

INTERNATIONAL LAW ASSOCIATION

RIO DE JANEIRO CONFERENCE (2008)

INTERNATIONAL LAW ON SUSTAINABLE DEVELOPMENT

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REPORT

Introduction

This is the third report of the International Committee on International Law on Sustainable Development, building upon its previous two reports, specifically its 2006 substantive report on the principle of integration. The report is divided into three parts. First, there is an overview of recent developments and a summary of key issues. The report also considers a number of recurring contradictions within the sustainable development debate, though goes on to ask whether the existence of such tensions is necessarily a weakness in the present political discussions on the issue. Second, there are short reports on (i) sustainable development and international trade and investment, (ii) sustainable development and environmental governance and (iii) a brief review of the 2007 United Nations Declaration on Indigenous Peoples. Third, there is a short conclusion, highlighting future plans of the Committee.

Various members of the Committee attended the 2007 regional conference in Pretoria. In addition to contribution to the conference itself, the members also held a very useful "working" meeting of the Committee, chaired by Duncan French. The meeting considered both the current contours of the sustainable development debate and the internal workings of the Committee. The meeting decided to ask the officers of the Committee to consider establishing four internal working groups to help assist the Committee (and its officers) in its work. The chair and co-rapporteurs endorsed this proposal.

The four working groups, together with each group's convener, were:

- i) sustainable development and trade and investment (Professor Ximena Fuentes);
- ii) sustainable development and human rights (Professor Susana Vieira);
- iii) sustainable development and international development (Professor Surya Subedi);
- iv) sustainable development and environmental governance (Dr Duncan French).

The benefit of establishing such working groups was to encourage members to feel more engaged (and take a more active role and/or responsibility for their committee). Committee members were asked whether they would like to join such working groups, it being noted that this was not a requirement of Committee membership, especially as we would be looking for active and regular involvement, above and beyond, what is otherwise required. At the open working session in Rio de Janeiro, the working group structure was revisited. In light of experience, the officers of the Committee have decided to reassess the use of such working groups – though as a method it has advantages, the structure underlines the risks of a fragmented approach to sustainable development. The Chair and co-rapporteurs would wish to place on record their thanks to all members for expressing their interest on this matter, and would particularly like to thank Professors Susana Vieira and Surya Subedi for agreeing to convene their respective groups.

Part A: Summary and Overview of Issues

The concept of sustainable development remains, in many ways, as complex and contested an idea as when it was first promulgated on the international stage with the publication of *Our Common Future* in 1987.¹ It continues to have the potential to draw disparate policy groupings together, while at the same time continuing to divide political, economic and legal opinion as to its scope, purpose and, even, utility. Notwithstanding this, the concept of sustainable development remains *en vogue*, as exemplified by its frequent incorporation in new treaties in various fields of international law (eg. 2007 Treaty of Lisbon, 2007 ASEAN Charter and revised 2008 Charter of the Organisation of the Islamic Conference) as well as in national laws.

It is also sixteen years since the international community met in Rio de Janeiro to consider questions of sustainable development and global environmental responsibility at the United Nations Convention on Environment and Development (UNCED). The broad consensus that was reached at the 1992 “Rio” Conference not only set an agenda that repositioned the priorities of the international community but has continued to have a strong bearing on national, regional and international strategies ever since. The seminal documents of the 1992 conference – the Rio Declaration on Environment and Development, UN Framework Climate Change Convention and Convention on Biological Diversity, the Forestry Principles and Agenda 21 – have all proved to be key markers in the global environmental debate and have remained extremely pertinent in the period since 1992.

In particular, the Rio Declaration continues to provide a normative framework in the arena of both environmental and sustainable development law, governance and policy-making. Since the adoption by the international community of the Rio principles, progress has been achieved in virtually all cases, including, but certainly not limited to²:

(i) the “no harm” principle (Principle 2) – endorsed by the International Court in its 1996 *Nuclear Weapons Advisory Opinion* as a rule of custom³ and amplified still further by the 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities;⁴

(ii) the precautionary approach / principle (Principle 15) – codified in various treaties and discussed in various international judicial fora, and notwithstanding continuing concerns over its precise status and scope,⁵ undoubtedly one of the bedrock features of modern-day international environmental law;

¹ World Commission on Environment and Development (WCED), *Our Common Future* (Oxford, 1987).

² For further analysis of relevant principles of international law relevant to sustainable development, see <http://www.cisd.org/projects001.html>. See also French, D. *International Law and Policy of Sustainable Development*, (Manchester, 2005), Bugge, H.C. and Voigt, C. (eds.), *Sustainable Development in International and National Law* (Europa Law Publishing, 2008). More generally, see also Schrijver, N. J. *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, (Martinus Nijhoff/Hague Academy of International Law forthcoming 2008), Cordonier-Segger M.C. & Khalfan, A. *Sustainable Development Law* (Oxford, 2004) and Gehring, M.W. & Cordonier-Segger, M.C. (eds.), *Sustainable Development in World Trade Law* (Kluwer Law International, 2005).

³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ Reports 226.

⁴ The report, which also contains commentaries on the draft articles, appears in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*.

(iii) the principle of “common but differentiated responsibilities” (Principle 7) – a principle that not only reflects political reality but also has proved immensely valuable⁵ in the negotiation and implementation of both environmental commitments and, more controversially, softer “sustainability” targets (as, for instance, contained in the 2002 Johannesburg Plan of Implementation);

(iv) the “polluter pays principle” (Principle 16) – a principle that while not as widely discussed, perhaps, as the previous principles has nevertheless had a core role in the framing of the rules of attributing legal responsibility and allocation of financial compensation in the event of environmental damage, affirmed in the recent 2006 ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm arising out of Hazardous Activities;⁷

(v) the “right to development” (Principle 3) – though it continues to be controversial and its outer limitations disputed, the right to development (now understood within the context of sustainable development) has become increasingly embedded both normatively and operationally;⁸

(v) “the global partnership” (preamble / Principle 7) – though much still needs to be done to ensure the creation of a fully-functioning international order (not just of States, but of other entities at all levels) that works effectively to promote both sustainable development and ‘the health and integrity of the Earth’s ecosystem’, real progress in international cooperation both between States and within States can nevertheless be evidenced in the last decade;

(vii) the principle of “integration” (Principle 4) - something that this Committee studied in depth in its 2006 report, and which has often been described as the *sine qua non* of sustainable development⁹;

(vii) “the further development of international law in the field of sustainable development” (Principle 27) – international law continues to be pivotal in supporting the movement towards sustainable development, not only in terms of promoting substantive change in treaty law but also in improving our understanding of the legal implications of sustainable development both through case-law and the formulation of legal principles (most noticeably the 2002 ILA New Delhi Declaration on Principles of International Law relating to Sustainable Development, which also includes references to all of the Rio principles highlighted above¹⁰).

⁵ Most recently, see *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* (2006) WT/DS291/R, WT/DS292/R and WT/DS293/R (29 September 2006), paragraph 7.89: ‘Since the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so. Our analysis below makes clear that for the purposes of disposing of the legal claims before us, we need not take a position on whether or not the precautionary principle is a recognized principle of general or customary international law’.

⁶ For a general discussion, see Rajamani, L. *Differential Treatment in International Environmental Law* (Oxford, 2006).

⁷ The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2006*, vol. II, Part Two.

⁸ See below for further discussion of recent movement on the right to development.

⁹ On the 2005 *Iron Rhine (Belgium v. Netherlands) Arbitration*, see the comment of Marie-Claire Cordonier-Segger in Bugge, and Voigt, above note 2, 125: ‘As such, the Iron Rhine award suggests that in certain circumstances, the duty to integrate environmental protection with development is an accepted principle of international law. In this light, a ‘principle of sustainable development’ might be essentially a label for the exhortation found in Principle 4 of the Rio Declaration on Environment and Development, which provides 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.” This definition has several implications, not the least the practical application for which it was used in the Iron Rhine award. In certain contexts, as this decision shows, there is a ‘fundamentally normative’ element of the principle, in that its application persuaded the Arbitral Panel that the costs of impact assessments and mitigation measures should be borne by the Party carrying out the development (as an integral part of the reactivation of the Iron Rhine Railway), rather than by the Party through whose territory the railway would pass. The ratio of the Award suggests that a principle of sustainable development requires States to take environmental protection considerations into account in the development process’.

¹⁰ ILA, *Report of the Seventieth Conference (New Delhi, 2002)* (ILA, 2002) 23-29 (also submitted by the governments of The Netherlands and Bangladesh to the 2002 World Summit on Sustainable Development as UN doc. A/57/329).

This – the briefest – of overviews is, however, sufficient to highlight the enormous strides taken since 1992, as well as (perhaps) sending a warning note of the progress that still needs to be achieved. Nevertheless, it is undisputable that the Rio Conference set not only the international community *en masse*, but also individual nation States, regional governments, corporations and local communities (among many other groups) with both a challenging agenda and a framework for action. Unfortunately, implementation of that agenda, as shown by the limited developments achieved at the 1997 UN General Assembly Special Session on Agenda 21 (Rio +5) and the 2002 Johannesburg World Summit on Sustainable Development, has been patchy and disjointed.

It was partially because of this lack of general progress that the Committee focused, in its report for the Toronto conference in 2006, upon the importance of the principle of integration to the achievement of sustainable development. As the report noted, and which is worth repeating, '[i]t is a truism to note that sustainable development will only be realised when the principle of integration is properly – and fully – implemented...sustainable development is unattainable without understanding the central role that the principle of integration plays in the broader endeavour'.¹¹ As the report highlighted, integration takes place at all different levels and through various different mechanisms.

Now, in this report, the Committee wishes to stress that whilst continuing to focus upon the significance of integration, it is essential to remain aware of the importance of maintaining the relative balance between the different aspects of sustainable development. Though the official documentation on sustainable development may often be criticised for reading like little more than rhetorical mantra, often repeated but seldom truly understood, or only tangentially put into practice, the notion that 'the integration of the three components of sustainable development – economic development, social development and environmental protection – a[re] interdependent and mutually reinforcing pillars'¹² contains, nevertheless, an important truth. In other words, the *implementation* of sustainable development does, in fact, require holistic integration between its various components. The prioritisation of one aspect over the others is likely to be short-termist and ultimately defeat the purpose of integration. As discussed in Part B, with particular reference to the environment, the risk of marginalisation, however, remains a potential risk.

(i) Summary of Recent Developments

The period covered by this report (2006-2008) has been a time of both positive engagement and more negative grandstanding in the movement towards sustainable development. Such public activity must also be considered within the context of a fast moving private sector, where the benefits of globalisation are equalled with the negative implications of increasing economic and political interdependence. The threat of global recession and a crisis in banking in developed countries are having major repercussions globally. This summary provides merely an overview of some of this activity; further information on various aspects is then provided in Part B of this report.

