

INTERNATIONAL LAW ASSOCIATION
NEW DELHI CONFERENCE (2002)
LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT

Members of the Committee:

Dr Kamal Hossain (Bangladesh): *Chair*
Professor Nico Schrijver (Netherlands): *Rapporteur*

Mr Alfonso Ascencio Herrera (Mexico)
Mr Emmanuel Opoku Awuku (HQ/Ghana)
Mr Gilbert M Bankobeza (HQ/Tanzania)
Dr Simone Borg (Malta)
Dr Milan Bulajic (Yugoslavia)
Dr Susana Camargo Vieira (Brazil)
Alternate: Dr Fernando de Faria Tabet
Professor Keu-Cab Cho (Korea)
Professor P J I M de Waart (Netherlands)
Alternate: Professor Friedl Weiss
Professor A A Fatouros (Hellenic)
Professor David E Flint (Australia)
Alternate: Professor Ben Boer
Professor Janusz Gilas (Poland)
Professor Konrad Ginther (Austria)
Alternate: Dr Wolfgang Benedek
Alternate: Dr Kunibert Raffer
Mr M A Pesh Imam (Pakistan)
Professor Gunther Jaenicke (Germany)
Alternate: Professor Thomas Oppermann
Alternate: Professor E U Petersmann
Professor Srecko Jelinic (Croatia)
Professor Maria Magdalena Kenig-Witkowska
(Poland)

Dr Anja-Riitta Ketokoski (Finland)
Mr Salvador B Lao (Philippines)
Professor Yoshiro Matsui (Japan)
Alternate: Professor Ryuichi Ida
Professor K M Meessen (Germany)
Professor Roda Mushkat (Hong Kong)
Mr Tawfique Nawaz (Bangladesh)
Professor Eze Ogueri II (HQ/Nigeria)
Professor Alain Pellet (France)
Mr M C W Pinto (HQ/Sri Lanka)
Professor Nicholas M Poulantzas (HQ/Greece)
Professor Asif Hasan Qureshi (UK)
Alternate: Dr Duncan French
Mr Alberto Roselli (Italy)
Professor Philippe Sands (UK)
Professor Oscar Schachter (USA)
Mr M J Noel-Etienne G Sinatambou (HQ/Mauritius)
Justice (rt) Kuldip Singh (India)
Alternate: Mr Ram Niranjan Jhunjunwala
Dr Atef Suleiman (HQ/United Arab Emirates)
Dr Alexandre Timoshenko (HQ/UNEP)
Professor Danilo Turk (Slovenia)

FIFTH AND FINAL REPORT

**SEARCHING FOR THE CONTOURS OF INTERNATIONAL LAW IN THE
FIELD OF SUSTAINABLE DEVELOPMENT**

INTRODUCTION

The Committee is approaching the conclusion of its work. Section 1 of the Committee's report briefly reviews the mandate of the Committee and the evolution of its work. Section 2 reports on the Committee's research seminar on 'International Law and Sustainable Development: Principle and Practice', held in Amsterdam, 29 November-1 December 2001 as well as on its questionnaire. Section 3 of the Committee's report assesses the inception of sustainable development in international law, while section 4 explores its various dimensions. Subsequently, section 5 sketches the contours of an international law of sustainable development on the eve of the UN's World Summit on Sustainable Development, to be held in Johannesburg, August-September 2002. This section serves as the basis of the resolution annexing a Draft Declaration on Principles of International Law in the Field of Sustainable Development, to be discussed at the New Delhi Conference.

1. MANDATE AND ORIENTATION OF THE COMMITTEE'S WORK

The Committee was established at the 1992 Cairo conference of the ILA, as a follow-up to the earlier ILA Committee on Legal Aspects of a New International Economic Order. Apart from a series of substantive reports, the work of this Committee culminated in the Seoul Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order, adopted at the ILA's Seoul Conference in 1986.¹ This 13-principle Declaration was a remarkable achievement and resulted from intensive consultations by international lawyers from all parts of the developing and industrialized world. The Declaration has often been referred to in academic literature, UN reports and also in decisions of the Iran-US Claims Tribunal.² In 1992, the year during which the UN Conference on Environment and Development took place in Rio de Janeiro, the ILA decided to constitute a new Committee charged with identifying and elucidating principles, norms and rules of international law, both existing and emerging ones, which could constitute the normative framework for sustainable development.³ In discharge of its mandate the Committee conducted in-depth reviews of various dimensions of the multifaceted concept of sustainable development. In addition to its biannual progress reports to the ILA during the period 1994-2002, it also convened a series of research seminars which resulted in the following books: S.R. Chowdhury, E. Denters and P. de Waart (eds.), *The Right to Development in International Law* (1992); K. Ginther, E. Denters, P. de Waart (eds.), *Sustainable Development and Good Governance* (1995) and F. Weiss, E. Denters and P. de Waart (eds.), *International Economic Law with a Human Face* (1998) and N. Schrijver and F. Weiss (eds.), *International Law and Sustainable Development: Principle and Practice* (forthcoming).

