, Swahili and French. His main legal interests are in field of human rights and development, with special emphasis on economic and social rights, minority rights, sustainable development and Islamic law. He has represented the CISDL at the Financing for Development process and the World Summit for Sustainable Development process, in both cases presenting legal briefs, recommendations and organizing events related to the integration of human rights into these processes. He has coordinated a CISDL study to provide advocates of Third World debt cancellation with information on their legal options, in conjunction with the Canadian Jubilee 2000 movement. He has worked with the Law & Society Trust in Colombo, Sri Lanka, coordinating a coalition of civil society organizations advocating improved fundamental rights protection in the Sri Lankan Constitution, and publishing. He is the author of a publication on "Constitutional Reform and Minority Rights in Sri Lanka." He has previously worked with the Investigations Branch of the Canadian Human Rights Commission in Ottawa and Rights and Democracy (International Centre for Human Rights and Democratic Development) in Montreal. He also worked with Kituo Cha Sheria (Legal Aid Centre) in Nairobi, Kenya, researching community security in informal settlements.

He has served as an editor on the *Revue québécoise de droit international*, a Montreal-based law journal, was Co-Chair of the McGill International Law Society and administered the McGill Human Rights Internship Programme. He holds a B.A. (First Class Honours) in the fields of political science (in particular comparative politics of developing areas) and international development, and both civil and common law degrees (L.L.B., B.C.L., Great Distinction) from the McGill University Faculty of Law in Montreal.

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Salim A. Nakhjavani is Lead Counsel for Crosscutting Issues at the Centre for International Sustainable Development Law (CISDL). He is Whewell Scholar in International Law in the University of Cambridge and Leslie Wilson Minor Scholar at Magdalene College. His main research interests include compliance and dispute settlement in international sustainable development law, theories of representation in international law, the prosecutorial function in international criminal law, and comparative criminal procedure.

He was awarded the LL.M. with First Class Honours from the University of Cambridge in 2002, and holds B.C.L. and LL.B. degrees with Great Distinction from the Faculty of Law at McGill University, having graduated with the highest standing in the fields of Criminal Law and Human Rights. He was a scholarship participant at the September 2001 session of the Institute of International Public Law and International Relations in Thessaloniki, Greece. He is past Research Director of the McGill Legal Information Clinic and represented the CISDL Commission at the 2000 International Law Association conference in London. In 1999, he was commended by the Government of Quebec for his work in founding the Westmount Youth Orchestra. Mr. Nakhjavani is a citizen of Britain & Canada, and is fluent in French, English, Persian and elementary German.

Alhagi Marong

Alhagi Marong, a citizen of the Gambia, is a Senior Research Fellow at the Centre for International Sustainable Development Law (CISDL). He currently teaches International Commercial Transactions at the Department of Law, American University of Armenia, in Yerevan. In 1996-97, Mr. Marong held the Greenshields Fellowship at McGill University and obtained an LL.M in International Business Law with Honours in 1998. In 1998/99 he won a McGill Major Fellowship, and then a Commonwealth Scholarship, to pursue doctoral studies on international investment law and sustainable development at the Institute of Comparative Law, McGill University. His research interests include issues of norm creation in international law, and the confluence between international business regimes and social and environmental concerns, particularly with respect to developing countries. Before coming to McGill, he studied at the Fourah-Bay College, University of Sierra-Leone and at the Sierra-Leone Law School, earning his LL.B (Hons.) and B.L degrees respectively. In both years, he won the prize for the best all-round performance, and was the valedictorian for his undergraduate year.

Upon graduation, he worked for the Ministry of Justice in Gambia for five years doing mainly criminal prosecution, and representing the government in civil defence litigation. During this period, he also served as legal adviser for the National Environment Agency of The Gambia, concluded a major research project for the Law Reform Commission of The Gambia on Customary Land Tenure and Dispute Resolution, and consulted for the Food and Agriculture Organization (FAO, Gambia) on Participatory Approaches to Land Use Planning. He has also worked as an Intern at the Legal Affairs Division of the World Trade Organisation in Geneva, and studied at the International Development Law Institute, in Rome.

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Witold Tymowski is a Research Fellow at the Centre for International Sustainable Development Law (CISDL). He is a graduate of the National Programme (combined B.C.L./LL.B.) of the McGill University Faculty of Law. Mr. Tymowski has actively participated in numerous organisations, including the

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Sumudu Atapattu is Lead Counsel for Human Rights and Poverty Eradication at the Centre for International Sustainable Development Law (CISDL). A national of Sri Lanka, she holds LLM (1st class honours) and PhD Degrees from the University of Cambridge and is an Attorney-at-Law of the Supreme Court of Sri Lanka (was placed 1st in order of merit at the final examination). She specialized in International Environmental Law for her doctoral degree. In 2000, she was awarded a Senior Fulbright scholarship and carried out research on environmental rights and human rights at New York University Law School and George Washington University Law School as a visiting scholar. From August 1995 to January 2002, she worked as a Senior Lecturer at the Faculty of Law, University of Colombo, Sri Lanka, where she taught Environmental Law and International Law. She was instrumental in introducing the subject of environmental law to the law school curriculum and developed the subject to include international environmental law and an inter-disciplinary approach.

Ms. Atapattu also working as a Consultant to the Law & Society Trust, a non-governmental human rights organization in Colombo, Sri Lanka. She was the editor of the LST Review, a monthly research publication of the Trust for several years. She has worked on the draft fundamental rights chapter of the proposed Constitution, the draft legislation on equal opportunity, edited several publications and coordinated research for the annual State of Human Rights Report of the Trust. This year, she is editing the 2002 State of Human Rights Report. She has also worked on several projects as an independent consultant and in 2001 she served on a panel of experts on liability and compensation issues for the WHO's proposed Framework Convention on Tobacco Control.