Multilateral Environmental Agreements

Implementation of multilateral environmental agreements (MEAs) has continued to highlight both the international community's stated intention to work towards key environmental objectives whilst, concurrently, revealing that there are real political difficulties in maintaining the fragile consensus that exists on some of the more contentious aspects of these agreements. The arguments over the post 2012-status of the Kyoto Protocol inherent within the confused and weak mandate of the 2007 Bali Road Map, continues to signal, for instance, the persistent incoherence in political will regarding the issue of climate change.¹³ Though there have been significant developments in scientific understanding and political acceptance of climate change by way of the completion and publication of the Fourth Assessment Report of the Inter-governmental Panel on Climate Change in 2007,¹⁴ questions over how to respond – and at what pace – continue to bedevil international negotiation. Furthermore, there can be little doubt that, at the domestic level, insufficient efforts are taking place to change production and consumption patterns in order to reduce our dependence on carbon.

¹¹ ILA, *Report of the Seventy-Second Conference (Toronto, 2006)* (ILA, 2002) 468. References removed.

¹² 2002 Plan of Implementation, paragraph 2.

¹³ See UN Doc. FCCC/CP/2007/6/Add. 1, p. 3.

¹⁴ See <http://www.ipcc.ch>.

As regards other MEAs, specifically the Biodiversity Convention (CBD) and the Desertification Convention, lack of political will is stalling substantial progress towards the achievement of the longer-term objectives of these two regimes. In particular, only an optimist would consider the Biodiversity Convention's target of achieving, by 2010, a significant reduction of the current rate of biodiversity loss as currently attainable. Moreover, the negotiations on an 'international regime' to regulate access-and-benefit sharing under the CBD continue to divide States, highlighting not only the innate complexity of the issue itself but also how difficult it is for States to consider issues horizontally when they raise other aspects of international regulation, such as intellectual property law and traditional knowledge. Nevertheless, global environmental responsibility remains a "calling" beacon for States, and Australia's ratification of the Kyoto Protocol in 2007 is a reminder of the continuing importance of multilateral cooperation on a wide array of environmental topics of common concern.

World Trade Organization

A similar story of uneven development can be noticed in the World Trade Organisation (WTO). The continued stalling – and now collapse – of the Doha negotiations highlights what many commentators always felt, that Doha was too idealistic in its ambition of creating a trade round for development. The old debates over agriculture, in particular, continue and this has been supplemented by a range of other issues, including fisheries subsidies, environmental goods and services and market access for non-agricultural products. The WTO Member States continue to struggle to find their way through this *impasse* – though with very little chance of early resolution. Coupled with this, States continue to negotiate preferential trading agreements, which have the potential to undermine the universality of international trading commitments. In the absence of a comprehensive negotiated agreement in the short term, the work of the dispute settlement mechanism continues to provide the forum to resolve both individual disputes and, behind them, broader structural tensions. Significantly, such disputes are involving not only disputes between developed States but also cases where developing countries are both the complainants¹⁵ and the defendants.¹⁶ Whether the disputes have concerned variations in approach as to how to respond to new technologies (such as biotechnology¹⁷) or more traditional concerns over national protectionism (as in the area of agriculture), the WTO dispute settlement has been useful. For instance, the recent Appellate Body decision in *Brazil – Retreaded Tyres* (2007) provides a clearer understanding both as to how States should balance trade obligations with non-trade objectives under article XX(b) GATT¹⁸ as well as how preferential trading agreements are to be viewed when relying upon such exemptions,¹⁹ two issues that are both important in ensuring that the WTO contributes towards meeting sustainable development objectives. But notwithstanding the effectiveness of such a mechanism, it is generally accepted that dispute settlement is always a second-best option, and is being relied upon here in the absence of greater policy-dialogue and political consensus.

ACP-EU Economic Partnership Agreements

A new model of trade relationships is also currently being negotiated by the European Union and its African, Caribbean and Pacific (ACP) partners. These Economic Partnership Agreements (EPAs) are to replace the contested trade-aspects of the EU-ACP Cotonou Agreement, so as to ensure compliance with WTO obligations. The European Union considers such EPAs as a significant break from the past, with asymmetrical reciprocity of commitments ensuring both support for development whilst at the same time as GATT-proofing these new agreements. Critics question both the conventional wisdom of

¹⁵ See *United States — Subsidies on Upland Cotton* Report of the Appellate Body (AB-2004-5) 3 March 2005 and *United States — Domestic Support and Export Credit Guarantees for Agricultural Products* (request for consultations received 11 July 2007), both complaints brought by Brazil.

¹⁶ See *Brazil – Measures Affecting Imports of Retreaded Tyres* (2007), a complaint brought by the European Union.

¹⁷ Arguably, the most important example of this kind being *European Communities — Biotech Products* (2006) where the parties were the European Union, Canada, the United States and Argentina.

¹⁸ Para. 178: 'in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake' (references removed).

¹⁹ Paras. 227 & 228: 'The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure...In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b)...'.

such treaties and the process by which they have been negotiated. There is further discussion on EPAs below.

Bretton Woods institutions

The World Bank and the International Monetary Fund continue to find themselves the subject of criticism that they are failing to respond to the needs of their Member States – that reform is long overdue. This is a perennial issue and one that the Bretton Woods Institutions have found themselves incapable of disproving, despite incremental improvements. The World Bank, in particular, has continued to take forward its good governance and anti-corruption agenda, with a new strategy on the issues adopted in 2007. On environmental issues, the World Bank continues to seek a three-pronged approach: mainstreaming cross-cutting environmental concerns, working through the Global Environment Facility and providing funding in specific areas, including reducing dependence on carbon. Critics would still point to the reality gap between both the amount spent on environment and other aspects of the World Bank and the inconsistent approach to environmental risks, though there is no doubt the World Bank has travelled a long way since Rio, and for that alone it should be given due credit.

International Court of Justice

As regards relevant case law, sustainable development continues to be an attractive tool for judicial bodies to rely upon as and when required. In *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) Request for the Indication of Provisional Measures* (2006), for instance, the International Court of Justice noted expressly that ‘the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development...account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States’.²⁰ This careful balancing of interests, relying upon terminology based upon the judgment in *Gabčíkovo-Nagymaros* (1997), may tell us little about how the Court will finally decide the matter before it, though the case potentially raises many important questions over international watercourses, environmental obligations in both treaty and customary law and, of course, how environmental issues can be reconciled with developmental matters.

National Courts

There has been a similar reliance on sustainable development at the national level. The South African Constitutional Court, for instance, noted in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* that ‘[t]he Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development...Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.’²¹

Significantly, the Constitutional Court also went on to consider the role of judicial settlement in the context of sustainable development, which again is worth quoting at length: ‘[t]he role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out’.²²

As noted above, this is only a summary of recent activity, though further information on some of these matters is provided further below. Nevertheless, the general trend – if, in fact, it can be called a trend – is unfortunately readily apparent; that **there continues to be a sizeable mismatch between the limited**

²⁰ Judgment of 13 July 2006, para.80.

²¹ 2007 (6) SA 4 (CC); 2007, (10) BCLR 1059 (CC), paragraph 45.

²² Ibid, paragraph 102.

progress that can be evidenced in certain discrete areas and the lack of political will to achieve wholesale substantive change. Ultimately, until the necessary political will develops, innovations in law will have marginal impact in promoting lasting improvements.

(ii) Sustainable Development – 2 Recurring Contradictions

The continued uneven and sporadic nature of implementation of sustainable development highlights the reality that as a workable concept it remains beset with contradictions, thus explaining the limited progress to date. However, it equally challenges policy-makers and academics committed to the pursuit of sustainable development to clarify and operationalise the concept. The remainder of this first section therefore considers, in outline, two such contradictions and challenges; (i) the attainment of sustainable development through law versus policy and (ii) whether sustainable development is premised upon modification to the *status quo* versus wholesale regime reform? The report will not enquire whether these contradictions exist, but rather whether their existence is actually a problem. There is a strong argument that the creative tension that arises between different interest groups in supporting these various positions is actually maintaining both political interest in the ideal of sustainable development and ensuring that no one particular concern – be that economic growth, environmental protection, *et cetera* – subsumes the others.

(a) law versus policy?

One of the most interesting issues surrounding sustainable development is the extent to which law can play a useful role in its achievement. It is a truism to note that law (especially international law) cannot achieve sustainable development in and of itself; in many ways, law is an instrumental tool through which States strive to meet certain policy goals, for example, poverty reduction, the 2010 CBD target, even sustainable development itself.

Therefore, though law can, undoubtedly, be used to promote a collective societal vision of international society – above and beyond the narrow interests of individual nation States, it is international law's contribution as a *framework* for the establishment and distribution of concrete rights and obligations, as well as providing the mechanisms for negotiation and dispute settlement, that is ultimately of utmost importance. Whether this operational framework is viewed positively (as a functional necessity of an international society) or more critically (as a means of shaping and wielding power within an uneven world), most are agreed that there are obvious limitations as to what the law can itself achieve. Thus, though we might validly disagree as to the true extent of law's role in promoting issues such as environmental conservation, poverty reduction and sound economic development, most accept that law's role is inevitably part and parcel of other human activity, be that political, economic, technological or economic. In other words, sustainable development cannot be "acquired" by just law.

Building upon this finding, two more general points may be considered. First, by placing law in a wider social and political context, it should force us to reshape our view on certain, increasingly sterile, questions. For instance, the question over the legal status of sustainable development becomes less important, though not altogether irrelevant. It is no longer a question of whether sustainable development has binding force or not, it is now a question as to how far it is influencing legal and political debate including the resolution of judicial disputes. Ensuring effective impact, rather than ascertaining status, should become our principal concern.²³

Second, it highlights the reality that the achievement of clearly targeted policy initiatives can achieve as much, if not more, than the reliance on an abstract legal principle ever could. The stark reality is that if the international community were able to muster the necessary support to fulfil the Millennium Development Goals, this would be more conducive to sustainable development than the implementation of most international treaties. Though as international lawyers we instinctively – and

²³ Cf. Magraw, D. and Hawke, L. 'Sustainable Development' in Bodansky, D. *et al* (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, 2007) 637-638: 'How sustainable development has had these effects – whether as a non-normative policy, as soft law, as a reconciling norm of customary international law (as submitted by Judge Christopher Weeramantry), as a 'metaprinciple' to avoid conflict (as submitted by Vaughan Lowe), or simply through the normative power of the actual – will probably remain the subject of debate among lawyers for many years'.

rightly – seek to uphold the importance of law, we should do so concurrently with an awareness of its limitations as an instrument of change.

(b) *status quo* versus regime reform?