The Committee's work has not only been influenced by the increasing international awareness of the interrelationship between environmental conservation and development efforts through the notion of sustainable development, but also by other main developments such as the increased scope for international co-operation as a result of the end of the Cold War, the emergence of the concept of good governance, the increasing attention to human rights, the notion of interdependence and the need for integration of various public international policy objectives which call for long-term planning. Meanwhile, many principles of the Seoul Declaration gained new orientations, such as the principle of permanent sovereignty over natural resources, which apart from rights now increasingly gives rise to responsibilities in many fields of natural resource management, environmental policies and foreign investment regulation. On the other hand, principles like the 'common heritage of humankind' and the 'entitlement of developing countries to development assistance' and 'transfer of technology' were being eroded and supplemented: for example, in the case of common heritage with the principle of 'common concern of humankind'. In a similar vein, the principle of positive discrimination in favour of developing countries had to give way to the principles of 'common but differentiated responsibilities' and 'graduation and integration'.⁴

In carrying out its task of identifying principles of international law in the field of sustainable development, the Committee was in the fortunate position to be able to learn from and to build upon the work of various other institutions, governmental and non-governmental. Reference may be made to the Report by the Brundtland Legal Experts Group on Environmental Law (1987),⁵ reports of groups of experts convened by the UN Secretariat (1995) and UNEP (1997, 2000), the revised IUCN Draft Covenant on Environment and Development (2000) and the Earth Charter (2000).⁶ The Committee built upon these reports and declarations and viewed it as its main mission, and perhaps main comparative advantage, to give due weight to both environmental and developmental concerns. For it was the Committee's firm impression that developmental concerns were given considerably less weight in politics as well as in academia. An impressive follow-up can

¹ Report of the Sixty-Second Conference (Held at Seoul, South-Korea), London, 1987, pp. 1-11. The Report of the ILA NIEO Committee can be found at pp. 409-487.

² See the *Amoco Award* (1987), reprinted in 15 *Iran-US CTR*.

³ See Resolution 12, ILA, *Report of the Sixty-Fifth Conference Cairo, Egypt*, Cairo, 1993, pp. 12-13 and pp. 422-423.

⁴ See also P. VerLoren van Themaat, 'Ten Years after the Seoul Declaration', in E. Denters and N.J. Schrijver, *Reflections on International Law from the Low Countries in Honour of Paul de Waart*, The Hague, 1998, pp. 13-26.

⁵ R.D. Munro and J.G. Lammers, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, London, 1987. For a review and critical evaluation from a development perspective see the ILA's Cairo report, 1993, pp. 414-416.

⁶ See also the Committee's report to the London Conference in ILA, *Report of the Sixty-Ninth Conference*, London, 2001, pp. 654-700, at pp. 666-667 and pp. 673-674.

be noted in the field of international environmental law, in terms of both standard-setting by way of the conclusion of a series of new conventions and through improved entry-into-force and implementation records. Little progress could be noted in the field of international law relating to development. Hence, the Committee took it upon itself to contribute to the achievement of a balanced and comprehensive state of international law in the field of sustainable development, as also called for in Chapter 39 of Agenda 21 of the UN Conference on Environment and Development.⁷ For, as it became apparent in recent years, a perceived neglect of the interests and special needs of developing countries still gives rise to strong protests in many circles, including civil society in the developed countries. The tasks of the Committee have included:

(1) analysis of those parts of the law relating to international co-operation for economic development, with a view to their progressive clarification and formulation, and to their integration into the corpus of international law applicable to trade and economic relations, protection and preservation of the environment, and human rights;

(2) consideration of the extent to which international law could contribute to the integration of international public policy goals at the national level, in the fields of economic development, environmental protection and human rights; and

(3) considerations of new directions in which international law might be progressively developed so as to promote the achievement of these goals and to contribute to the coherence of international public policy goals in the fields of human rights, development and environmental protection.

In sum, the Committee seeks to identify the international law in the field of sustainable development and where possible to contribute to its further development.

II. THE COMMITTEE'S RESEARCH SEMINAR IN AMSTERDAM IN 2001

From 29 November to 1 December 2001 the Committee organized a research seminar 'International Law and Sustainable Development: Principle and Practice' in Amsterdam. The seminar took place in close co-operation with the newly-established Amsterdam Institute for International Development (AIID), a joint undertaking of the two Amsterdam-based universities. Apart from financial assistance from AIID, the Committee through ILA also received a grant from the International Social Science Council/UNESCO to encourage the participation of some scholars from developing countries, especially from Asia. Furthermore, participants enjoyed the hospitality of the Mayor of Amsterdam and the Amsterdam Centre of International Law.

Participants were asked to address the following topics at the seminar:

1. Conceptual issues
2. Sustainable development and international economic, investment and WTO law
3. Role of civil society
4. Sustainable development and human rights: labour standards, the right to a clean environment, the right to development
5. International climate law: Kyoto, Bonn, Marrakesh and beyond
6. Natural resource management, global commons and global public goods
7. The European Union and sustainable development
8. The concept and status of least developed countries
9. Practice of integrative efforts, for example the EU experience (see art. 6 and art. 178 revised EC treaty), Kyoto Protocol, law of the sea and fisheries conventions.

Key questions to be taken into account in writing a paper were suggested to be:

- "Which principles and rules of international law relevant to sustainable development are at stake in the fields of concern in your paper?
- What is their legal status in international law: unclear, emerging, firmly established?
- What tension and/or contradiction, if any, can be noted between environmental and developmental concerns?
- Who are the actors? What is their status under the various international legal instruments under review in your paper?
- To what extent can you discern integration efforts with other fields of international law?
- Is there any special attention for the position, needs and interests of least developed countries?

⁷ See Chapter 39, 'International Legal Instruments and Mechanisms', in *Agenda 21*, published in *UN Doc. A/CONF.151/26/Rev.1 (Vol.I)*.