At present, Ms. Atapattu lives in the United States with her family and is attached to the Institute for Legal Studies of the University of Wisconsin-Madison Law School as a visiting scholar. She is working on a book on International Environmental Law which will be published next year, by Transnational Publishers, New York.

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Perspectives (IUCN for the Global Environment Facility) (1999). She has also prepared briefing papers on a range of social issues related to international development such as debt relief, poverty alleviation, aid effectiveness, the multilateral development banks, and gender and development. In Australia, Ms. Deere was the national coordinator for a global network of youth organizations working on the reform of the Bretton Woods Institutions. She holds a M.A. in International Affairs from the Johns Hopkins University School of Advanced International Studies (SAIS) and a Bachelor of Economics (Hons I) from the University of Sydney, Australia.

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Dr. Gehring teaches German Constitutional and Administrative Law at the Faculty of Law, University of Hamburg, Germany. His recent research has included a WTO/GATT law project at their Institute for International Affairs, and contributed to the German language legal textbook on International Economic Law. His PhD focused on Trade and Environment, exploring implementation of the precautionary principle in WTO law. Dr. Gehring's interests in international sustainable development law include trade and sustainable development, international sustainability impact assessments, sustainable development and the Law of the Seas.

Dr. Gehring speaks German, English, Spanish and basic French. He has studied at the Universidad de Deusto in Bilbao, Spain, where he specialised in International and European Law, and at the University of Hamburg, specialising in Environmental and Economic Administrative Law. He received his first State Law Degree with distinction. During his studies he gained professional experience in an English law firm in East Sussex, England, at the German Embassy in Buenos Aires, Argentina, and at the Brussels office of a German law firm, where he concentrated on European Environmental Law. He has also worked for the Ministry of Environment of Hamburg and has participated in various environment and international law conferences, including the COP-6 of the Framework Convention on Climate Change in The Hague, Netherlands, and the United Nations Environment Programme International Environmental Governance meetings in Montreal, Canada. Dr. Gehring is also a member of the German Social Democratic Party, is an Alderman on his local town council, is a member of the local environmental committee and is Vice-Chair of the local party division.

María Leichner

María Leichner is Lead Counsel for Crosscutting Issues at the Centre for International Sustainable Development Law (CISDL). She is the Founder and Executive Director of the Fundación Ecos, a non-profit educational and research centre created to promote sustainable development and transform *Agenda 21* principles into concrete action since 1994. At Fundación ECOS, Dr. Leichner created "The Trade, Investment and Environment Program" to stimulate the Mercosur Civil Society towards implementation of sustainable development principles to make a solid contribution within the region. She holds a Doctorate in Law from the School of Law and Social Sciences, National University of Litoral (1997), Argentina. Before joining Fundación Ecos, Dr. Leichner had served as Professor at Buenos Aires University, School of Social Sciences and Economics. Before establishing Fundación ECOS Dr. Leichner co-ordinated "Informa Mercosur" a program based in Argentina to promote Mercosur for the civil society and the academia sector in 1993. She has been organizing groups of key decision makers in the region promoting sustainable development dilemmas facing the Mercosur. She is a Consultant of World Wildlife Fund -

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Dr. Leichner was nominated Guest of Honour of at The National University of Rosario, Argentina related to her work on the Mercosur Civil Society. She became a Senior Fellow of the Centre for International Sustainable Development Law at the Faculty of Law of McGill University in 2002. She was nominated one of the Global Leaders for Tomorrow 2002 –World Economic Forum - for her work on sustainable development in a global scale. She is part of the Global Leaders for Tomorrow Environmental Sustainability Index Task Force. In 2001, she became a partner of the International Investment Rules Project, to produce a Framework for a set of global 'Sustainable Development Investment Rules' and stimulate a global coalition to press for its implementation. It seeks to develop the conceptual and strategic foundation for an approach to the global governance of investment, both portfolio and foreign direct investment (FDI), that integrates social, environmental, and human rights norms.

Dr. Leichner's work has focused on increasing public awareness of civil society participation in trade, investment and environment. This activity consists principally of research, communication and information outreach through, on one hand, a continual interchange of opinions and discussions with involved NGO's and IGO's. Dr. Leichner is also President of the Patagonia Land Trust Argentina. The objective of this project is to donate 60,000 hectares to the National Parks Administration to create the first National Park on the Patagonian coast named Monte León National Park.

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Maya Prabhu is Lead Counsel for Sustainable International Health Law at the Centre for International Sustainable Development Law (CISDL). She is a graduate of Dalhousie Medical School and McGill Law School. She has also obtained an A.B. magna cum laude in Social Studies (political and social theory) from Harvard University and Master's Degree in Political Economy from the London School of Economics. Her legal interests include international humanitarian law, medical ethics and various issues at the nexus of health and human rights. Maya's past experience includes health policy analysis at the United Nations Policy Development Branch, the International Affairs Division of Health Canada, the Canadian International Development Agency and the Manitoba Center for Health Policy and Evaluation. Her field work has taken her to Thailand and India for research on HIV/AIDS. While in medical school she did extensive work in psychiatry and post-traumatic stress disorder, especially among civilians and combatants in post-conflict situations. Ms. Prabhu was raised in Winnipeg, Manitoba; she is endeavouring to become as multilingual as her colleagues at the CISDL.

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