There has long been a discussion as to whether sustainable development demands radical economic reform, similar to that espoused by the proponents of a New International Economic Order (NIEO)?²⁴ Unsurprisingly, the ‘official’ reform agenda is very much premised on slight modifications to what already exists rather than seeking either to overthrow the established order or a return to older debates. Nevertheless, one cannot endorse sustainable development without reflecting upon economic change. Within the ILA itself, for instance, the 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development expressly ‘reaffirm[s]’ the 1986 Seoul ILA Declaration on Progressive Development of Principles of Public International Law relating to a New International Economic Order,²⁵ building as it does upon its precepts of equity, solidarity and global co-operation, amongst other concepts.

And for many, the NIEO is not just simply a historical antecedent to the current debate on sustainable development, but movement towards some of the *ideals* of NIEO is a prerequisite for the long-term achievement of sustainable development. Of particular relevance is the inclusion within the New Delhi Declaration of notions of intergenerational equity and, especially, intragenerational equity, the latter being defined as ‘the right of all peoples within the current generation of fair access to the current generation’s entitlement to the Earth’s natural resources’ – this corresponding very closely with many of the underlying assumptions in the Seoul Declaration. Moreover, the New Delhi Declaration – reflecting changing political times – contains matters that would *now* be considered essential to the achievement of the NIEO; not only environmental conservation but also good governance, public participation, human rights, gender empowerment, a precautionary approach to human health and natural resources, and poverty eradication to name but a few. All of these notions are, undoubtedly, legitimate in their own right, as well as fully capable of being operationalised in isolation, but it is when they are understood within the broader framework of sustainable development that the interconnected nature of these issues becomes that much more apparent.

Of course, as the 2002 Johannesburg Plan of Implementation made plain, globalisation is not regarded as a policy choice but rather something of an inevitability that must be worked within.²⁶ Though not immutable – States have themselves recognised in the same document that globalisation should be made ‘fully inclusive’ – the general direction in which the international economy is moving is unquestionable, and largely unquestioned. As the Plan of Implementation notes, the aim, rather, is to equip particularly developing States with ‘policies and measures at the national and international levels...to help them to respond effectively to those challenges and opportunities’.²⁷ Whatever the merits of fundamental change – no one could really deny the apparent virtue in Gillespie’s comment that ‘[i]f international trade was based on the basic norms of social justice and environmental sustainability...then it might, in certain instances, be quite beneficial to forms of sustainable development’²⁸ – sustainable development is ultimately constrained to act as a corrective within the confines of the pre-existing system. Nevertheless, and asserting more forcefully than perhaps Gillespie does the merits of free trade, one might suggest that though these ‘basic norms of social justice and environmental sustainability’ are accurately reflected in the principles of both the Seoul and New Delhi Declarations, it is only when these texts are read *conjunctively* and in an *integrated* fashion do they provide a convincing and potentially effectual normative framework for change. The reality that such a framework is rarely discussed at the political – or even academic level, these days – is greatly to be regretted.

²⁴ See generally French, D. “From Seoul with Love” – the continuing relevance of the 1986 Seoul ILA Declaration on Progressive Development of Principles of Public International Law relating to a New International Economic Order’ 55 *Netherlands International Law Review* (2008) 3-31.

²⁵ To be found in ILA, *Report of the Sixty-Second Conference (Seoul, 1986)* (ILA, 1987) 1-11.

²⁶ 2002 Plan of Implementation, paragraph 47. See also Weiss, F. and De Waart, P. ‘An Introductory View’ in Weiss, F. *et al* (eds.), *International Economic Law with a Human Face* (Kluwer, 1998) 4: ‘The ongoing integration of the world economy, popularly described as ‘globalization’, constitutes a comprehensive challenge to established principles of ordering life in economically and legally distinct territories’.

²⁷ 2002 Plan of Implementation, paragraph 47.

²⁸ Gillespie, A. *The Illusion of Progress: Unsustainable Development in International Law and Policy* (Earthscan, 2001) 96.

On both of these issues, (i) law versus policy and (ii) modification of the *status quo* versus regime reform, there is little dissent that such disputes either exist or remain currently unresolved. It is tensions such as these that have permeated the wider debate, even before the Rio Conference in 1992. What is perhaps less well understood is whether this actually matters. As noted above, there is an argument that it does not; that such tensions maintain a vibrancy and interest in the debate over sustainable development that might otherwise be marginalised. Of course, if taken to their extremes, such dichotomies would clearly prove unhelpful and wholly negative – any chance of achieving political consensus over sustainable development would then be lost. But as creative tensions that underpin current negotiations, they ensure timely reinvigoration of global priorities. In other words, it is through the existence of such uncertainties that the evolutionary and democratic nature of the sustainable development debate is highlighted. It ensures that the international community does not rest upon an artificial consensus as to what sustainable development means – agreed by all but implemented by few – but rather that the debate over the concept is continually pushed-and-pulled towards seeking genuine answers to what are, after all, particularly difficult questions.

Part B

International Trade, Foreign Investment Law and Sustainable Development

This part of the Committee's report is concerned with the interaction between trade and foreign investment law, on the one hand, and the concept of sustainable development, on the other. Is there any progress in the required integration between international economic law and environmental protection, which figures prominently among the principles of the New Delhi Declaration (ILA, 2002)? Moreover, any tensions that exist between the attainment of sustainable development and the politics of trade and investment liberalization highlights an ongoing tension between market liberalization and the necessary State action to regulate the failures of the free market.

Introduction

Developments in international trade law

In answering this question it is important to remember the underlying goals involved in the different fields of law which are to be integrated. International trade law is ultimately concerned with the liberalization of global trade. Despite the ongoing debate regarding the pros and cons of trade liberalization on environmental protection and on the equitable distribution of wealth, the fact is that trade liberalization is the paradigm that governs international economic relations today. In this context, this report should look at developments within the organizations involved with the promotion of trade liberalization. The starting point should be the study of WTO law, as this is the international organization in charge of promoting trade liberalization at a multilateral level. It is also important to review regional or bilateral developments in this field.

The rationale behind trade liberalization – which explains why most countries in the world participate in this trend towards the liberalization of trade – is that the overall result is beneficial to *all* participants. At the opening of the new round of trade negotiations launched at Doha in 2001, participating countries agreed on the benefits of trade liberalization. As was noted in the Doha Ministerial Declaration (2001): 'The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism' (paragraph 1).

However, it should also be noted that the Doha Declaration marked a significant difference, if compared to past trends in trade negotiations. Misgivings about how equitable the allocation of benefits between States in terms of the effects of trade liberalization policies were given expression in the Ministerial Declaration. As the second paragraph states 'international trade *can* play a major role in the

promotion of economic development and the alleviation of poverty'. This particular drafting is full of significance: it says "can", not "does". Therefore, trade liberalization by itself does not deliver the development goal to the international community. Thus, the question inevitably becomes what kind of adjustment should be made to the international trade structure to help the system overcome such flaws? It is clear that the answer does not lie in the mere inclusion of the words sustainable development in the Preamble of the Marrakesh Agreement. This might have an impact on the interpretation of the WTO Agreements, but it seems that if the objective is to put development at the centre of the present agenda, this would require a certain amount of reform of the trade system itself. Nor can it rely on the dispute settlement mechanism, the objective of which is to resolve trade disputes between the parties accessing its procedures. This report thus explores what, if any, progress has been made in the negotiations by the parties of new agreements in this field. Reference is also made to the limited impact of recent decisions by the dispute settlement mechanism.

Development in international foreign investment law

Foreign investment law is closely related to trade. Economic liberalization in this field has taken the form of foreign investment promotion and protection through bilateral investment treaties and investment chapters in free trade agreements. There seems to be consensus on the beneficial effects of the free flow of foreign capital into domestic economies. As a way to promote foreign investment, host States have assured investors that their investments will be accorded a standard of treatment which might, as a result, be higher than the standards established by domestic law. However, the real impact of this system of protection on the increase in the flow of foreign investment is debatable.²⁹ Nevertheless, warnings have been recently raised concerning the negative impact of foreign investment protection on the ability of states to design the social and economic policies that serve better the attainment of sustainable development.

The prospects of a negotiated compromise in the WTO context

Despite the fact that the mainstream view among the WTO members is that trade liberalization is the best formula for development, and that development should come as an expected result of free market policies,³⁰ the organization has inevitably been required to open the negotiations, so as to ensure discussion of those non-trade elements, which explain why trade liberalization alone has not improved economic and social conditions in many developing countries. However, this new round of negotiations, the Doha Round, seems to have come to a standstill, primarily due to the lack of political will from developed countries to open-up their markets to agricultural products from developing countries. It should, however, also be noted that developed countries argue that developing countries are unwilling to lower high tariffs on a variety of industrialised products.

The multilateral forum of negotiations is important to developing countries, as individually they lack the negotiating power to achieve their goals. For this reason, concerns have been raised regarding the new European policy of replacing the Cotonou Agreement with the African, Caribbean and Pacific (ACP) countries with new agreements (Economic Partnership Agreements or 'EPAs') that remove the unilateral preferences previously granted to those countries. The negotiation of these EPAs has followed a separate track, parallel to the Doha Round. The bilateral nature of these negotiations has been criticized for its disregard of the negative effects of free trade liberalization on development. At the recent African Union Assembly (31 January- 2 February 2008, Addis Ababa), the organization expressed its concerns about EPAs in the following terms:³¹

'FURTHER CONCERNED that the process leading to the conclusion of Interim Economic Partnership Agreements did not build on what was negotiated earlier and in particular that political and economic pressures are being exerted by the European Commission on African countries to initial Interim Economic Partnership Agreement.

...

²⁹ Hallward-Driemeier, M. *Do Bilateral Investment Treaties Attract FDI? Only a bit . . . and they could bite* (World Bank, DECRG, 2003)

³⁰ Paragraph 16 of the Singapore Ministerial Declaration reads as follows: "Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development". As commented by Markus Gehring: 'the text manages to give the impression that sustainable development is a natural result of liberalized trade' in *Sustainable Development in World Trade Law* (forthcoming).

³¹ Assembly/AU/Decl.2(X), Declaration

6. CALLS ON the European Union and its Member States to deepen the EPA negotiating mandate of the European Commission to enable it to effectively address the development objectives of EPAs;

...

9. CALLS ON the European Union to respect the commitment it made in the Cotonou Partnership Agreement that no ACP country should be worse-off after the end of the Cotonou preferences’.

On the positive side, mention should be made of the use of sustainability impact assessments as a method to anticipate the effects of free trade agreements on a broad range of economic and social interests. The European Union itself has made use of this interesting tool. Parallel to the initiation of negotiations with ACP countries of the new EPAs an independent EU-ACP Sustainability Impact Assessment was undertaken between 2002 and 2006. However, it seems that many negative effects were simply not identified in the assessment and this explains why EPAs still attract so many critics. This should raise questions about how neutral these sustainability impact assessments are.