- What has become of traditional North-South issues?
- What about globalization-related issues?
- What mechanisms to enforce or monitor compliance exist? Do these exhibit any innovative features?"

The fifty participants from Africa, Asia, Latin America, North America and Europe included eleven members of the Committee as well as the ILA Director of Studies, Ambassador Costa R. Mahalu (Tanzania) and the Ambassador Fernando (Sri Lanka). The twenty presentations and lively ensuing discussions dealt with a wide set of legal aspects of sustainable development, varying from the need for increased attention for the developmental side, through the compatibility of natural resource or investment regimes and sustainable development, to subjects such as the potential role of national courts, the private sector and international trade in fostering sustainable development. The concluding and very inspiring words of Dr Kamal Hossain further contributed to a fruitful seminar. All in all, the seminar succeeded in accomplishing a worthwhile exchange of information leading up to an in-depth debate enabling a thorough analysis of the principle and practice of sustainable development. In an edited form the results will be made generally available through the publication of a book, entitled *International Law and Sustainable Development: Principle and Practice* (to be published in 2002).

III. THE INCEPTION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW

The phrase ‘sustainable development’ as launched in the Rio Declaration has found recognition in international legal instruments remarkably soon. Various environmental treaties incorporate it, for example the Climate Change Convention, the Convention on Biological Diversity and the Anti-Desertification Convention. It also features in the World Fisheries/Straddling Stocks Convention as well as in the preamble of the 1995 Agreement on the Establishment of the World Trade Organization. The WTO includes among its goals the ‘optimal use of the world’s resources in accordance with the objective of sustainable development’. The Doha Declaration of the Fourth Ministerial Conference of 14 November 2001 states: ‘International trade can play a major role in the promotion of economic development and the alleviation of poverty...’ and since ‘the majority of WTO Members are developing countries...we seek to place their needs and interests at the heart of the WTO Work Programme...’ (para.2). Furthermore, the Ministers strongly confirmed their commitment ‘to the objective of sustainable development, as stated in the Preamble of the Marrakesh Agreement’: ‘We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive’ (para.6).⁸

Reference may also be made to the prominent place of sustainable development as an objective in the law of the European Union. For example, the Treaty on European Union, as amended through the 1997 Treaty of Amsterdam, includes objectives such as ‘economic and social progress and a high level of employment and to achieve balanced and sustainable development’ (Art. 2). Sustainable development is also elevated as a general objective in Article 2 of the revised EC Treaty, albeit in not entirely identical terms.⁹ These new objectives are a clear policy response to the call for sustainable development as adopted during the UN Conference on Environment and Development, held in Rio de Janeiro in 1992. Obviously, the Community aims at fostering a type and pace of economic growth which does not lead to exhaustion of non-renewable natural resources and to irreparable damage to the physical and natural environment. This goal should be viewed in conjunction with the social objectives of the Community such as promoting a high level of employment and social cohesion. Furthermore, Article 6 of the revised EC Treaty stipulates the integration of environmental protection requirements in all Community policies and activities ‘with a view to promoting sustainable development’.

⁸ Text Doha Declaration, 14 November 2001, available at website www.wto.org and published in *ILM*, forthcoming.

⁹ It is notable that the Title on Environment in the Maastricht and Amsterdam Treaties (currently Title XX) did not refer explicitly to the objective of ‘sustainable development’. However, the EU Nice Conference held in December 2000 adopted an interesting Declaration on Article 175 EC Treaty: ‘The High Contracting Parties are determined to see the European Union play a leading role in promoting environmental protection in the Union and in international efforts pursuing the same objective at global level. Full use should be made of all possibilities offered by the Treaty with a view to pursuing this objective, including the use of incentives and instruments which are market-oriented and intended to promote *sustainable development*’. (emphasis added)

Sustainable development is also an objective in the ACP-EU development co-operation treaties.¹⁰ In the new ACP-EU Partnership Agreement of Cotonou (2000) the pursuance of sustainable development is clearly linked to poverty reduction (art. 1). Furthermore, sustainable utilization and management of natural resources is identified as one of the three cross-cutting issues, alongside with gender and institutional capacity building.¹¹

It is interesting to note that sustainable development and related concepts also feature in a number of international judicial decisions of the 1990s.¹² Reference should first of all be made to the International Court of Justice. In the aborted *New Zealand v. France Nuclear Tests Case* (1995) the Court pronounced that its Order was ‘without prejudice to the obligations of States to respect and protect the natural environment’.¹³ In its Advisory Opinion to the UN General Assembly on *The Legality of the Threat or Use of Nuclear Weapons* the Court made reference to Principle 24 of the Rio Declaration on Environment and Development (on protection of the environment in times of armed conflict). The Court stated that ‘the environment is not an abstraction, but represents the living space, the quality of life and the health of human beings, including generations unborn’. Moreover, the Court concluded: ‘The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is part of the corpus of customary international law relating to the environment’.¹⁴ In its judgment in the case concerning the *Gabcikovo-Nagymaros* project between Hungary and Slovakia the Court re-emphasized and elaborated on this principle: ‘...new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such standards given proper weight, not only when States contemplate new activities, but also when continuing activities begun in the past. *This need to reconcile development with protection of the environment is aptly expressed in the concept of sustainable development.*’¹⁵ Judge Weeramantry, in his separate opinion, went a few steps further by stating that sustainable development is ‘part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community’, reaffirming that ‘in the area of international law...there must be both development and environmental protection, and that neither of these rights can be neglected’.¹⁶