In view of the present tensions, one would expect that the WTO itself, as a multilateral forum for negotiations, should provide answers in the form of new agreements and reforms. The Doha Round, however, has demonstrated that these issues are too difficult to negotiate. The environmental dimension of the debate has found its own place in the WTO. However, again the WTO has not been able to provide answers in the form of amendments or new agreements in this respect. The Committee on Trade and Environment, set up in 1995, continues to be bedeviled by fundamental disagreements, as well as divisions over more specific issues (such as the ongoing discussions on environmental goods and services). Its mandate was twofold: (i) to identify the relationship between trade and environmental measures in order to promote sustainable development, and (ii) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system. No recommendations of amendments to the existing rules have been made. Moreover, at present, though negotiations have been established regarding the relationship between WTO rules and trade restrictions in MEAs and the liberalization of environmental goods and services, there seems little evidence of early resolution.

The case law of the WTO Dispute Settlement Mechanism and the limits of reform through adjudication.

In the light of the lack of developments at the level of negotiation, in which States have been unable to take decisions on the harmonization of trade and environmental obligations, the WTO Dispute Settlement system has taken the lead in attempting to reconcile the law in a case by case examination. The rulings of panels and the Appellate Body with regard to environmental issues raised in the case law has evolved towards a more positive view on the possibilities that environmental measures can be justified under the permitted exceptions to free trade rules. In the period under review, three important decisions should be mentioned:

1) *EC – Measures Affecting the Approval and Marketing of Biotech Products. Complaints by the United States (WT/DS291), Canada (WT/DS292) and Argentina (WT/DS293). Consolidated reports of the Panel released on 29 September 2006.*

The EC imposed certain measures regarding a regime for the approval of biotech products and also adopted certain measures prohibiting or restricting the marketing of biotech products. The EC applied a general *de facto* moratorium on the approval of biotech products since June 1999. This case relates to the interpretation of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and, to a lesser extent, the application of the precautionary principle. The Panel decided that there was undue delay in the completion of the EC's approval procedures for biotech products and, therefore, the EC was in breach of its obligations under the SPS Agreement. According to the Panel, the applicable law was the SPS Agreement, but it applied it in the narrow context of Article 8 obligation (read together with Annex C) to ensure that approval procedures are undertaken and completed without undue delay. The moratorium itself was not considered to be a SPS measure.

With regard to safeguards adopted by individual EC members applicable to particular products, consisting of prohibitions on a particular biotech product that was formally approved for use within the EC, the Panel examined their legality according the SPS Agreement. In particular, the Panel interpreted articles 5.1 and 5.7 of the SPS Agreement, concluding that this was not a situation of insufficient

scientific evidence that would have allowed a State to have recourse to a provisional measure under Article 5.7 of the SPS Agreement. The Panel also considered whether any risk assessment had been provided by these States which would have reasonably supported the ban and the answer was in the negative.

Arguably, one of the most important parts of the decision in understanding the relationship between trade rules and MEAs is the one concerned with the relevance of other rules of international law in the interpretation of the WTO Agreements in issue. This point had already been raised in the *US – Shrimp Turtle* case. That decision was subject to the criticism of not having applied the strict terms of Article 31(3)(c) of the Vienna Convention on the Law of Treaties by having recourse to international instruments to which not all parties to the dispute were parties. In the present case, the treaties at issue were the 1992 Convention on Biological Diversity and the 2000 Cartagena Protocol on Biosafety. The latter was particularly relevant to the EC as it permits the imposition of import bans of GMOs on the basis of the precautionary principle. The decision of the Panel might be considered extremely conservative on this point. According to the panel, the application of other treaties in the interpretation of WTO Agreements requires that the other treaties should be in force between all Members of the WTO. According to this view, it would be *practically* impossible to use treaties outside the realm of the WTO in the interpretation of WTO Agreements, though MEAs and other international treaties can still be relevant to the “interpretation” of WTO Agreements, as well as the fact that MEAs can also be relevant where they reflect customary international law. However, it must be borne in mind that this was not necessarily a case of using an environmental treaty to interpret a particular term of the SPS Agreement – certainly the Panel was critical of the uncertainty surrounding how the European Communities wished to use the Cartagena Protocol in the dispute itself. Rather, this case ultimately refers to a hypothetical problem which the Panel was not called to resolve: a problem of harmonization between two treaties containing apparently contradictory rules. Future disputes concerning contradictions between different norms should not be resolved by reference only to Article 31 of the Vienna Convention on the Law of Treaties.

2) *Brazil – Retreaded Tyres (WT/DS332/R.)* Panel Report circulated on 12 June 2007 and Appellate Body circulated on 3 December 2007.

Brazil imposed an import ban on retreaded tyres from the EC. Imports from Mercosur countries were not exempted by this ban due to an Mercosur arbitral tribunal ruling that the ban violated Mercosur. Among other issues, the interpretation of Article XX(b) of GATT 1994 was central to the decision of the Panel. Brazil’s justification for the imposition of the ban relied on the necessity of the measure to protect human and animal life and health and the environment. Brazil argued that waste tyres present well-recognized dangers to public health and the environment: cancer, dengue fever, reproductive problems and environmental contamination. Brazil’s position was that the ban contributed to a reduction in the accumulation of waste tyres in its territory. This is the first time that a developing country invoked the environment related exemptions under Art.XX of GATT against an industrialized party in a WTO dispute.³²

As noted in the introductory part above, the Panel found that Brazil demonstrated that risks posed by mosquito-borne diseases such as dengue, yellow fever and malaria to human health and life exist in Brazil in relation to the accumulation as well as transport of waste tyres. It also found that Brazil demonstrated that the accumulation of waste tyres poses a risk of tyre fires and the associated health risks arising therefrom. Further, the Panel also found that there was a genuine relationship between the measure and its contribution to the protection of life and health. With regard to the interpretation of the term “necessary” in Art.XX(b) the Panel followed the previous case law on this issue, including the feasibility of alternative measures. In this case, the Panel concluded that the measure satisfied the “necessity” test. Therefore, the Panel went on to examine the fulfilment of the requirements of the chapeau of Art. XX. The panel found that the measure was applied in a manner that constituted a means of unjustifiable discrimination. Indeed, the case reports a significant increase in the import of used tyres of foreign origin which shows how the import ban favours tyres retreaded in Brazil.

The Appellate Body upheld the Panel’s findings on Art.XX(b), though overturned the panel on the chapeau reasoning and ultimately ruled that the measure was not justified due to the exemptions for MERCOSUR countries and imports pursuant to the national court injunction. As regards Art.XX(b), an

³² This point is made by Markus Gehring in *Sustainable Development in World Trade Law* (forthcoming).

important question presented to the Appellate Body concerned the interpretation of the term "necessary" in Art.XX(b). In the opinion of the Appellate Body, a qualitative analysis, such as the one undertaken by the Panel, was 'within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution'³³ to the reduction in the number of wastes tyres. The Appellate Body also clarified that the measure should be apt to make a material contribution to the achievement of the objective. The following paragraphs explain the position of the Appellate Body with regard to the adequate evidence to establish such *aptitude* to make a material contribution:

'150. ... we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.

151. This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions – for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time – can only be evaluated with the benefit of time. In order to justify an import ban under Art.XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence'.

3)*Canada/US – Continued Suspension of Obligations in the EC – Hormones Dispute. Claim by the EC against Canada (DS321) and the United States (DS320). Panel Report circulated 31 March 2008.*

These disputes relate to the application of the SPS Agreement and the way it deals with the lack of scientific evidence of the harmful effects of certain products. In 1998, the Appellate Body decided that the European ban on beef treated with hormones was not warranted under the provisions of the SPS Agreement. In particular, it decided that the EC ban was not based on a risk assessment as provided by Article 5.1 of the SPS Agreement. The Appellate Body concluded that the right of a State to set its appropriate level of protection is subject to compliance with Article 5.1.³⁴ In the opinion of the Appellate Body, Article 5.1, read in conjunction with Article 2.2, requires that there be a rational relationship between the measure and the risk assessment. The Appellate Body concluded that the EC had not undertaken a risk assessment, therefore, there could be no possibility of a rational relationship between the ban and a risk assessment which did not exist.

The period of implementation of the 1998 report expired on 13 May 1999. On 3 June 1999, the US and Canada requested authorization of the DSB for the suspension of concessions to the EC, which was granted by arbitration. In 2003 the EC claimed that, following the enactment of a new Directive (2003/74/EC) on this issue, there was no legal basis for the continued imposition of the suspension of concessions. The Directive established a permanent ban on the import of meat treated with oestradiol - 17 β and a provisional ban regarding other five hormones. After consultations, on 14 January 2005 the EC requested the establishment of a Panel. On 31 March 2008 the Panels' reports were circulated. As the two decisions are identical, being the Panels composed of the same members, the analysis that follows will make reference to the Panel's report concerning Canada.

³³ WT/DS332/AB/R, para. 147.

³⁴ WT/DS26/AB/R (1998)

The EC claimed that Canada was in breach of Article 22.8 of the DSU. The Panel concluded that to decide on this issue it was necessary to address the question of the compatibility of the EC implementing measures with the provisions of the SPS Agreement. In other words, the Panel was required to apply the criterion established by the Appellate Body in 1998: the rational relationship between the ban and the risk assessment on the basis of which the EC decided to keep the import ban in place. Applying Annex A(4) of the SPS Agreement, the Panel concluded that a risk assessment was composed of three requirements: a) identification of the additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs at issue; b) identification of any possible adverse effect on human or animal health; and, c) evaluation of the potential for that adverse effect to arise from the presence of the identified additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuff. While in the opinion of the Panel, the EC fulfilled the first and second requirements with regard to oestradiol -17 β , it concluded that the EC's risk assessment failed to provide analysis of the potential for the adverse effects to arise from consumption of beef products containing residues of the hormone at issue:

'although the European Communities has evaluated the association between the excess hormones and neurobiological, developmental, reproductive and immunological effects, as well as immunotoxicity, genotoxicity, and carcinogenicity, it has not satisfied the requirements of the definition of a risk assessment contained in Annex A(4) [of the SPS Agreement] because it has not evaluated specifically the possibility that these adverse effects come into being, originate, or result from the consumption of meat or meats products which contain veterinary residues of oestradiol -17 β . . .'