Second, reference can be made to the pronouncements by the WTO Appellate Body, most notably in the *United States-Import Prohibition of Certain Shrimp and Shrimp Products Case* (1998), commonly known as the Shrimp Turtles case between the US and India, Malaysia, Pakistan and Thailand. In its interpretation of exception article XX (g), which permits, in deviation of the GATT rules, the taking of measures ‘relating to the conservation of exhaustible natural resources’, the Appellate Body referred to ‘contemporary concerns of the community of nations about the protection and conservation of the environment’ and to the fact that the Preamble of the WTO Agreement explicitly acknowledges the objective of sustainable development, a concept which in its view ‘has been generally accepted as integrating economic and social development and environmental protection’. Hence, the Appellate Body deemed US legislation ‘provisionally justified’ under Article XX(g). Although the Appellate Body ultimately decided that the US measures constituted unjustifiable discrimination, the various references to sustainable development and legitimate environmental concerns differ from earlier decisions of GATT panels, especially the Tuna/Dolphin panels.¹⁷

From this brief review of significant recent developments it follows that sustainable development has become an established objective of the international community and a concept with some degree of normative status in international law.¹⁸ This is not to say that its contents are clear. For example, Professor Lowe goes as

¹⁰ For a discussion of European development co-operation policies see K. Arts, *Integrating Human Rights into Development Co-operation: the Case of the Lomé Convention*, The Hague, 2000 and J.A. McMahon, *The Development Co-operation Policy of the EC*, London, 1998.

¹¹ See Articles 36-38 of the ACP-EU Partnership Agreement, signed in Cotonou, 23 June 2000.

¹² See in particular P. Sands, ‘International Courts and the Application of the Concept of Sustainable Development’, in 3 *Max Planck UNYB* (1999), pp. 389-403.

¹³ ICJ Order of 25 September 1995, *ICJ Reports 1995*, para. 64.

¹⁴ *ICJ Reports 1996*, para. 29.

¹⁵ *ICJ Reports 1997*, para. 140 (emphasis added).

¹⁶ *Ibid.*, pp. 85-119.

¹⁷ See the case note by F. Weiss, ‘The Second Tuna Panel Report’, in *Leiden Journal of International Law*, vol. 8 (1995), pp. 135-150.

¹⁸ See among other publications P. Sands (ed.), *Greening International Law*, London, 1993; *ibid.*, ‘International Law in the Field of Sustainable Development’, in *British Year Book of International Law*, vol. 65 (1994), pp. 303-381; *ibid.*,

far as to claim that sustainable development 'is rooted in theoretical obscurity and confusion, and it suffers from the same reluctance to test theoretical principles for their practical utility that impedes the development of many other areas of international law'. The author also states that sustainable development 'is clearly entitled to a place in the Pantheon of concepts that are not to be questioned in polite company, along with democracy, human rights, and the sovereign equality of states.'¹⁹

IV. THE VARIOUS DIMENSIONS OF SUSTAINABLE DEVELOPMENT

It seems imperative to provide a somewhat more precise description of the concept of sustainable development, in addition to the concise but admirable one of the Brundtland Commission: '...development to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs'.²⁰ In its various reports the Committee made an effort to distinguish various dimensions of the concept of sustainable development,²¹ including:

- sustainable use of natural resources;
- sound economic development, both of developing countries and of industrialised countries which in the case of particularly the latter necessitates reducing and eliminating unsustainable patterns of consumption and production;
- integration of developmental and environmental concerns;
- inter- and intra-generational equity;
- the time dimension;
- respect for human rights; and
- public participation.

Building on the description of 'development' in the UN Declaration on the Right to Development (1986), on the Universal Declaration of Human Rights (1948) and on the Stockholm and Rio Declarations (1972 and 1992), we may well arrive at describing sustainable development as a comprehensive economic, social and political process, which aims at the sustainable use of natural resources of our planet and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.

V. THE CONTOURS OF AN INTERNATIONAL LAW RELATING TO SUSTAINABLE DEVELOPMENT

Some general and some specific principles of international law are at the core of international law relating to sustainable development. Taken together, they may well be viewed as a framework of an international law in the field of sustainable development.

1. General principles

Obviously, a first general principle is the *rule of law in international relations, including international economic relations*. This entails a duty incumbent on States (and on international institutions and other main actors in international economic relations as well) to abstain from measures of economic policy that are

Principles of International Environmental Law: Frameworks, Standards and Implementation, Manchester, 1995; D. Hunter, J. Salzman and D. Zaelke, *International Environmental Law and Policy*, New York, 2nd ed., 2002; A. Boyle and P. Birnie, *International Environmental Law*, Oxford, 2nd ed., 2002.

¹⁹ See V. Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development*, Oxford, 1999, pp. 30-31. Similarly, Brownlie writes: 'For the present, the concept remains problematic and nebulous, appearing more as a statement of the issues than as a resolution of the basic problems'. I. Brownlie, *Principles of Public International Law*, Oxford, 5th ed., 1998, p. 287.

²⁰ World Commission on Environment and Development, *Our Common Future*, Oxford, 1987, p. 43.

²¹ See especially the Committee's reports to the ILA Conferences in Buenos Aires (1994) and Helsinki (1996). See also M.C.W. Pinto, 'The Legal Context: Concept, Principles, Standards and Institutions', in F. Weiss, E. Denters and P. de Waart (eds.), *International Economic Law with a Human Face*, The Hague, 1998, pp. 13-14; A. Boyle and D. Freestone, 'Introduction', in *ibidem* (eds.), *International Law and Sustainable Development. Past Achievements and Future Challenges*, Oxford, 1999, pp. 8-16; M. Fitzmaurice, 'The Principle of Sustainable Development in International Development Law', forthcoming in *UNESCO Encyclopaedia on Environment and Life Support Systems*.

incompatible with their international obligations and which are detrimental to the sustainable development opportunities of third countries and peoples. Treaties and binding decisions by international institutions have to be observed and fulfilled in good faith by all parties concerned.²²

This brings us to the principle of the *duty to co-operate* towards global sustainable development and protection of the global environment. The duty to co-operate is well-established in international law, as exemplified by Chapter IX on International Economic and Social Co-operation of the UN Charter and Principle 4 of the 1970 Declaration on Friendly Relations.²³ It applies at the global, regional and bilateral levels and often requires prior information, consultation and negotiation. It is also embodied in Principle 27 of the Rio Declaration, where it provides: 'States and peoples shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.' Similarly, Rio Principle 7 states that 'States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem...', while its Preamble refers to the goal of establishing a new and equitable global partnership through the creation of new levels of co-operation among States, key sectors and people'. Indeed, in today's world this principle does no longer exclusively relate to States, but also applies to international institutions, civil society and the business community as contracted in this mission by UN Secretary-General Kofi Annan through his Global Compact to promote sustainable growth and good citizenship through committed and creative leadership. Calling to observe nine universal principles in the areas of human rights, labour standards and the environment, it brings together companies with business organizations, UN organizations, international trade unions, non-governmental organizations and other parties to foster partnerships and build a more inclusive and equitable global marketplace.²⁴

Third is the principle of the *observance of human rights*, both economic, social and cultural rights and civil and political rights.²⁵ This principle is instrumental for integrating human rights concerns and the discourse on sustainable development as well as for emphasizing the preponderant role of public participation in promoting development, social progress and environmental conservation. First of all, the fundamental human right to a life in dignity is at stake to which the right to development as the synthesis of existing human rights, such as the rights to an adequate living, food, education and primary health care, is closely related. Secondly, the principle now also includes participatory rights, access to information and justice.

The fourth and last general principle with a prominent place in this effort is that of *integration*. It could even be argued that the principle of integration serves as the very backbone of the concept of sustainable development. As to its content, inspiration can be sought from various principles of the Stockholm and Rio Declarations, the World Charter for Nature, the IUCN Covenant, the Earth Charter as well as from important multilateral treaties such as the UN Convention on the Law of the Sea and the EC Treaty.²⁶ Principle 3 of the Rio Declaration stipulates that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Furthermore, the Declaration integrates not only the concepts of environment and development, but also the needs of generations, both present and future (see Rio Principle 4). Earlier, Principle 13 of the Stockholm Declaration provided that 'States should adopt an integrated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population'. As regards treaty law, the Law of the Sea Convention, for example, states: '...the problems of ocean space are closely interrelated and need to be considered as a whole'. Article 6 of the revised EC Treaty mandates the integration of environmental protection requirements in all Community policies and activities 'with a view to promoting sustainable development'. Similar, albeit somewhat weaker wording is also employed in the only real 'coherence' and 'integration' article in the field of development co-operation, namely Article 178 EC Treaty according to which: 'The Community shall take account of the objectives referred to in Article 177 [listing the EC development objectives, rapp.] in the policies that it implements which are likely to affect developing countries'. The importance of an integrated approach features also prominently in the Anti-Desertification Convention and the Straddling Stocks Agreement. Various

²² See Seoul Declaration Principle 1, referred to in note 1 above.

²³ GA Res. 2625 (XXV), 24 October 1970. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

²⁴ See the website un.org/globalcompact. See also the paper of Paul de Waart to the Committee's research seminar, *Sustainable Development in the Global Market: Principle and Practice*, Amsterdam, 2001.

²⁵ Cf. The Vienna Declaration of the World Conference on Human Rights, 1993.

²⁶ See Preamble UN Convention on the Law of the Sea, 1982 and Art. 6 revised EC Treaty.

international regimes are a process towards enhanced integration, as can be noted from the efforts of the fourth Ministerial Conference of the WTO, held in Doha in 2001, to mainstream labour standards, environment and development in WTO arrangements as well as from the jurisprudence of its dispute settlement bodies in the *Hormones*, *Shrimp-Turtle* and *Asbestos* cases.