Therefore, the conclusion that the risk assessment was flawed necessarily led to the conclusion that there was no rational relationship between the ban and the risk assessment, as required by Article 5.1 of the SPS Agreement.³⁵

In addition to the examination of the compatibility of the permanent ban contained in Directive 2003/74/EC with the SPS Agreement, the Panel also reviewed the conformity of the provisional import ban with Article 5.7 of the SPS Agreement. This is important, because Article 5.7 deals with cases of insufficient scientific evidence and, therefore, reflects the precautionary principle as confirmed by the Appellate Body in the original Hormones Report.. The decision will undoubtedly disappoint those who believed in the prospects of a positive incorporation of precaution in this field. According to WTO case law, Article 5.7 is applicable when relevant scientific evidence is not sufficient to undertake a risk assessment in conformity with Article 5.1. Therefore, the concept of 'insufficient scientific evidence' was central to the decision of the Panel.

The first conclusion in this regard was that good veterinary practices and the risk of misuse or abuse in the administration of hormones were not part of the concept of insufficient scientific evidence.³⁶ The second (arguably more significant) conclusion of the Panel, following the previous *Japan – Apples* decision of the Appellate Body, was that insufficient scientific evidence is not the same as scientific uncertainty. Scientific uncertainty may still allow for the performance of a risk assessment and, in the opinion of the Panel, insufficient scientific evidence only existed when it was not possible to conduct a risk assessment.³⁷ In the opinion of the panel, scientific uncertainty covers a number of situations which will not fall into the scope of Article 5.7. These situations include theoretical uncertainty (it can never be said that science reaches absolute certainty about a particular issue)³⁸ and divergent scientific views³⁹.

The problem is that the Panel did not explicitly map onto this conceptual framework the situation which the precautionary principle intends to address, namely the lack of scientific evidence regarding

³⁵ WT/DS321/P, para. 7.548

³⁶ Ibid, para. 7.578

³⁷ Ibid, para. 7.609

³⁸ Ibid, para. 7.609

³⁹ Ibid, para. 7.610

the harmful effects of a particular activity or substance. We are left with two alternatives. Either the lack of scientific evidence of harm is an element of the traditional risk assessment under Article 5.1 or it was not dealt with by the Panel at all and we will have to wait for future interpretations of Article 5.7 to tackle this issue.⁴⁰ Under the first alternative, the precautionary principle might be completely devoid of practical effects, because the risk assessment methodology favored by the Panel requires evaluation of the potential adverse effects, and this reminds us of the traditional foreseeability rule which the precautionary principle precisely intends to replace. The second alternative will require future Panels or the Appellate Body to explain why the conclusion of this Panel (as set out in paragraph 7.626 below) does not exclude *ipso facto* the precautionary principle from the possible interpretations of Article 5.7 of the SPS Agreement:

‘. . . if relevant evidence already exists, not any degree of insufficiency will satisfy the criterion under Article 5.7 that “relevant scientific evidence is insufficient”. Having regard to our reasoning above, particularly with respect to scientific uncertainty and the existence of international standards, we consider that, depending on the existing relevant evidence, there must be a critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient. In the present case where risk assessment have been performed and a large body of quality evidence has been accumulated, this would be possible only if it put into question existing relevant evidence to the point that this evidence is no longer sufficient to support the conclusions of existing risks assessments’.

It should be noted that various aspects of the Panel report are being appealed to the Appellate Body.

At least one conclusion can be drawn from the recent case law of the WTO Dispute Settlement bodies in the field of sustainable development. The Appellate Body decision in the *Brazil - Retreaded Tyres* case shows a certain degree of flexibility in assessing the compatibility of trade restrictions with the obligations of the parties under the GATT. It seems that the Appellate Body was open to considering the legality of Art. XX(b) measures despite lack of immediate proof of the material contribution of the measure to the protection of health or the environment. Moreover, to make a final decision the Appellate Body must also question the real nature of the measures in question: genuinely environmental or a disguised/discriminatory protectionist measure. However, with regard to the SPS Agreement, the approach is much starker; the tendency shown by WTO decisions is for the strict application of a methodology of risk assessment, irrespective of how reasonable it might appear to some governments to deviate from that methodology in cases of new technologies that might affect human health or the environment. The formalism of the SPS Agreement thus leaves the real nature of the measures largely outside the scope of WTO dispute settlement bodies in favour of a less nuanced, more technocratic, approach. Therefore, reform to the system may only come as the result of a negotiated solution by the Members themselves.

Sustainable development and the protection of foreign investment

In its origins, the arbitration of foreign investment disputes was seen as a way to promote the flow of capital into developing countries and, thus, contribute to sustainable development. The private law nature of the foreign investment arbitration system now in place and a certain degree of judicial activism from arbitrators in this field have only recently raised doubts about the overall wisdom of the system.⁴¹ In particular, some authors point to the negative impact of foreign investment protection on the ability of states to design the best social and economic policies for the attainment of sustainable development. This objection has been answered by pointing that there is no proof that investment treaties have resulted in a significant regulatory chill, or that they unduly constrain regulation that promotes sustainable development.⁴² However, if we agree that sustainable development is achieved

⁴⁰ It might be asserted that the factual premise of the precautionary principles was subsumed into Article 5.1 when the Panel states that ‘scientific uncertainty may be factored into the conclusions of the risk assessment’. However, this line may be interpreted only with reference to divergent scientific views. See *ibid.* para. 7.610.

⁴¹ Van Harten, G. *Investment Treaty Arbitration and Public Law* (Oxford, 2007).

⁴² Newcombe, ‘Book review on Van Harten, Investment Treaty Arbitration and Public Law’ 71 *Modern Law Review* (2008) 150.

through a set of public policy decisions and measures taken by States, one should not overlook the fact that every decision of international illegality by investment tribunals is a decision that gives priority to the interests of the investor over the interests of the public good (as represented by the State). It is for this reason that judicial activism, lack of uniformity in the decisions, and unaccountability of the judges, are serious flaws in the system that should be taken seriously. It should not come without criticism that some arbitrators conceive their job as protective of the wealth of investors.

It is true that States themselves have consented to various obligations towards foreign investors contained mainly in bilateral investment treaties and investment chapters in free trade agreements. In these international instruments States assure that foreign investors will be accorded fair and equitable treatment, full protection and security and national treatment, that compensation will be paid in the case of direct and indirect expropriation, and that the most favored nation clause will be applied. The problem is that all these standards of treatment are loosely defined in the relevant treaties. The tendency shown by most investment arbitrators has been to interpret the scope of State obligations broadly and little judicial thinking has been devoted to the effects of the awards on the ability of States not only to regulate the economy but also to shape the relationship between the State, as responsible for the public good, and the rest of the society through administrative law. In this light, one must however hope that the balanced decision of *Methanex v. United States* (2005),⁴³ in which the tribunal sought to affirm a bright line between regulation and expropriation will be followed beyond NAFTA in investment disputes more generally.⁴⁴ As the tribunal noted very clearly,

‘the Tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. Hence, Methanex’s central claim under Article 1110(1) of expropriation...fails. From the standpoint of international law, the California ban was a lawful regulation and not an expropriation. Nor has Methanex established that the California ban manifested any of the features associated with expropriation.

In *Feldman v. Mexico*, the tribunal held that: “... *the regulatory action has not deprived the Claimant of control of his company . . . interfered directly in the internal operations . . . or displaced the Claimant as the controlling shareholder. The claimant is free to pursue other continuing lines of business activity Of course, he was effectively precluded from exporting cigarettes However, this does not amount to Claimant’s deprivation of control of his company.*”⁴⁵

Notwithstanding this, and despite the fact that some may continue to try to minimize the negative impact of investment treaty arbitration on the ability of states to pursue their own social and economic policies, it is clear that both the direct impact of investment decisions and their incidental effect on the general shaping of government policy can be significant. In many countries, and not only those that are engaged in a process of radical economic reforms such as Bolivia, Ecuador and Venezuela, governments find it difficult to continue assuming obligations towards foreign investors in the context of bilateral investment agreements. The last BIT subscribed by Chile, for example, was negotiated in 2003.

In this light, it is also worth briefly noting some recent annulment decisions, as they further demonstrate that the system of international investment adjudication lacks the institutional tools that would contribute to the legitimacy of a system which today is very much in question. For instance, the issue of a state of necessity and its impact on the ability of a State to continue fulfilling its obligations towards foreign investors appeared prominently in four cases against Argentina: *Enron*, *Sempra*, *CMS* and *LG&E*. The four cases involved the interpretation of the US/Argentina BIT containing the following Article XI: ‘This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or the restoration of international peace or security or the protection of its own essential security interests’.

In the first three cases, the tribunals did not find that there was a case for the invocation of state of necessity. These tribunals understood that customary law of state necessity as reflected in the ILC

⁴³ Award of 3 August 2005.

⁴⁴ Lawrence, J. ‘Chicken Little Revisited: NAFTA Regulatory Expropriations after Methanex’ 41 *Georgia Law Review* (2006) 264.

⁴⁵ Part IV, Chapter D, paragraphs 15-16.

Articles on State Responsibility (article 25) was to be read into Article XI of the US/Argentina BIT. Therefore a high threshold was required for the operation of the clause. In contrast, the *LG&E* decision interpreted Article XI of the BIT as a self-standing provision (though, in para. 245 it also refers to Article 25 of the Articles on State Responsibility). The result was that the *LG&E* award was favorable to the position that between 1 December 2001 and 26 April 2003, Argentina was in a state of necessity, for which reason it was to be exempted from the payment of compensation for damages incurred during that period. Interestingly, the annulment committee in the *CMS* case found manifest errors of law in the way the tribunal interpreted Article XI of the US/Argentina BIT. In the opinion of the Committee, article 25 of the Articles on State Responsibility could not be read into Article XI of the BIT. Moreover, according to the Annulment Committee, the operation of Article XI could have meant that in taking measures of emergency Argentina had not breached the BIT. It was a manifest error that the Tribunal did not stop to consider this question. Despite the existence of manifest errors of law, the Committee found that its powers were so limited that it should dismiss the claim of annulment based on the incorrect interpretation of Article XI, and this was so despite the fact the Committee itself states that these two errors could have had a decisive impact on the operative part of the Award.⁴⁶

These cases and annulment decisions are, of course, interesting in and of themselves. However, at a more systemic level, it raises wider concerns which directly impact upon the ability of a State not only to respond to difficult economic circumstances, but also to work within established rules - the rule of law is one thing, but without legal certainty it becomes an unruly master. Sustainable development will never be achieved while States face such uncertainty. For this reason, voices have been raised on the necessary reform to the system. In particular, some suggest that a permanent international investment tribunal should be created as this would contribute coherence and accountability to the adjudication of investment disputes. However, the prospects for reform might be impaired by amendment and denunciation processes established in the Washington Convention and the respective investment agreements. In this connection, questions have been raised, for instance, regarding the effects *ratione temporis* of the denunciation of the Washington Convention by Bolivia (notification received on 2 May 2007) and the notification of Ecuador excluding from the scope of the Convention disputes relating to the utilization of its natural resources (4 December 2007).