2. Specific principles of international law in the field of sustainable development

Amongst more specific principles, the first to be mentioned is the established principle of *sovereignty over natural resources* according each State the right to possess and determine freely the management of its natural resources for its own development within the limits of international law. The particular meaning of this principle dominated the discussions in the context of the United Nations during the 1960s and 1970s as well as those of the former NIEO Committee of the International Law Association.²⁷ This principle is a natural corollary of the traditional principle of territorial sovereignty which implies a duty of a territorial State to protect, within its territory, the rights of other States, as pointed out by the *Island of Palmas* arbitration (1928).²⁸ During recent decades this has been supplemented by an obligation incumbent upon territorial States to protect not only the environment of areas beyond national jurisdiction, but also their own environment. Indeed, resource sovereignty has increasingly been interpreted as giving rise to a series of duties as well, most notably the duty of sustainable and prudent use of natural resources, protection of biological diversity and elimination or reduction of the effects of over-exploitation of soil, deforestation, over-fishing and pollution.²⁹ It should be noted that the Stockholm Declaration was among the first documents which stipulated that the principle of sovereignty over natural resources must be exercised in an environmentally responsible way. Especially its Principle 21 called for the prevention of extraterritorial effects causing environmental damage in other countries or in areas outside national jurisdiction. This is repeated in Principle 2 of the Rio Declaration, with the notable addition of the words ‘and developmental needs’ in the phrase that all States have the sovereign right to exploit their natural resources ‘pursuant to their environmental and developmental needs’. The principle of sovereignty over natural resources and the corollary responsibility not to cause transboundary damage is included in various treaties, including UNCLOS, the Climate Change Convention, the Convention on Biological Diversity and the European Energy Charter Treaty. A result of this development is the emergence of the principle of *the duty to ensure sustainable use of natural resources*. It requires States and peoples to pay due care to the environment and to make prudent use of the natural wealth and resources within their jurisdiction. To a certain extent this was already reflected in paragraph 1 of the 1962 Declaration on Permanent Sovereignty over Natural Resources: ‘The right of peoples and nations to permanent sovereignty over natural resources must be exercised in the interest of their national development and the well-being of the people of the State concerned.’³⁰ Principle 2 of the Stockholm Declaration also pointed out that careful planning and rational management are required for safeguarding the natural resources of the earth. Ever since, UN resolutions have gradually elaborated standards for nature conservation and utilization of natural resources. Reference can be made to Article 30 of the Charter of Economic Rights and Duties of States (1974),³¹ the UNEP Principles on Conservation and Harmonious Utilization of Shared Natural Resources (1978)³² and the World Charter for Nature (1982).³³ This principle of sustainable use of natural resources is also amply reflected in treaty law, including in the fields of the law of the sea (through the notion of ‘maximum sustainable yield’), natural resource exploitation (e.g. Tropical Timber Agreement), nature conservation and the environment. The Convention on Biological Diversity provides a clear definition of sustainable use: ‘the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs of the present and future generations’.³⁴ In this way the principle of sustainable use is closely related to the principle of

²⁷ See K. Hossain and S.R. Chowdhury (eds.), *Permanent Sovereignty over Natural Resources: Principle and Practice*, London, 1984. See also ILA, *Report of the Seoul Conference*, London, 1987, p. 409.

²⁸ *Island of Palmas* case (The Netherlands/United States of America), 4 April 1928, 2 UNRIIA 829, extracts in C.R.R. Robb (ed.), *International Environmental Law Reports*, Cambridge, vol. I (*Early Decisions*), 1999, pp. 141-146.

²⁹ See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge, 1997.

³⁰ GA Res. 1803 (XVII), 14 December 1962.

³¹ GA Res. 3281 (XXIX), 12 December 1974.

³² UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, 1978.

³³ GA Res. 37/7, 28 October 1982.

³⁴ Article 2 of the UN Convention on Biological Diversity, 1992. See also preamble and Art. 5 of the UN Watercourses

intergenerational equity, perhaps still an emerging one in international law. According to this principle, States must take into account the interests of both present and future generations. The principle of equity is a principle of international law of a rather more general nature, enabling the international community to take into account considerations of justice and fairness in the formation, application and interpretation of international law. Treaty law refers frequently to equity or equitable principles, both in the environmental field (e.g. Climate Change Convention) and the law of the sea (e.g. as regards maritime delimitation). On various occasions, the ICJ has applied the principle of equity, for example in the *Continental Shelf* case (Tunisia v. Libya, 1982) with a view to balancing up 'the various considerations which it regards as relevant in order to produce an equitable result'.³⁵ The principle of intergenerational equity has been well defined by Edith Brown-Weiss, reflecting the view that as 'members of the present generation, we hold the earth in trust for future generations', while 'at the same time we are beneficiaries entitled to use it'.³⁶ The Stockholm Declaration referred in its Principle 1 already to a 'solemn responsibility to protect and improve the environment for present and future generations', while Rio Principle 2 includes the objective 'to equitably meet developmental and environmental needs of present and future generations'. Intergenerational equity as a principle has found recognition in the law of the sea, outer space law, international wildlife law (early applications are the Whaling Convention and the World Heritage Convention) and international environmental law, albeit that here sustainability and preservation are also based - and ought to be - on the intrinsic value of nature and fauna and flora rather than on the needs and interests of future generations of humankind. However, outside these fields the status of the principle of intergenerational equity is still uncertain. It is interesting to note the land-mark decision of the Supreme Court of the Philippines in the *Minor Oposa* case when it provided *locus standi* and acceded to the claims of NGOs on behalf of children and future generations against drastic deforestation plans and actual logging licences,³⁷ but this decision on its own cannot accord the principle of intergenerational equity a firm status in international law with respect to the management of natural resources and the environment *within* national jurisdiction. It is often argued that the principle of equity includes *intragenerational equity* relating to members of the current generation of humankind, necessitating assistance by the industrialised States to developing States by way of distributive justice and global partnership. This may be reflected in various stipulations aimed at a fair and equitable utilisation of natural resources as well as at financial assistance and access to environmentally sound technology. This concept of intragenerational equity is crucial to achieving sustainable development, if the global partnership for sustainable development is to secure both participation of developing countries and effective implementation.³⁸ While various treaty provisions and some State practice can be noted, in general terms intragenerational equity has as yet received an inadequate follow-up in practice. Hence, it must be concluded that, so far, intragenerational equity is at best an emerging principle of international law in the field of sustainable development.