Sustainable Development and Environmental Governance

Introduction

It is unfortunately not possible to provide a comprehensive survey of recent developments in this field or to set out a detailed analysis of the continuing – and increasingly complex – interplays between environmental issues and sustainable development. Nevertheless, it is hoped that this part of the Committee report will at least highlight the importance of why maintaining environment quality is a fundamental prerequisite for the achievement of sustainable development. In particular, the report will consider the issue of climate change as a matter of international governance.

Environment and Development: A Looming Crisis? A Way Forward?

It is a self-evident truth that sustainable development is unobtainable without sound environmental stewardship. Unfortunately, as GEO-3, the third Global Environment Outlook, published by UNEP in 2002, highlighted, the issue is one of tremendous seriousness. As it noted, ‘one of the three pillars of sustainable development – the environment – [is] seriously listing because of the distortions placed on it by the actions of a human population that now numbers more than 6000 million. The importance of the environment is often underplayed even though its value to human survival and development is incalculable’.⁴⁷

⁴⁶ Decision of the Ad-Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007), para. 135. The *Sempra* case award was delivered to the parties on 28 September 2007, only 3 days after the decision of the Annulment Committee in the *CMS* case. The short difference of time between the two decisions may explain that the award in *Sempra* insists in reading Article 25 of the Articles on State Responsibility into Article XI of the US/Argentina BIT. However, purely for the sake of the consistency in adjudication of investment disputes, enforcing an incorrect award, which has failed to correct manifest errors previously recognized, flies in the face of sound judicial practice and does not add to the legitimacy of the system.

⁴⁷ See generally <http://www.unep.org/geo/geo3/>.

GEO-4, recently published in 2007, repeated this uncomfortable message; '[d]espite changes in environmental governance, and greater understanding of the links between environment and development, real progress towards sustainable development has been slow. Many governments continue to create policies concerned with environmental, economic and social matters as single issues. There is a continued failure to link environment and development in decision making...As a result, development strategies often ignore the need to maintain the very ecosystem services on which long-term development goals depend. For many, acknowledging that environmental change could endanger future human well-being is inconvenient, as it requires an uncomfortable level of change to individual and working lives'.⁴⁸

It is within this context that international attempts to achieve sustainable development are situated; a global environment significantly diminished, with specific sectors on the brink of collapse / extinction / exhaustion, but with a social reality that nevertheless relies upon the environment for human development and growth. There is a harsh truth lying behind these tandem pressures; the international community can neither afford to ignore the growing environmental threat, but nor can it fail to act on the equally stark human crisis.

Nevertheless, despite the importance of both issues, a different question has arisen; to what extent has the endorsement of the "newer" imperatives of social development and poverty eradication (as endorsed by the UN not only within its Millennium Declaration but also as part of the broader sustainable development agenda specifically at the World Summit on Sustainable Development in 2002 and the World Summit in 2005) had a perverse impact on maintaining the importance of environmental considerations? Of course, ever since the Brundtland Report, the international community has sought to show that the traditional concern over the risk of marginalisation of environmental protection in favour of economic growth is misplaced. But now, to what extent is there a similar risk of marginalising environmental protection in the attempt to strive towards *social* development?

Fortunately, as the inclusion of environmental sustainability as the UN's seventh Millennium Development Goal highlights very clearly, strategic environmental management must continue to be a priority if long-term social development is ever to be achieved. As GEO-4 recently stated, '[t]he integration of environmental activities into the broader development framework is at the heart of MDG 7 on achieving environmental sustainability (UN 2000). Recognition of the need for integration of environmental concerns into public and private social and economic sector institutions, which was greatly enhanced by the vision put forward by the Brundtland Commission, has increased tremendously over the last decade at both national and international levels'.

Moreover, environmental conservation ranges far beyond those aspects of the environment which are of immediate and direct benefit (fuel, food, natural resources) but extends significantly to include those ecological services which sometimes go unnoticed, and certainly undervalued. As the Ecological Society of America notes, '[n]atural ecosystems and the plants and animals within them provide humans with services that would be very difficult to duplicate. While it is often impossible to place an accurate monetary amount on ecosystem services, we can calculate some of the financial values'.⁴⁹

There is another reason why environmental improvement is so fundamental to the achievement of sustainable development. Due to the nature and degree of environmental risk (as well as the poor's inability to resource appropriate remedial and/or adaptive strategies) disproportionate damage will be caused to the world's poorest communities if appropriately resourced responses are not found. Thus, to be effective, solutions to environmental problems must also be justifiable in terms of their effect upon the world's poorest. This is not only because without a pro-poor approach, many of the fundamental causes of environmental degradation will simply not be resolved, but also because action on an environmental issue will be regressive if it exacerbates the economic, social and power disparities between the (poorer) South and the (richer) North. Though, as an aside, it is worth remembering that while at the macro-level, poverty eradication and environmental protection can be achieved concurrently within the context of sustainable development, this is not always necessarily so at the level of the project. For instance, as the Biodiversity Secretariat noted back in 2003, '[a]chieving the

⁴⁸ See generally <http://www.unep.org/geo/geo4/media/>.

⁴⁹ See <http://www.esa.org>.

Millennium Development Goals as such is not necessarily a threat to biodiversity, but the implementation of specific development activities may well be'.⁵⁰

Thus, while it would be foolishly short-term to marginalise environmental issues, nor should the synergy between the environment and social development necessarily always be presumed. Everything will depend upon context, and key to ensuring that there is as little divergence between them as possible is ultimately arguably a matter of process; have appropriate procedures of integration, public participation, impact assessment, *et cetera* been put in place?⁵¹ If so, the likelihood of win-win solutions is that much greater and similarly the existence of negative consequences is also reduced.

There can be very few occasions where the outcome of a dispute between apparently conflicting values is immediately obvious. That is why the predecessor to this ILA Committee spent much time considering the importance of good governance,⁵² as only through due process and transparent and legitimate processes can fully-informed decisions be reached, with any remaining negatives reduced to the greatest possible extent.

International (Environmental) Law and Sustainable Development

Though international environmental law is an essential part of the broader sustainable development debate, they have never been completely synonymous. And though the two are very difficult to disentangle, there have always been notable distinctions between them. As Birnie and Boyle note, 'although much of international environmental law could be regarded as law 'in the field of' or 'aiming at' sustainable development, there remain important differences'.⁵³ Moreover, for some, the attempt to bring these ideas together is to be regretted. As was noted as long ago as 1993, 'the new ideology of 'sustainable development' undermines the autonomy of environmental law as a body of rules and standards designed to restrain and prevent the environmentally destructive effects of certain kinds of economic activity'.⁵⁴ For others, however, the inclusion of sustainable development – seeking as it does to reflect the international community's attempt to reconcile social, economic and environmental concerns – should be considered either as a wholly positive example of much-needed integration or, if nothing else, as acceptance of the political reality that the pressures and tensions inherent within sustainable development have had – and are continuing to have – a significant influence upon the evolution of international environmental law; what perhaps Magraw and Hawke mean when they refer to sustainable development's 'normative power of the actual'.⁵⁵

Significantly, multilateral environmental agreements and other instruments of international environmental law have become central features not only of the global debate on environmental protection *per se* but also, unsurprisingly, on how the environment relates to other issues, such as the international economy, social development and human rights; in other words, international environmental law is both significant in its own right but equally important in terms of its contribution to the broader sphere of sustainable development governance.

Nevertheless, environmental objectives will not be achieved through environmental law alone; in reality, real progress will only truly be achieved when they are addressed, not just as discrete topics, but as intrinsic aspects in other areas of law and policy. It is now unquestioned that as environmental issues are both cross-cutting and horizontal in nature, it is inadequate to confine consideration of such matters to the specific spheres of multilateral environmental agreements and other environmental regimes. Rather, environmental considerations should influence and affect non-environmental law and policy across the whole spectrum of issues, including those currently of international and national debate – such as trade, development, security, human rights.

⁵⁰ The Programme of Work of the Convention and the Millennium Development Goals – Note by the Secretariat (UNEP/CBD/COP/7/20/Add.1, 30 November 2003) paragraph 37.

⁵¹ See above note 23, 637: 'The concept of sustainable development also has had profound effects on the nature of the impact of assessments and accounting processes. In particular, it has resulted in broadening their scope both geographically and with respect to the elements assessed to include social and economic considerations as well as environmental ones, and thus facilitate a more holistic assessment of the projects or activities concerned'.

⁵² Ginther, K. *et al* (eds.), *Sustainable Development and Good Governance* (Kluwer Academic Publishers, 1995)

⁵³ Birnie, P. and Boyle, A. *International Law and the Environment* (Oxford, 2nd ed. 2002) 2.

⁵⁴ Pallemarts, M. 'International Environmental Law from Stockholm to Rio: Back to the Future?' in Sands, P. (ed.), *Greening International Law* (Earthscan, 1993) 18.

⁵⁵ See above note 23, 638.

This raises important institutional and governance questions,⁵⁶ both over the internal structure of the United Nations (including the strengthening of UNEP and the Commission on Sustainable Development, and the avoidance of replication) as well as the development of more permanent and tangible linkages between relevant treaties, regimes and global institutions (such as the World Bank). Of course, there has been considerable discussion on the advantages and disadvantages of setting up a new World Environmental Organisation or a World Organisation for Sustainable Development. There are many arguments against such a step. There are, after all, already so many international organisations.⁵⁷ And would not the establishment of a new ‘specialised’ organisation be in contradiction with an integrated approach? The question of sustainable development must, after all, form an integral part of general financial, trade and development policies. This requires a decisive political forum that can apply itself energetically to this task. It is clear that ECOSOC, UNEP and the UN Commission on Sustainable Development will never acquire the stature that this mission demands. Taking everything into consideration and mindful of the continually weak international structure for sustainable development, might the best course of action be to consider establishing a new World Organisation for Sustainable Development, as advocated by the Brundtland Commission or a UN World Environment Organisation, as proposed by France, Sweden and other countries? This could place the whole question of sustainable development much more clearly on the international agenda and provide an efficient centre for coordination of international environmental and development policy and operational activities. In the longer term, UNCTAD, UNEP and regional organizations such as UNECE and could also be integrated into such a new world organisation. Of course, how likely this is in the current political climate is unclear, though inevitably some form of institutional change appears to be a *sine qua non* of longer-term fundamental reform.

In maintaining its focus on environment and sustainable development, the Committee seeks to uphold this *duality* between the special importance of international environmental law and its inherent limitations to achieve comprehensive results alone. Merely as one example of this duality, one only need mention the issue of over-fishing. Depletion of fish stocks can cause dramatic changes in the whole marine ecosystems, as well as threatening local livelihoods, national economic security and food security. Overfishing of species potentially results in extinction-level threats, diminishes biodiversity and removes components from important food chains. To understand how international law can be utilised in response to such issues requires an understanding not only of the specific conservation regimes currently in operation (and how they may be made more effective), but also what influence other regimes (such as, in this case, WTO rules on subsidies) have on such environmental efforts.⁵⁸ Another example is climate change. The UN-sponsored climate change regime is a driving force in seeking international consensus on the issue, but it is only part (if admittedly a singularly important element) of a much wider nexus of interests, rights and obligations which will ultimately affect the issue of climate change. Thus, climate change is an example *par excellence* of an ‘environmental’ issue that cannot – and should not – be constrained by artificial nomenclatures. As the next section highlights, the climate change regime is truly an issue of both environmental and sustainable development governance.

Climate Change – a Global Problem of Governance⁵⁹

As climate change is intimately interlinked with energy, agriculture, transport, industry and infrastructure and hence with consumption and production patterns, it is closely linked with sustainable development. The recent Intergovernmental Panel on Climate Change (IPCC) reports confirm the close link between climate change and sustainable development. The climate change convention is

⁵⁶ See Swart, L. and Perry E. (eds.), *Global Environmental Governance: Prospects on the Current Debate* (Center for UN Reform Education, 2007) particularly the contributions of Ivanova, M. and Roy, J. (The Architecture of Global Environmental Governance), Biermann, F. (Reforming Global Environmental Governance) and Meyer-Ohlendorf, N. and Knigge M. (A United Nations Environment Organisation).

⁵⁷ See Blokker N. M. and Schermers H.G. (eds.), *Proliferation of International Organisations: Legal Issues* (Kluwer Law International, 2001).

⁵⁸ See, for instance, Deere, C. *Net Gains: Linking Fisheries Management, International Trade and Sustainable Development* (IUCN, 2000).

⁵⁹ With specific thanks to Professor Joyeeta Gupta for drafting this section on climate change.

ambiguous in its commitment to sustainable development.⁶⁰ While it identifies sustainable development as both a right and as a goal in Article 3, it also submits that economic development is necessary to being able to address climate change and achieve sustainable development, as can be seen in the text dedicated to targets for the developed countries. However, the Kyoto Protocol of 1997 and the Marrakech Accords of 2001 refer to sustainable development more consistently.

Within the developed countries, the targets adopted fall far short of what is needed to be within EU-defined limits of dangerous climate change. Most developed countries continue to prioritise economic growth and seek cost-effective options rather than adopt a clear precautionary approach. If global emissions must stay within reasonable limits, global emissions must peak by 2015 according to IPCC and this appears to be a big challenge for all countries. The December 2007 negotiations at Bali concluded that 'deep cuts in global emissions will be required to achieve the ultimate objective of the Convention' but did not make any quantitative recommendations for specific targets. It has initiated a two year process to focus on (a) shared vision of cooperative action, (b) action on mitigation with measurable commitments and actions for the developed countries and nationally appropriate mitigation actions by developing country Parties, measures on deforestation, cooperative sectoral action, market based approaches, economic and social consequences of response measures and strengthening the catalytic role of the Convention; (c) enhanced action on adaptation; (d) enhanced action on technology development and transfer, and (f) enhanced action on the provision of financial aid and investment to support action.

The Clean Development Mechanism, a market mechanism under the Kyoto Protocol, explicitly refers to the need to achieve sustainable development in projects in developing countries that aim to reduce greenhouse gas emissions against a specified base line. While standards have been developed to identify what constitutes sustainable development in such projects (e.g. the Gold Standard),⁶¹ the literature reveals that since the determination of whether a project is sustainable has been left to host country governments and since the sustainable development aspects are neither contractually binding nor specifically monitored prior to the delivery of emission credits, the sustainable development component remains weak in these projects⁶².

It is expected that a new follow-up Protocol will be adopted in 2009 for the period beyond 2012. Such a Protocol has the opportunity to put the precautionary principle central to its framing of the issues. With Australia's recent ratification of the Kyoto Protocol, there are expectations that the next US government may be more constructive in post-Kyoto negotiations.

In the meanwhile there has been litigation in the US on whether the US Environment Protection Agency (EPA) has the statutory duty to regulate carbon dioxide (CO₂) as a pollutant; and whether it is under a duty to regulate it,⁶³ and whether EPA had authority to regulate emissions from new motor vehicles.⁶⁴ After several attempts,⁶⁵ the US Supreme Court decided in favour of the plaintiffs. It may be

⁶⁰ Arts, K. and Gupta, J. 'Climate Change and Hazardous Waste Law: Developing International Law of Sustainable Development' in Schrijver, N. and Weiss, F. (eds.), *The Law of Sustainable Development* (Martinus Nijhoff, 2004), 519-551.

⁶¹ Beuermann, C., Langrock, T. & Ott, H. *Evaluation of (non-sink) AIJ-Projects in Developing Countries (Endadec)*. (Wuppertal Institute for Climate, Environment and Energy, 2000) (available at: <http://www.wupperinst.org/Publikationen/WP/WP100.pdf>). See also Brown, K., Adger, W.N., Boyd, E., Corbera-Elizalde, E. & Shackley, S. *How do CDM projects contribute to sustainable development?* (Tyndall Centre Technical Report 16. Norwich, UK: Tyndall Centre for Climate Change Research, 2004).

⁶² Ellis, J. & Karousakis, K. *The Developing CDM Market* (OECD, 2006); Cosby, A., Parry, J.-E., Browne, J., Babuy, Y.D., Bhandari, P., Drexhage, J. & Murphy, D. *Realizing the Development Dividend: Making the CDM Work for Developing Countries, Phase I Report – Pre-Publication Version* (Winnipeg, Manitoba: International Institute for Sustainable Development, 2005) available at: <http://www.iisd.org/climate/global/dividend.asp> (last accessed on 28 September 2006). Gupta, J. van Beukering, P., van Asselt, H., Brander, L., Hess, S. and van der Leeuw, K., 'Achieving Sustainable Development Through Project Based Flexibility Mechanisms: Lessons from Five AIJ Projects' 8 *Climate Policy* (2008), in press; Sterk, W. & Wittneben, B. 'Enhancing the Clean Development Mechanism through Sectoral Approaches: Definitions, Applications and Ways Forward' 6 *International Environmental Agreements: Politics, Law and Economics* (2006) 271-287.

⁶³ Meltz, R. 'Global Warming: The Litigation Heats Up', *Congressions Research Service Report for Congress*, Order Code RL 32764 (The Library of Congress, 2005).

⁶⁴ 42 U.S.C. § 7521(a)(1).

⁶⁵ *Commonwealth of Massachusetts v. EPA*, 415 F.3d 50, D.C.Cir., Jul 15, 2005; 35 *Envtl. L. Repr.* 20, 148; *Massachusetts v. EPA*, 433 F. 3d 66, D.C. Cir., December 2 2005.

relevant to observe that greenhouse gases are listed in Schedule 1 of the Canadian Environmental Protection Act, 1999.⁶⁶ In October 2006, Friends of the Earth Canada, Friends of the Earth International and the Climate Justice Programme submitted an Opinion to the Compliance Committee and the Environment Canada arguing that Canada is allegedly violating the UNFCCC and its Kyoto Protocol.⁶⁷ Related domestic litigation is also ongoing.

There have also been cases filed against power companies on the grounds that their emissions amount to a public⁶⁸ and/or a private nuisance case⁶⁹, that export credits provided by US banks violate the law because they do not take environment impact assessment into account⁷⁰ and that German institutions that provide export credits should disclose information about such projects.⁷¹ Court cases in Australia have covered a number of issues including whether a minister did not have the authority to prevent a planning body from examining the GHG emissions from a mine expansion project before it decided to approve the decision,⁷² and whether the impacts of climate change on the great barrier reefs are actionable⁷³. In Nigeria a court case against gas flaring⁷⁴ has been instituted, and court cases in India focusing on local environmental impacts have led to courts calling for a fuel switch in public transport in New Delhi (with spillover effects around the capital) and the phasing out of older commercial vehicles⁷⁵ and the introduction of specific standards for cars. In the latter case, all cars in the National Capital Region of New Delhi can now only be registered if they conform to the Euro II emission standard, which was the standard applicable at the time in the European Union.

Sheila Watt-Cloutier on behalf of 62 other named petitioners representing Inuit peoples in the US and Canada has filed a complaint against the US before the Inter-American Court of Human Rights alleging that climate change may potentially destroy the culture and economy of Inuit peoples.⁷⁶ Nepal, Belize, Peru and NGOs from the US have petitioned UNESCO to list specific domestic sites (namely Everest National Park, Belize Barrier Reef, Huarascan National Park and Waterton-Glacier International Peace

⁶⁶ Order Adding Toxic Substances to Schedule 1 to the Canadian Environmental Protection Act, 1999 (S.C. (1999), c. 33), 139:36 *Canada Gazette Part I* (3 September 2005), 2880. See Environment Canada, 'Toxic Substances List - Updated Schedule 1 as of November 30, 2005' (Environment Canada, 2005), available at <http://www.ec.gc.ca/CEPARRegistry/subs_list/Toxicupdate.cfm>. See also 'Fact Sheet: Greenhouse Gases, Climate Change and the Canadian Environmental Protection Act, 1999' (16 July 2005), found at <http://www.ec.gc.ca/press/2005/050716-2_b_e.htm>

⁶⁷ See Climate Justice Programme, 'Legal Initiatives to Enforce Canada's Duty to Reduce Greenhouse Gas Emissions', press release (31 October 2006), found at <<http://www.climatelaw.org/media/Canada>>

⁶⁸ *State of Connecticut, et al. v. American Electric Power Company Inc., et al* (2004) 406 F.Supp.2d. 265-274.

⁶⁹ *Open Space Inst. v. American Electric Power Co.*, No. 04 CV 05670 (S.D.N.Y.), filed July 21, 2004.

⁷⁰ *Friends of the Earth, Greenpeace, Inc. and City of Boulder Colorado v. Overseas Private Investment Corporation, Export-Import Bank of the United States*, filed in the US District Court for the Northern District of California (26 August 2002).

⁷¹ Gesetz zur Neugestaltung des Umweltinformationsgesetz und zur Änderung der Rechtsgrundlagen zum Emissionshandel vom 22. Dezember 2004, in force since 14th February 2005, BGBI.I, at 3704. See also EC Directive 2003/4/EC of 28 January 2003 on access to environmental information, [2003] OJ L 41/26. See VG 10A 215.04 Verwaltungsgericht Berlin based on the unofficial translation of the German original by the Climate Justice Programme (3 February 2006). The Court Order is published in *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2006, p. 850 and see the following article for an evaluation of it: Mecklenburg, W. and Verheyen, R. 'Informationen über Exportförderungen als Umweltinformationen' *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* (2006), 781.