By contrast, the principle of *common but differentiated responsibilities* has a firm status in various fields of international law, including human rights law, international trade law and international environmental law.³⁹ Principle 7 of Rio reads in part: 'In view of the different contribution to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.' An obvious example is climate change. The Climate Change Convention and its Kyoto Protocol seek to achieve the stabilisation of greenhouse gas concentrations in the atmosphere at a level which would prevent dangerous anthropogenic interference with the world's climate system and they commit industrialised countries to take measures with the aim of returning, by the years 2008-2012, to the 1990 emission level of

Convention.

³⁵ *ICJ Reports 1982*, p. 60.

³⁶ This principle was coined by E.D. Brown Weiss, *In Fairness to Future Generations. International Law, Common Patrimony and Intergenerational Equity*, New York, 1989. See also C. Redgwell, *Intergenerational Trusts and Environmental Protection*, Manchester, 1999.

³⁷ Text in 33 *ILM* (1994), p. 173.

³⁸ See the thorough analysis by D.A. French, 'International Environmental Law and the Achievement of Intragenerational Equity', in *The Environmental Law Reporter*, vol. 31 (2001), pp. 10469-10485.

³⁹ See on this principle D. French, 'Developing States and International Environmental Law. The Importance of Differentiated Obligations', in 49 *International and Comparative Law Quarterly* (2000), pp. 34-60 and Y. Matsui, *Some Aspects of the Principle of Common but Differentiated Responsibilities*, paper to the ILA's research seminar, Amsterdam, 2001.

greenhouse gases. The rationale for differentiation is twofold. Firstly, it is recognised that so far the bulk of global emissions of greenhouse gases originated in industrialised countries and they should therefore bear the main burden for combating climate change. Secondly, developing countries need access to resources and technologies in order to be able to achieve sustainable development. The principle of common but differentiated responsibilities is being implemented in various ways, including different standards for developing countries (no quantitative reduction commitments in the field of climate change), delayed compliance time tables (ozone layer arrangements) and undertakings conditioned upon receipt of additional financial assistance and access to technology (biological diversity). Recently, it was also acknowledged in the context of WTO dispute settlement proceedings, in which a WTO Panel urged 'Malaysia and the United States to co-operate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment.'⁴⁰ While we have thus noted a hole in the traditional bulwarks of the principle of sovereign equality, the principle of differentiation goes even one step further through the principle of the recognition of *the special needs and interests of countries with economies in transition and developing countries, with special regard to least developed countries*. The first group of countries, those with economies in transition, may be a temporary one with particular relevance in the fields of international financial, monetary and environmental law. It includes especially the countries which belonged to or were within the sphere of influence of the former Soviet Union and which suffered from inefficient and wasteful production patterns, outdated technologies and extreme pollution levels and consequent public health problems in heavily industrialised areas. Particularly international climate law provides these countries with considerable 'flexibility' in meeting the commitments under the Convention and the Kyoto Protocol.⁴¹ The category of the 'least developed countries', currently numbering fifty, has a somewhat longer history and roots in some other fields of international law as well, including the law of the sea, international trade law and international development co-operation arrangements (e.g. the Lomé conventions). Yet, what that actually means in practice is subject to erosion as illustrated by the lack of clear results of the recent UN Conference on the Least-Developed Countries, held in Brussels in May 2001.⁴² In essence, the same goes for other sub-categories of developing countries affected adversely by environmental, social and developmental circumstances, such as small island developing States and islands supporting small communities or particularly environmentally fragile developing countries, which are, for example, low-lying or with mountainous eco-systems.

A principle which has gained some currency is that of the *common heritage of humankind*. Considerable attention has been given to the regulation and control of the global commons, most notably the deep sea-bed and its resources, outer space and its celestial bodies such as the moon, and perhaps Antarctica. Principles of non-appropriation, non-exclusive and peaceful use, international management, equitable sharing of benefits and reservation for intergenerational equity have been agreed to for these areas beyond national sovereignty or jurisdiction. Most notably, the principle of common heritage of humankind has been codified in Part XI of the Law of the Sea Convention and the 1979 Agreement Governing the Activities on the Moon and Other Celestial Bodies. On various occasions it has been proposed that these principles could also be extended to, for example, tropical rain forests, wetlands of international importance or the environment as such and what belongs to all of us, such as major ecological systems of our planet. Currently, this is at best called *common concern of humankind* (see the Climate Change and Biodiversity conventions). This is a somewhat vaguer notion than the common heritage principle, obviously not implying non-appropriation and an international regime, but it still carries the connotations of global interest in preserving the environment and needs of future generations.

Next, the Committee refers to two key principles especially of international environmental law: the principle of the 'precautionary approach' and the principle of 'public participation'. The *precautionary*

⁴⁰ *United States-Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Art. 21.5 by Malaysia*, Report of the Panel, WT/DS58/AB/RW, 22 October 2001.

⁴¹ Text Kyoto Protocol in 37 *ILM* (1998), p. 32 and Marrakesh Agreement in 41 *ILM* (2001/2002). See the Committee's report to the ILA Conference in Taipei, London, 1999, pp. 700-703; J. Gupta, *The Climate Change Convention and Developing Countries: From Conflict to Consensus?*, Dordrecht, 1997. See also O. Yoshida, *The International Legal Régime for the Protection of the Stratospheric Ozone Layer*, The Hague, 2001.