⁷² *Australian Conservation Foundation v. Minister of Planning* (2004), 140 LGERA 100, available at <www.austlii.edu.au/au/cases/vic/VCAT/2004/2029.html>.

⁷³ *Wildlife Preservation Society of Old Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage & Bowen Central Coal Management Pty Ltd & Coal Pty Ltd*- (Federal Court proceedings No.QUD216, 2005), available at <<http://www.climatelaw.org/media/Australia.emissions.suit>>. See also 'Global Climate Change and the Great Barrier Reef: Australia's Obligations Under the World Heritage Convention: A report prepared by the Sydney Centre for International and Global Law' (Faculty of Law, University of Sydney, Australia, 2004), available at <http://www.cana.net.au/SCIGL_greatbarrierreef_Final_Report_210904.pdf>.

⁷⁴ *Barr. Ikechukwu Okpara et al. v. Shell Petroleum Development Company of Nigeria Limited, et al.* (Suit No. FHC/CS/B/126/2005, 20 June 2005), filed in the Federal High Court of Nigeria, in the Benin Judicial Division.

⁷⁵ S.C. Writ Pet. (Civil), *M.C. Mehta v. Union of India* (July 29 1998), (No. 13029/1985), AIR 1998 SC 2963, found at <<http://www.elaw.org/resources/text.asp?ID=1051>>; S.C. Writ Pet. (Civil), *M.C. Mehta v. Union of India* (April 5, 2002), No. 13029/1985, AIR 2002 SC 1696 found at <<http://www.elaw.org/resources/text.asp?ID=1102>>.

⁷⁶ Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States (7 December 2005).

Park respectively) in the List of World Heritage in Danger under the Convention on World Heritage.⁷⁷ While some plaintiffs are more successful than others, these cases signal the increasing use of the court system to deal with climate change.

Conclusion – A Way Forward

The matter of linkages between environmental conservation and sustainable development has always been a complex and nuanced issue. Nevertheless, the underlying themes are clear; first, ensuring that the notion of environmental stewardship remains at the heart of efforts to achieve sustainable development and second, maintaining a coordinated response to what was referred previously to as the *duality* of law's response, supporting effective 'environmental' regimes while, equally importantly, ensuring holistic and cross-cutting integration in 'non-environmental' fields.

Development in international human rights law

Upon protracted negotiations, the UN General Assembly adopted in 2007 at last the United Nations Declaration on Indigenous Peoples.⁷⁸ The 46-article Declaration deals in a comprehensive way with the identity, the position and the rights of indigenous peoples. It addresses their rights to self-determination, non-discrimination, life and integrity, cultural identity and heritage, an educational system and health services, as well as their rights to their lands and their resources. It also provides for consultation and participation in decision-making in resource management. At several places the UN Declaration explicitly uses the term self-determination, especially in Article 3. However, the Declaration sees this as a limited form of self-government within the framework of the State rather than to political independence. Among other provisions, this follows from Article 4 of the United Nations Declaration which specifies that the autonomy or self-government of indigenous peoples relates to "their internal and local affairs" and from the final provision in Article 46 that "Nothing in this Declaration may be ...constructed as authorizing or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of any state". Unfortunately, the Declaration does not contain a definition of indigenous peoples. Equally striking is that the Declaration refers merely once to the concept of "sustainable development". Nevertheless, in many respects the Declaration is quite a far-reaching and ambitious document.

The new UN Declaration on the Rights of Indigenous Peoples touches in many of its provisions on the economic rights of indigenous peoples and their entitlement to their lands, territories and resources. For example, Article 26 of the United Nations Declaration provides that: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" and imposes an obligation upon States to "give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned". The previous Article 25 determines that indigenous peoples should be able to uphold their responsibilities to future generations in this regard. In a formulation reminiscent of the above-quoted phrase in Article 1 of the two Human Rights Covenants ("In no case may a people be deprived of its own means of subsistence"), it is provided in Article 10 that indigenous peoples deprived of their means of subsistence are entitled to just and fair redress. Article 10 stipulates that: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." In a similar vein, Article 28 adds: "Indigenous peoples have the right to redress, by means that can include restitution or, when that is not possible, just, fair and equitable compensation, for the lands, territories which they have traditionally

⁷⁷ Convention Concerning the Protection of the World Cultural and Natural Heritage (Stockholm, 16 November 1972), Article 11.4.

⁷⁸ General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 13 September 2007, by 143 to 4 votes, with 11 abstentions. Document Assembly/AU/Dec. 141 (VIII), 30 January 2007. See for the particular role of African countries: Genugten, W.J.M. 'The African Move towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments behind the Procedures', 1 March 2008, full text at <http://ssrn.com/abstract=1103862>. See also the 2008 report of the ILA Committee on Rights of Indigenous Peoples.

owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”

While these rights are certainly far-reaching,⁷⁹ it should be noted that none of these provisions vests indigenous peoples *expressis verbis* with permanent sovereignty over their natural wealth and resources or entail exclusive rights for indigenous peoples over the natural resources within their territories. Rather they vest indigenous peoples with clear-cut rights in consultation and decision-making and in benefit-sharing. This interpretation is confirmed by Article 32 of the UN Declaration which lays down an obligation for States to consult and cooperate with the indigenous peoples concerned before engaging in any project affecting their lands and territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

The period under review also saw the controversies concerning the right to development raising their head once again. Upon a proposal of the Non-Aligned Movement, the UN General Assembly decided that the feasibility of a new “legal standard of a binding nature” on the right to development should be examined.⁸⁰ This prompts new debates as to status of the right to development as a legal norm, the normative content of a treaty if compared with the declaration on the right to development, the experience with existing human rights treaty norms which relate to the right to development (both at global and regional levels), and national experience with the right to development. The UN high-level task force on the right to development stayed away from the rather ideological discussions on the need for a new human rights treaty on the right to development and instead focused on efforts on how to implement the right to development as a human and people’s right. As part of its pragmatic approach the task force developed a set of criteria to assess the implementation of the right to development and applied these to selected global partnerships under the purview of Millennium Development Goal Eight, such as the Paris Declaration on Development Effectiveness, the ECA/OECD-DAC Mutual Review of Development Effectiveness, the intra-African Peer Review Mechanism and the ACP-EU Partnership Agreement (Cotonou Convention).⁸¹

Part C: Conclusion and Future Research Direction

As this report has shown, sustainable development is a deeply integrated concept, affecting a diverse array of issues, ranging from climate change to international investment, and the links between such issues are becoming evermore complex and nuanced. Some progress can be noticed in limited spheres, though ‘on the ground’ impact remains both patchy and slow. Unfortunately, the reality is that political will continues to be insufficient to generate the necessary responses quickly enough. Achieving global consensus on many of the most acute issues remains very difficult indeed. As a product of political will, international law’s ability to promote sustainable development is thus hindered by these continuing divisions.

However, not all legal progress is dependent upon the will of States; the role of the judiciary – both domestically and internationally – should not be under-estimated, nor should we marginalize the important “voice” of the independent secretariats of international organisations and treaty regimes, non-governmental organisations, interested academic bodies and the like. Moreover, as was noted at the start of the report, the inevitable tension that continues to permeate the ‘sustainable development’ debate is not necessarily a bad thing so long as it assists in helping to maintain political and *popular* interest in the ideal of sustainable development.

The Committee and its working groups will convene at the ILA conference in Rio to consider this report in more depth. It will discuss and analyse the current ‘state of play’ in the area of sustainable development, which, as noted, is increasingly diverse, cross-cutting and complex. Moreover, the Committee and working groups, assisted by the officers, will formulate a plan of work, incorporating its future research direction, covering at least the next four years. Among the issues to be discussed is

⁷⁹ See also Eide, A. ‘Rights of Indigenous Peoples – Achievements in International Law During the Last Quarter of a Century’ 37 *Netherlands Yearbook of International Law* (2006) 155-212, at 199-200.

⁸⁰ See UN Doc. A/RES/62/161, 18 December 2007, adopted by a vote of 135 to 53.

⁸¹ For the 2008 report of the UN High-level Task Force on the Right to Development, see UN Doc. A/HRC/8/WG.2/TF/2, 31 January 2008.

the matter as to what the Committee wishes to achieve as a final outcome of its work. Thus, the officers of the Committee see the Rio conference as a key moment in the “journey” of the Committee, moving on from New Delhi and the endorsement of general principles towards a sharper focus on systemic implementation and integration, beginning at The Hague conference in 2010. And it is fitting that this shift in gear should take place in Rio, which will forever be connected with the emergence of the global consciousness on sustainable development.

At its working session in Rio de Janeiro, the following draft work programme was agreed:

Work Programme of the ILA Committee on International Law
on Sustainable Development

The Chair and Co-rapporteurs propose the following work programme, culminating in a final report at the 75th biennial Conference in Sofia in 2012.

Topic

A critical analysis of the role and effectiveness of institutional mechanisms (including third party adjudication and other supervisory bodies) in promoting domestic and international implementation of integrated approaches to sustainable development.

This topic will be considered through an assessment of the following two key areas:

- (1) extant and prospective global and regional mechanisms that impact upon the promotion of international and domestic implementation of sustainable development;
- (2) the utility and function of international legal norms and principles in the operation of domestic mechanisms that promote implementation of sustainable development.

Timetable

- 1) post-Rio (09/2008) – inform Committee members of work programme and encourage members to begin thinking critically about contributions
- 2) Sheffield (08/2009) – during the seminar on “Global Justice and Sustainable Development”, the Committee will also meet to ‘stock take’ prior to the 2010 report
- 3) The Hague (07/2010) – Interim Report, with specific focus on judicial and other supervisory mechanisms
- 4) Sofia (2012) – Final Report

Indicative List of Issues

The following issues were identified at an informal meeting of the Committee on 18th August 2008 – there are clear omissions and therefore this should not be taken as anything other than a partial list:

- (i) judicial interpretations of sustainable development in national, regional and international courts and other supervisory bodies
- (ii) challenges of systematic integration within international institutions (eg. UN, WTO, international financial institutions, ICSID)
- (iii) role of non-State actors in supporting institutional supervision of implementation of sustainable development

- (iv) benefits and objections of a 'human rights-based approach' to assessing and supporting implementation of sustainable development
- (v) institutional mechanisms promoting integrated approaches to food security, sustainable energy and legal implementation of related principles of permanent sovereignty over natural resources and the right to development
- (vi) role of environmental principles within non-environmental fora
- (vii) role of institutional framework to integrate actions designed to reduce social conditions preventing sustainable development due to global insecurity
- (viii) the concept of sustainable impact assessments in fostering sustainable development policies
- (ix) the significance of cultural diversity in national implementation of sustainable development