⁴² See the Brussels Declaration in *UN Doc. A/CONF.191/12* as well as the Programme of Action for Least developed Countries in *UN Doc. A/CONF.191/11*, 8 June 2001.

principle is often quoted in general terms, but also more concretely applied in various environmental regimes at both international and national levels. There is increasing emphasis on the duty of States to take preventive measures to protect the human health, natural resources and the environment, for example through environmental impact assessment. The emergence of this 'precautionary approach' is also clearly reflected in Principles 15 and 19 of the Rio Declaration and multilateral treaty law, most notably in international fisheries law, international water law and physical planning. The Rio Declaration provides unequivocally in its Principle 15: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. The principle of the precautionary approach builds on older principles such as the principle of due care and the preventive principle. The principle has been expressed in various multilateral treaties, most notably the Vienna Convention on the Ozone Layer and its Montreal Protocol, the Biological Diversity Convention and the Fish Stock Agreement. Furthermore, it is quickly gaining firm ground in numerous regional regimes and domestic laws.⁴³

One of the novel features of the Rio Declaration was its call for *public participation and access to information and justice*. It coincided with the call of many citizens' movements for more participatory processes of national and international decision-making and with the increased status of human rights. In international environmental law this has received a certain response, most notably in the Treaty of Aarhus on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters concluded in 1998 under the auspices of the UN Economic Commission for Europe. Similarly, participatory processes in development efforts are widely viewed as to be of prime importance.⁴⁴

Last but not least, the new international law of sustainable development also embraces *good governance, including democratic accountability*. Its exact contents may not be very clear in the discourse of politics and development studies. Yet, as a legal concept it has found a place in, among other legally relevant documents, the EU-ACP co-operation treaties (1995 and 2000). The concept of good governance can well be instrumental in integrating the various dimensions of the concept of sustainable development, including global good governance in the sense of the participation of States in international law-making, conference diplomacy and decision-making within international institutions, participation of non-State entities in national and international decision-making and good national governance.⁴⁵ As to the latter, the 1997 UNDP policy document *Governance for Sustainable Development* defines the concept in the following terms: 'Good governance ensures that political, social and economic priorities are based on a broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources'. The Cotonou Convention of June 2000 incorporates a further interesting definition: '...good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption'.⁴⁶ This anti-corruption element is also emphasised in the IMF Guidelines on Good Governance (1997).⁴⁷

CONCLUDING OBSERVATIONS

In its work the Committee has been able to note that the 1992 Rio Conference has received an impressive legal follow-up, especially in international environmental law. However, it also noted the fact that developmental concerns have been given relatively less weight in politics and international law. It would be no exaggeration to say that there has been a neglect of development in the evolution of international law

⁴³ See E. Hey, 'The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution', in *Georgetown International Environmental Law Review* IV (1992), pp. 303-318.

⁴⁴ See Declaration on the Right to Development, *UN Doc. A/RES/41/128*, 4 December 1986 and the UN Secretary-Generals' *Agenda for Development*, in *UN Doc. A/48/935*, 1994.

⁴⁵ See Commission on Global Governance, *Our Global Neighbourhood*, Oxford, 1995; P. Sands, 'International Law in the Field of Sustainable Development', in *65 British Year Book of International Law* (1994), pp.303-381 at pp. 355-360.

⁴⁶ Article 9 of the Cotonou Convention.

⁴⁷ IMF, Guidelines Regarding Governance Issues, published in *IMF Survey* (1997), 5 August 1997.

in the field of sustainable development.⁴⁸ However, the Committee also observe that the international law of development is not a moribund relic of the past, but is still alive,⁴⁹ albeit subject to considerable challenges. These are due to dominant market-economy approaches and new directions as a result of greater emphasis on human rights, environmental conservation and good governance. Particular concerns are the continued conflicts of interests between developing and industrialized States and the question whether, and to what extent, developing States have discretion to determine their own developmental and environmental policies in an era of globalization.⁵⁰ Since the particular mission of the Committee, as it evolved during its work, was to contribute to the achievement of a balanced and comprehensive state of international law in the field of sustainable development, as called for in the Rio Declaration and in Agenda 21, the Committee would like to record core principles of international law in the field of sustainable development, as they emanate from the Committee's work since the start of its activities. Seven principles have been identified and elaborated upon in the attached draft resolution. Some have a firmly established status, others are emerging principles. The international community has committed itself to far-reaching goals, among others through the Millennium Declaration of the United Nations and the Seven Pledges to ban poverty and provide an adequate living standard to all by 2015. The Committee is deeply convinced that here international law has a role to play, both as a value system consolidating an integrated approach to environment and development and as a concrete regulatory framework for co-operation between all relevant actors.⁵¹

⁴⁸ See the various Committee reports 1994-2002 and N.J. Schrijver, 'Development-The Neglected Dimension in the Evolution of the International Law of Sustainable Development', Institute of Social Studies, *Dies Natalis Address*, The Hague, 2001, 34 p.

⁴⁹ Cf. P. Slinn, 'The International Law of Development: A Millennium Subject or a Relic of the Twentieth Century?', in W. Benedek, H. Isak and R. Kicker (eds.), *Development and Developing International and European Law*, Frankfurt am Main, 1999, pp. 299-318.

⁵⁰ See on this for example S. Anderson (ed.), *Views from the South. The Effects of Globalization and the WTO on Third World Countries*, Chicago, 2000.

⁵¹ P. Sands, 'Environmental Protection in the Twentieth Century: Sustainable Development and International Law', in N.J. Vig and R.S. Axelrod (eds.), *The Global Environment. Institutions, Law and Policy*, Washington D.C., 1999, pp. 116-137, at p. 119.